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Please quote our ref: **PFA/KZN/35239/2009/AM**

**PER REGISTERED POST**

Dear Madam,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 (“the Act”): T A KHOZA (“complainant”) v METAL INDUSTRIES PROVIDENT FUND (“first respondent”) AND METAL INDUSTRIES BENEFITS FUNDS ADMINISTRATORS (“second respondent”)**

[1] **INTRODUCTION**

- 1.1 The complaint concerns the non- payment of a share of a death benefit to an identified minor child of the deceased by the respondents.
- 1.2 The complaint was received by this tribunal on 8 July 2009. On 18 September 2009 it was referred to conciliation in order to afford the parties an opportunity to settle the matter. However, the matter could not be resolved and it was referred for adjudication. A response dated 17 September 2009 was received from the second respondent. No further submissions were received from the parties.

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The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act No. 24 of 1956. The service offered by the Pension Funds Adjudicator is free to members of the public.

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1.3 After considering the submissions before this tribunal it is considered unnecessary to hold a hearing in this matter. As the background facts are known to the parties they will be repeated only to the extent that they are pertinent to the issues raised herein. The determination and reasons therefor appear below.

## [2] **FACTUAL BACKGROUND**

2.1 The complainant is the mother of the minor child Mr Msizi Khoza (“Msizi”), aged 7, born out of a relationship with Mr M. M. Banda (“the deceased”) who passed away on 17 July 2001. The deceased was a member of the first respondent. At the time of his death, the deceased was married to Thoko Phillipine Shange (“surviving spouse”). It is not clear from the submissions how many children were born of this marriage.

2.2 After the deceased’s death, a total death benefit in the amount of R170, 582.70 became available for distribution. After conducting an investigation of the circle of beneficiaries, the trustees of the first respondent identified the following persons to be considered for the benefit:

- Ms T. P. Shange, aged 37 – wife of the deceased;
- Mr K. Msizi, aged 7 – minor son of the deceased;
- Thokozani;
- Nokulunga;
- Ezna.

2.3 The trustees then resolved to divide the benefit as follows:

- Ms T. P. Shange – R60, 459.28;
- Thokozani - R10, 000.00 (payable to T. P. Shange);
- Nokulunga – R10, 000.00 (payable to T.P. Shange);
- Ezna – R26, 508.34 (payable to T. P. Shange);

- Mr K. Msizi – minor son of the deceased (born before his marriage) R44, 180.56 (retained until applicant emerges)

2.4 In 2007, a death benefit in the amount of R106, 967.62 consisting of the surviving spouse's portion of the benefit and his dependants as mentioned above, was paid to the deceased wife by the respondents. The respondents resolved to retain Msizi's share of the benefit until he emerges. However, in February 2009, the board of trustees of the first respondent decided to pay Msizi's share of the benefit to the surviving spouse since the benefit was not claimed by the complainant.

### **[3] COMPLAINT**

- 3.1 The complainant is aggrieved by the decision of the board of trustees of the first respondent to pay Msizi's share of the death benefit to the surviving spouse. The complainant states that the board of trustees did not conduct an extensive investigation of the whereabouts of the deceased's minor child. Instead, it sent out letters to incorrect addresses, which she did not even receive. The complainant states that the board should have also asked the deceased's brother who worked with him about the correct address and the whereabouts of Msizi.
- 3.2 The complainant submits that the board should have retained Msizi's share of the benefit by paying it into a beneficiary trust instead of paying it to the deceased's wife.
- 3.3 Thus, the complainant requests this tribunal to assist her and order the board of trustees of the first respondent to pay Msizi's share of the death benefit to her.

### **[4] RESPONSE**

- 4.1 The second respondent submitted a response on behalf of the first respondent in its capacity as the administrator. It advised that in July

2007 the first respondent received an application for death benefits from the surviving spouse. In her claim, she mentioned that the deceased had another child with the complainant born before his marriage with her namely, Msizi and provided the complainant's details as follows: Da Vinci Shirt Manufactures, 122 Ramsay Avenue or P. O. Box 30091 Mayville.

