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Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): M MAKUME (“complainant”) v SENTINEL MINING INDUSTRY RETIREMENT FUND (“respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the distribution of a death benefit by the respondent following the death of the complainant’s brother, Mr MI Mohalajeng (“the deceased”).
- 1.2 The complaint was received by this Tribunal on 10 March 2011. A letter acknowledging receipt thereof was sent to the complainant on 5 April 2011. On the same date, a letter was dispatched to the respondent giving it until 23 May 2011 to file a response. A response was received from the respondent on 16 May 2011. The response was forwarded to the complainant on 17 May 2011 in the event that she wishes to file further submissions. In a letter dated 12 July 2011, the complainant indicated that she does not wish to make any further submissions.

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- 1.3 Having considered the written submissions, it is considered unnecessary to hold a hearing in this matter. As the background facts are known to the parties, only those facts that are pertinent to the issues raised herein will be repeated. The determination and reasons therefor appear below.

[2] **FACTUAL BACKGROUND**

- 2.1 The complainant is the sister of the deceased, who passed away on 20 June 2008. The deceased was a member of the respondent until the date of his death. He was not married, but had a girlfriend or a co-habiting partner, Ms MMS Misapitso ("Ms Misapitso"). Ms Misapitso had a son (Clinton Misapitso) from a previous relationship before she met the deceased. The deceased completed a nomination form on 1 October 2007 in terms of which he nominated his mother, Mrs MJ Khombisa ("Mrs Khombisa"), as 100% beneficiary of his death benefit. The complainant was nominated as an alternative nominee.
- 2.2 A total amount of R211 773.74 became available for distribution to the deceased's beneficiaries as a death benefit. After conducting its investigation regarding the circle of beneficiaries, the board of trustees of the respondent identified Ms Misapitso, Clinton Misapitso and the complainant as dependants of the deceased. The board of trustees decided to distribute the deceased's death benefit as follows:
- Ms Misapitso: 60%
 - Clinton Misapitso: 20%
 - Ms Makume: 20%
- 2.3 The allocation of the death benefit to Ms Misapitso and Clinton Misapitso is the subject matter of this complaint.

[3] COMPLAINT

- 3.1 The complainant is dissatisfied with the fact that the board of trustees identified Ms Misapitso and her son (Clinton Misapisto) as beneficiaries of the deceased's death benefit. She submits that Ms Misapitso was employed by the South African Police Service (SAPS) in Potchefstroom at the time when the deceased was retrenched by his employer.
- 3.2 She contends that the deceased nominated her as an alternative nominee of his death benefit prior to his death. She states that Ms Misapitso only resided with the deceased for a period of two months prior to his death and was just a girlfriend. She contends that the deceased owed no legal duty to support Clinton Misapisto as he was not his biological child. Thus, Clinton Misapitso was not entitled by law to receive any portion of the death benefit. She also submits that Ms Misapitso was not entitled to receive a portion of the death benefit as she was gainfully employed by SAPS and the deceased did not have any moral or legal duty to maintain her. The deceased was also not married to her and did not have children with her.
- 3.3 She contends that she became the sole nominee after the death of Mrs Khombisa. She also alleges that she was factually dependent on the deceased as he was giving her money to pay for her municipal services, monthly groceries and pocket money. She also states that a letter informing her of the trustees' decision was signed by one Mr Sandile Ngazibini ("Mr Ngazibini") whose authority is questionable. Thus, she submits that the allocation of 60% and 20% of the death benefit to Ms Misapitso and her son was inequitable and unjust.
- 3.4 Therefore, the complainant requests this Tribunal to reverse the trustees' decision to allocate portions of the death benefit to Ms Misapitso and her

son.

[4] RESPONSE

4.1 The respondent states that a death benefit which consists of the aggregate of the deceased's fund credit and a death cover became payable to his beneficiaries in terms of rule 6.1.1 of its rules. It states that in terms of rule 6.1.4 of its rules, a spouse's pension which is secured with 50% of the death benefit is payable to the deceased's surviving spouse and the balance constitutes a lump sum benefit to be allocated to his dependants and nominees in terms of section 37C of the Act. In the event that the deceased is not survived by a spouse, the entire benefit is allocated in terms of section 37C of the Act.

