



Ground & 1st Floors
Corporate Place
Cnr. Fredman Drive & Sandown Valley Crescent
Sandown
Sandton
2196

P.O. Box 651826, Benmore, 2010
Tel: 087 942 2700 □ Fax 087 942 2644
E-Mail: enquiries-jhb@pfa.org.za
Website: www.pfa.org.za

Please quote our ref: PFA/NW/33640/2009/TD
Your ref: PFA/MS/4269799108

Ms K M Mongale
1267 Mmamogale Street
Ikageng Location
POTCHEFSTROOM
2531

PER REGISTERED POST

Dear Madam

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, OF 1956 (“the Act”) – K M MONGALE (“the complainant”) v METROPOLITAN RETIREMENT ANNUITY FUND (“the respondent”)

1. Introduction

- 1.1 The complaint concerns the distribution of a death benefit by the respondent following the death of Mr Mr J M Mongale (“the deceased”).
- 1.2 The complaint was received by this office on 19 March 2009. A letter acknowledging receipt thereof was sent to the complainant on 28 May 2009. On 13 June 2009 a letter was dispatched to the respondent giving it until 13 July 2009 to file its response to the complaint. A follow-up letter was sent to the respondent on 17 August 2009 giving it until 26 August 2009 to file its response. A response was received from the respondent on 13 July 2009 and a copy of same was forwarded to the complainant on 23 November 2009 giving her until 2 December 2009 to file further

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

submissions. The complainant has, however, omitted to file further submissions.

- 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 is the mother of the deceased. The complainant was appointed an executor of the deceased's estate. The deceased had a retirement annuity with the respondent.
- 2.2 The respondent indicated that there is no beneficiary on the deceased's policy.
- 2.3 The complainant mentioned that the deceased nominated his sister as his beneficiary.

3. Complaint

- 3.1 The complainant is dissatisfied with the trustee's decision not to allocate the deceased's sister her portion of a death benefit. The complainant is aggrieved by the respondent's decision to disregard the deceased's nomination form which provided for the benefit to be distributed to his sister.
- 3.2 The complainant is requesting this Tribunal to investigate this matter.

4. Response

- 4.1 The respondent filed a response and confirmed that the deceased was a member of the respondent from 20 May 2004 until 9 January 2006.
- 4.2 The respondent further confirmed that the death claim was assessed and finalised on 15 April 2009 and that the deceased had two minor children. The employer pension proceeds were distributed to the two minor children in terms of the Pension Funds Act.
- 4.3 The respondent indicated that the sister of the deceased is not entitled to the fund proceeds purely on the nomination made by the deceased.

5. Determination and reasons therefor

- 5.1 The issue that falls for determination is whether or not the board of trustees exercised its discretion properly in the distribution of death benefit.
- 5.2 The payment of a death benefit arising from a pension fund organization as defined in section 1 of the Act is regulated by section 37C of the said Act, which in part reads:

“Disposition of pension benefits upon death of member

- (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 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.”

- 5.3 The distribution of death benefits is regulated by section 37C of the Act, read in conjunction with the definition of a “dependant” in section 1. The primary objective of these sections is to protect those who were financially dependent on the deceased during his lifetime. In effect, section 37C overrides the freedom of testation of the deceased. Thus, although the deceased may have articulated an intention to benefit a particular beneficiary in his nomination form, it does not necessarily imply that a benefit will in fact be awarded to him/her because the deceased’s intention as contained in his nomination form is only one of the factors taken into consideration when allocating a death benefit (see *Mashazi v*

African Products Retirement Benefit Provident Fund [2002] 8 BPLR 3703 (W) at 3705 J – 3706 C).

- 5.4 The legislature regards pension assets as a critical and essential component of any natural person's rights and therefore it has established a mandatory scheme (set out in terms of section 37C) in terms of which a death benefit has to be distributed. As can be seen, the Act differentiates between dependants and nominees, who may or may not be dependants of the deceased. A nominee is a person designated in writing by the deceased to receive the benefit, or a portion thereof (see *Gowing v Lifestyle Retirement Annuity and Others* [2007] 2 BPLR 212 (PFA)). Section 1 of the Act defines a dependant as follows:

“Dependent, 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,
 - (iii) is the 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.”

- 5.5 In *casu*, the deceased's sister does not fall within the definition of a dependant in terms of section 1 of the Act. She is a nominee and therefore, is not entitled to the fund proceeds purely on the nomination made by the deceased.
- 5.6 The board of trustees is vested with discretionary powers to decide on an equitable distribution of the death benefit. Only in cases where they have exercised the powers unreasonably and improperly or have unduly fettered exercise thereof, that its decision can be reviewed (see *Mphuthi v Mineworkers Provident Fund* PFA/GA/3043/2005).
- 5.7 In light of the above, no legal grounds exist for alteration of the decision by the respondent to exclude the deceased's sister from sharing the death benefits.

6. Relief

