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PER REGISTERED POST

Dear Madam

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): FJ ELLIS (“complainant”) v MINE EMPLOYEES PENSION FUND (“first respondent”), S ELLIS (“second respondent”), J ELLIS (“third respondent”) AND N ELLIS (“fourth respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the allocation of a death benefit by the first respondent.
- 1.2 The complaint was received by this Tribunal on 5 April 2011. A letter acknowledging receipt was sent to the complainant on 6 May 2011. On the same date, the complaint was dispatched to the first respondent giving it until 6 June 2011 to file a response to the complaint. A response dated 20 May 2011 was received from the first respondent on 23 May 2011. On 2 June 2011, the second, third and fourth respondents were joined as parties to the complaint and were requested to file their responses by no later than 1 July 2011. On 15

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June 2011, a reply was received from the complainant. On 30 June 2011, a reply was received from the second, third and fourth respondents

- 1.3 After reviewing the written submissions before this Tribunal it is considered unnecessary to hold a hearing in this matter. This Tribunal's determination and its reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 The complainant is the wife of the late Mr. RJ Ellis ("the deceased"). The deceased passed away on 14 November 2007. The deceased passed away whilst he was a member of the first respondent, thus, his dependants were entitled to a death benefit in terms of the first respondent's rules.
- 2.2 The deceased passed away while living with the complainant, his step son, complainant's son from a previous marriage ("Damian"), the second, third and fourth respondents.
- 2.3 The second, third and fourth respondents are the deceased's biological children, from his first marriage, and they are the nominated beneficiaries.
- 2.4 Following the deceased's death, a gross death benefit in the amount of R2 244 213.26 became available for distribution. 50% of the death benefit was used to purchase a spouse's pension for the complainant, in terms of rule 6.1.4 of the first respondent's rules. An amount of R700 556.99, after the deduction of tax in the amount of R258 158.38 and the deduction of the ex-spouse's pension interest awarded in terms of the divorce order, was then payable to the deceased's dependants in terms of section 37C of the Act.

2.5 After investigation the trustees decided to allocate the death benefit as follows:

Name of beneficiary	Percentage	Amount
Complainant	35%	R245 194.94
Second respondent	20%	R140 111.39
Third respondent	20%	R140 111.39
Fourth respondent	25%	R175 139.24
Complainant's son	Nil	Nil
Total		R700 556.99

[3] **COMPLAINT**

3.1 The complainant is dissatisfied with the percentage allocated to her and the trustees' decision to exclude her son when allocating the benefit. She feels that the trustees were biased when exercising their discretion towards her.

[4] **RESPONSE**

4.1 The first respondent's response is summarised as follows:

4.1.1 The death benefit comprised the aggregate of the deceased's fund credit and his death cover (an age based multiple of salary)

4.1.2 In terms of rule 6.1.4 of the first respondent's rules, the death benefit stood to be paid as follows:

If the deceased was survived by a 'spouse' as defined:

- (a) Fifty percent of the benefit would purchase a lifelong spouse's pension;
- (b) The balance would comprise a lump sum benefit to be allocated in terms of section 37C of the Act.

- 4.1.3 A spouse's pension of R6 653.19 was awarded to the complainant.
- 4.1.4 On the first respondent's investigation on possible beneficiaries, it became clear that there were mutual tensions between the complainant and Damian on the one hand and the second, third and fourth respondent on the other hand.
- 4.1.5 The first respondent's investigation was beset by problems from the outset. This situation was exacerbated by motion proceedings instituted by the deceased's ex-spouse, Mrs AE Ellis, in which the first respondent was cited along with other parties. She sought an order to amend the decree of divorce of 5 February 2003. The order was amended on 1 October 2010. In terms thereof, 50% of the deceased's pension interest as at 5 February 2003 was allocated to her and the first respondent was ordered to make payment. Because the first respondent did not know what the content of the order would be, the trustees could not resolve the benefit allocation until this was issued. The effect is that the benefit was reduced by R163 391.26.
- 4.1.6 Numerous submissions were received from the claimants during the course of the first respondent's investigation. To avoid any accusations of bias on the part of the first respondent, these were all incorporated into a 25 page report submitted to the first respondent Claims Committee. The Committee considered the matter on 20 January 2011. Amongst other things, it resolved not to accept Damian as a factual dependant of the deceased. It also resolved to invest the fourth respondent's allocation on his behalf, with the first respondent's assistance.