4.2 It referred to the definition of a "spouse" in its rules, which reads as follows:

"SPOUSE" shall mean at the date of the death of the MEMBER... the person who was:

- (a) the legal spouse of the MEMBER ...; or
- (b) the MEMBER'S ... partner of a union according to customary law or
- (c) the MEMBER'S ... partner of a union recognized as a marriage under any religion; or
- (d) the MEMBER'S ... life partner in a relationship which the TRUSTEES regard as having been permanent, provided that in making such determination the TRUSTEES must have regard to whether or not there was, at the relevant date or dates, cohabitation as well as other factors which they, in their sole discretion, regard as being relevant ..."

- 4.3 It also referred to the provisions of section 37C and the definition of a “dependant” in the Act. It contends that section 37C of the Act confers a discretion on the board of trustees under certain circumstances regarding the payment of a spouse’s pension and the allocation of a lump sum death benefit. In terms of the section, the board of trustees must take reasonable steps to identify all potential beneficiaries and to distribute the benefit equitably amongst the dependants and nominees. The purpose of section 37C of the Act is to ensure that the deceased’s dependants are taken care of financially. It also overrides the deceased’s freedom of testation in relation to the death benefit. The board of trustees must take into account factors such as the financial status of the beneficiaries, their future earning capacity, state of health, the nature of their relationship with the deceased, and the level of their financial dependency on the deceased. The board of trustees must also have regard to the deceased’s will or nomination form and the amount available for distribution. The respondent states that in terms of its rules, it must also determine if the deceased was survived by a spouse as defined.
- 4.4 It confirms that its investigations revealed that the deceased was survived by Ms Misapitso, Clinton Misapitso and the complainant as potential beneficiaries. It states that it does not dispute the complainant’s submissions that Ms Misapitso was gainfully employed and that the deceased did not have any moral or legal duty to support her and her son. It also acknowledges that the deceased was not married to Ms Misapitso. However, it asserts that Ms Misapitso and Clinton Misapitso qualified to receive portions of the death benefit as factual dependants. It submits that Ms Misapitso also qualified to receive a spouse’s pension in terms of its rules as she was co-habiting with the deceased at the time of his death. The complainant does not qualify for a spouse’s pension as she does not fall within the definition of a “spouse” as defined in the rules.

- 4.5 It contends that the complainant's nomination as an alternative nominee does not *ipso facto* mean that the board of trustees are bound to pay her the death benefit. This is due to the fact that a nomination form is not binding on the board of trustees and it only serves as a guide to them in exercising their discretion (*Mashazi v African Products Retirement Benefit Provident Fund and Another* 2003 (1) SA 629 (W)). The board of trustees would have fettered its discretion if it distributed the death benefit solely on the basis of the nomination form as confirmed in the matter of *Moir v Reef Group Pension Plan and Others* [2000] 6 BPLR 629 (PFA).
- 4.6 The respondent submits that the complainant was requested to provide information regarding the extent of her financial dependency on the deceased, but she failed to prove her dependency. She submitted vague affidavits which provide no details regarding the frequency and quantum of the financial assistance she allegedly received from the deceased. It states that according to her income and expenditure statement she submitted, her monthly income is R3 500.00 per month whilst her monthly expenditure is R1 020.00. Therefore, it is highly improbable that she would require ongoing and regular financial support from the deceased.
- 4.7 As regards the letter of allocation that was signed by Mr Ngazibini, the respondent submits that the decision regarding the allocation of the benefit was made by the board of trustees. Mr Ngazibini merely communicated this decision to her on behalf of the fund and thus had authority to write the letter.
- 4.8 It concludes that the board of trustees allocated the death benefit equitably amongst the deceased's dependants. Therefore, there is no reason for this Tribunal to interfere with the trustee's decision.

[5] **DETERMINATION AND REASONS THEREFOR**

Introduction

5.1 The issue for determination is whether or not the board of trustees of the respondent exercised its discretion properly in the distribution of the death benefit. The complainant states that the board of trustees erred in identifying Ms Misapitso and her son as dependants as the deceased did not have a moral or legal duty to maintain them.