- 4.2 The second respondent states that the board divided the benefit between the surviving spouse and the complainant on behalf of Msizi. The surviving spouse received her portion of the benefit in 2007. However, the first respondent required an application for the death benefit to be completed by the complainant on behalf of Msizi, along with other documentary evidence and guardianship of Msizi.
- 4.3 The board of trustees has attempted on numerous occasions over the last one and a half years to contact the complainant *via* the addresses mentioned above and the deceased's former employer. Copies of the letters sent to the complainant have been included in this response. The second respondent states that it has also telephonically contacted the deceased's brother, Mthunzi Goodenough Banda and the complainant's former employer, Mr Patrick Nene in order to get the complainant's contact details so that it can advise her to apply for a portion of a death benefit on behalf of Msizi.
- 4.4 In February 2009, after more than a year of retaining Msizi's portion of the benefit, the board decided to pay his portion to the surviving spouse since the complainant did not come forward or contact the fund nor submit any documentation in respect of Msizi's portion of the benefit.
- 4.5 The second respondent concludes by submitting that the fund has 12 months to investigate and trace dependants of the deceased for the purposes of paying a death benefit to them. However, it states that the

fund cannot hold the death benefit indefinitely whilst waiting for documentation.

## **[5] DETERMINATION AND REASONS THEREFOR**

- 5.1 The complainant complains about the non-payment of a share of death benefit to an identified minor child of the deceased.
- 5.2 Section 37C of the Act imposes three duties on the board of management of any pension fund organisation when distributing death benefits. Firstly, it needs to identify the nominees and dependants of the deceased member and thereafter it must effect an equitable distribution of the benefit among the dependants. The final task of the board is to determine an appropriate mode of payment.
- 5.3 The submissions indicates that the board of management of the first respondent accepted Ms T. P. Shange; Mr K. Msizi; Thokozani; Nokulunga and Ezna as the only dependants of the deceased based on the investigation carried out by them. The above qualified as dependants in terms of section 1 of the Act.
- 5.4 The next duty of the board is to decide on an equitable distribution between the identified dependants. The submission indicate that the board after taking into account relevant facts allocated the benefit as follows: R60 459.28 to Ms T P Shange; R10 000.00 each to Nokulunga and Thokozani; R26 508.34 to Ezna and R44 180.56 to Msizi. It decided to retain this amount until Msizi emerge. The submission also indicates that the surviving spouse is not Msizi's guardian. In 2007, the board paid a benefit of R106, 967.62 consisting of the surviving spouse's portion of the benefit and other deceased's dependants. However, in 2009 it paid Msizi's share to the deceased's wife after it did not receive a response to its letters as stated above. Thus, the issue to be determined is whether or not the decision by the board to

revisit the decision to include Msizi in the distribution, should be set aside.

5.5 The deceased passed away in 2001. The death benefit was only paid out in 2007, some six years after the deceased's death. The trustees outlined the steps they took during the ensuing eighteen months to trace Msizi, but were unsuccessful. By February 2009, the trustees took a pragmatic decision to revisit their previous decision and decided to allocate the balance of the death benefit to the deceased's widow. Payment was duly made in February 2009.

5.6 Msizi was initially included in the death benefit allocation as he was in terms of the definition of a dependant in section 1 of the Act, a dependant. The fact that eight years after the deceased's death the trustees were unable to contact Msizi or the complainant is an indication that, despite the fact that Msizi qualified as a dependant, he was not factually dependant on his late father.

**[6] ORDER**

6.1 In the result, the complaint is dismissed.

**DATED AT JOHANNESBURG ON THIS 17<sup>th</sup> DAY OF OCTOBER 2011**

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**DR. E.M. DE LA REY**  
**ACTING PENSION FUNDS ADJUDICATOR**

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**Section 30M filing: Magistrate's Court**

*Parties unrepresented*