- 4.1.7 The complainant objected to the Committee's decision. However, the Committee did not review their decision because it did not find grounds to do so in the complainant's objection.
- 4.1.8 The formulation of section 37C is wide enough to confer a discretion to the trustees to allocate 0% to a particular dependant or nominee if circumstances justify it.
- 4.1.9 For the trustees to accept Damian as a factual dependant, the onus of proof rests with the complainant as the claimant because Damian was a minor at the date of the deceased's death. The complainant was required to satisfy the trustees that on a balance of probabilities, Damian was in fact dependent on the deceased.
- 4.1.10 The complainant was required to prove that Damian was directly supported by the deceased. It would not suffice for her to show that Damian was indirectly dependent on the deceased by virtue of the fact that the complainant, who was legally obliged to support Damian, was a dependant.
- 4.1.11 From the submissions received, the trustees find it relevant that the deceased did not register Damian as a dependant on his medical aid. The Claims Committee was not persuaded by the available evidence that Damian was a dependant and he was accordingly not taken into account in the allocation of the lump sum benefit.
- 4.1.12 The second, third and fourth respondents were minors at the deceased's date of death. As such, the deceased was obliged to support them. Even if this was no longer the case, it appears they were financially dependent on him; they lived in

his house, he fully or partially supported them and they were listed as dependants on his medical aid scheme. They were also named as heirs in the deceased's will.

- 4.1.13 The first respondent submits that the complainant made the following allegations about its former employee named Verona:

“she believe (sic) the accusations [that the complainant was having an affair and no longer lived in the same house as the deceased] and that [the complainant must] give her proof of the opposite.”

- 4.1.14 The complainant also alleges that Verona threatened to stop payment of the spouse's pension. She therefore, alleges that the first respondent was not neutral. Ms Steinmann, Verona's supervisor at that time, doubts that she would have used words or phrases attributed to her by the complainant. According to her, Verona was always professional and empathetic in her dealings with claimants.
- 4.1.15 The first respondent submits that from email correspondences between the complainant and Verona, it appears that Verona communicated on many issues with the complainant and the first respondent cannot find any correspondence from the complainant in which she alleges that Verona had, during the course of any communications, made comments such as those alleged by the complainant.
- 4.1.16 If Verona had been biased, she would have withheld the adverse allegations from the complainant. These would go unchallenged, or would have omitted the complainant's verbal comments, or would have encouraged the complainant to waive her claim when she threatened to do so. Instead,

Verona informed the complainant and asked her to make written submissions.

- 4.1.17 According to Verona's note, she told the complainant that the pension may have to be suspended. It seems that Verona misinterpreted the applicable rules. The rules had previously provided for pension to be withheld from a spouse at the trustee's discretion if the parties were estranged at the date of death. It was subsequently pointed out to Verona that this is no longer the case and the complainant was apparently informed accordingly. However, the allegation of a breakdown in the marital relationship was still relevant in the context of allocating the lump sum benefit, so, Verona was in any event required to inform the complainant thereof and to ask her to respond.
- 4.1.18 The first respondent points out that there's a proviso (ii) to the definition of 'spouse' which contains a requirement that the member must have notified the Fund of the spouse in writing. However, this is subject to trustee discretion. The deceased did not notify the first respondent of the complainant. Thus, if Verona was, indeed, biased as alleged, there was nothing to prevent the Claims Committee from exercising this discretion against the complainant to deny her a spouse's pension. The report submitted to the Committee clearly supports the continuation of the pension.
- 4.1.19 In response to the complainant's allegation that Verona called her a liar, the first respondent submits that it cannot find an email on its records in which Verona made such an accusation. The first respondent avers that if an accusation of this nature was indeed made, one would reasonably expect that the complainant would have immediately informed Verona's manager and would have provided a copy of the

alleged email. There is no indication that she did so and she does not allege that she did.

- 4.1.20 In response to the complainant's allegation pertaining to Verona contacting Damian's father through Facebook, the first respondent submits that Verona was transparent about this contact. She immediately informed the complainant in an email in which she pointed to apparent discrepancies between the complainant's allegations and the information provided by Damian's father, and gave the complainant the opportunity to clarify the situation.
- 4.1.21 It is common for a claimant to perceive bias on the part of a fund when a fund employee informs him/her of adverse allegations or discrepancies and asks for his/her response. The complainant alleges that Verona made specific accusations even in writing. If so, one would reasonably assume that the complainant would have reported this to the fund in writing at the time. Alternatively, she would have informed her attorneys, yet her email to them makes no reference to such alleged incidents. She has also not attached to her complaint the email in which she was allegedly accused of lying.
- 4.1.22 The first respondent sees the complainant's accusations as an attempt to create the impression that the Claims Committee did not act impartially and that its decision should thus be overturned.