The distribution of the death benefit

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. The primary purpose of this section 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. It is the responsibility of the board of trustees when dealing with the payment of death benefits to conduct a thorough investigation to determine the beneficiaries and to thereafter decide on an equitable distribution. Their duties in this regard were summarised in *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA), at paragraphs 24 and 25, as follows:

“When making an “equitable distribution” amongst dependants the board of management has to consider the following factors:

- the age of the dependants;
- the relationship with the deceased;
- the extent of dependency;
- the wishes of the deceased placed either in the nomination and/or his last will; and
- financial affairs of the dependants including their future earning capacity potential.

In making their decision, trustees need to consider all relevant information and ignore irrelevant facts. Further, the trustees must not rigidly adhere to a policy or fetter their discretion in any other way.”

5.3 Further, section 1 of the Act defines a “dependant” in the following terms:

“**dependant**”, 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 a child of the member, including a posthumous child, an adopted child and a child born out of wedlock.
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died.”

5.4 It is clear that section 1(b) of the Act defines “dependant” broadly to include persons in respect of whom the deceased was not legally liable for maintenance. The purpose of the broad definition of a “dependant” was to include persons who are factually dependent on the deceased.

5.5 The submissions indicate that the board of trustees investigated the nature of the relationship between Ms Misapitso and her son (Clinton Misapitso) to the deceased before allocating portions of the death benefit to them. The facts indicate that Ms Misapitso was the deceased’s partner and she cohabited with him prior to his death. They shared a common household until the deceased’s death. The board of trustees also established that Clinton Misapitso was factually dependent on the

deceased at the time of his death. Although Clinton was not the deceased's biological child, he resided with his mother and the deceased and was financially dependent on them. Thus, Ms Misapitso and her son were correctly identified as factual dependants as provided in section 1(b)(i) of the definition of a "dependant" in the Act.

- 5.6 The issue of dependency in section 37C of the Act is not based on marriage or biological relationship. The purpose of the section is to ensure that those persons who were dependent on the deceased are not left destitute by his death. The respondent has established that Ms Misapitso and Clinton Misapitso were factually dependent on the deceased. Therefore, this Tribunal is satisfied that the board of trustees correctly allocated 60% and 20% of the death benefit to Ms Misapitso and her son.
- 5.7 The submissions indicate that Ms Misapitso also qualified for a spouse's pension in terms of rule 6.1.4 of the respondent's rules read together with the definition of a "spouse". This is due to the fact that she was the deceased's life partner at the time of his death. The board of trustees had regard to the nature and the relevant date of their cohabitation. The definition of a "spouse" in the respondent's rules specifically include the member's life partner in a relationship which the board of trustees regard as permanent. The facts indicate that the board of trustees had regard to relevant factors in identifying Ms Misapitso as a spouse as defined in the rules.
- 5.8 Although the complainant claims that the deceased was giving her money to pay for her municipal services, groceries and also gave her pocket money, she failed to provide proof regarding the frequency and quantum of the alleged payments. Put simply, the complainant failed to establish the extent of her dependency on the deceased. There is an uncontested submission that her monthly income is R3 500.00 whilst her monthly expenditure is R1 020.00. Thus, she does not require regular financial

support from the deceased, including any pocket money as she alleged.

5.9 It also appears from the facts that the complainant's claim is solely based on her nomination as an alternative nominee of the deceased's death benefit. However, the mere fact that a person was nominated as a beneficiary does not automatically mean that a benefit will in fact be paid to her. This is due to the fact that section 37C of the Act requires the board of trustees to conduct investigations in order to identify all the deceased's beneficiaries. The nomination form only serves as a guide to the board of trustees and they are not bound by it (see *Mashazi v African Products Retirement Benefit Provident Fund and Another* [2002] 8 BPLR 3703 (W) at 3705J-3706C). The board of trustees would have fettered its discretion if it distributed the death benefit solely on the basis of the nomination form without taking into account the dependency of other beneficiaries.

5.10 In light of the submissions, this Tribunal is satisfied that the board of trustees distributed the death benefit equitably amongst the beneficiaries having regard to the extent of their dependency on the deceased. There is nothing which suggests that the board of trustees fettered its discretion or that it did not take into account relevant factors.

[6] ORDER

1. In the result, the complaint cannot be upheld and is dismissed.

DATED AT JOHANNESBURG ON THIS 2nd DAY OF OCTOBER 2012

MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M Filing: Magistrate's Court

Complainant was represented by: Sibisi Attorneys

No legal representation for the respondent