Second, Third and Fourth respondent's Submissions

- 4.2 The second, third and fourth respondent filed their submissions and they are summarised as follows:
- 4.2.1 Damian was not dependent on the deceased. The trustees made a correct decision by excluding him when allocating the benefit.
 - 4.2.2 Verona was not biased, she dealt with the complainant and them in the same way.
 - 4.2.3 They are satisfied with the trustees' decision and they feel that this complaint is an attempt to stall the process.
 - 4.2.4 They would also like to clear that they did not receive R450 000.00 cash as claimed by the complainant. If it is necessary, they would be more than happy to provide their bank statements of monies received to the first respondent. At the end of the estate matter they only received R50 000.00.

[5] DETERMINATION AND REASONS THEREFOR

- 5.1 The complainant is dissatisfied with the percentage allocated to her and the trustees' decision to exclude Damian when allocating the benefit. She alleges that the trustees were biased when exercising their discretion towards her.
- 5.2 The payment of death benefits is regulated by section 37C of the Act, read in conjunction with the definition of a dependant in section 1. It is the board of trustees' responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the beneficiaries, decide on an equitable distribution and finally to decide on the most appropriate mode of payment of the benefit. The primary purpose of section 37C is to protect those who were financially

dependent on the deceased during his lifetime. In effect, section 37C overrides the freedom of testation or the wishes of the deceased as contained in a nomination form.

- 5.3 This Tribunal has to determine whether or not the trustees properly discharged their duties imposed by section 37C of the Act, i.e. that they considered all the relevant factors to the exclusion of the irrelevant factors and that they did not fetter their discretion. Where it is found that the trustees failed to take into account relevant factors, or took into account irrelevant factors, their decision shall be reviewable on the grounds that they exceeded their powers or that the decision constituted an improper exercise of their powers (see *Jordaan v Protektor Pension Fund* [2001] 2 BPLR 1593 (PFA) at 1596 F-G and 1597B-D (“*Jordaan*”).
- 5.4 This Tribunal must consider whether or not the trustees acted equitably by allocating the death benefit in a manner in which they did and by excluding Damian when allocating the death benefit.
- 5.5 Without repeating the findings of the respondent’s investigation, the trustees established that the deceased’s children lived with the deceased, were all minors at the deceased’s time of death, were financially dependent on the deceased and were also dependants on the deceased’s medical aid. The complainant receives R6 653.19 from the pension which was purchased by the first respondent on her behalf in terms of the first respondent’s rules, was further allocated R245 194.94 from the remaining 50% of the death benefit which was available for distribution in terms of section 37C of the Act, received R32 000.00 from the Unemployment Insurance Fund, R3 000.00 from a funeral policy and R34 000.00 from the mine in respect of the deceased’s last salary and leave. She is also employed as an assistant manager at BP garage, Waterfall Park.

- 5.6 In claiming to be allocated 60% of the benefit instead of 35% that has been allocated to her, the complainant bases her argument on her submission that there's a lady she knows who stayed with her man and after he passed away she was allocated 60% from the lump sum after receiving her monthly pension. Unfortunately, this Tribunal is not aware of the financial circumstances of the woman that the complainant is referring to which made the trustees to decide to allocate 60% to her. This Tribunal is also not aware of the amount that was available for distribution and how many dependants it had to be allocated. Thus, it could be that the financial circumstances of the woman that the complainant is referring to are completely different from hers for the trustees to arrive at a decision they arrived at.
- 5.7 The primary purpose of section 37C is to protect those who were financially dependent on the deceased during his lifetime. It was enacted to protect dependency, even over and above clear wishes of the deceased (see *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W)). For Damian to be allocated a portion of the death benefit, he and or the complainant would have to show that the deceased was financially supporting him during his life time. The complainant has not submitted proof of this. The fact that he was not a dependant on the deceased's medical aid and the submission made by the second, third and fourth respondents that one night their father sat them down and told them that the gifts, expensive clothes, school trips, sport events and the latest gadgets that Damian had was not funded by him but by the complainant, creates a strong impression that the deceased was not financially supporting Damian. Thus, the trustees correctly excluded him when allocating the death benefit.
- 5.8 The complainant makes bare allegations that the trustees were biased when exercising their discretion towards her after interviewing the second, third and fourth respondents. However, this is not

substantiated by any facts. There was a need for the trustees to interview the second, third and fourth respondents in order to investigate the aspect of dependency on the dependants. Thus, there is nothing to suggest that the trustees' decision was biased or unfair as a result of the interviews.

5.9 Therefore, this Tribunal finds that the trustees properly allocated the death benefit and there is no reason to interfere with their decision.

[6] ORDER

1. The complaint cannot be upheld and is dismissed.

DATED AT JOHANNESBURG ON THIS 13TH DAY OF NOVEMBER 2012

MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M filing: High Court

Parties unrepresented