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Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act"): NN MTEBELE ("complainant") v MINEWORKERS PROVIDENT FUND ("respondent")

[1] INTRODUCTION

1.1 The complaint concerns the non-payment of a death benefit.

1.2 The complaint was received by this Tribunal on 6 June 2012. A letter acknowledging receipt thereof was forwarded to the complainant on 27 July 2012. On the same date, a letter was dispatched to the respondent giving it until 27 August 2012 to file its response. The due date for the response was extended to 4 September 2012. The respondent did not file a response despite being requested to do so. No further submissions were received from the parties.

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 Mr. S Mpisi ("the deceased") passed away on 17 April 2008. During his lifetime, he was employed by Arnot Colliery (Pty) Ltd ("employer"). He was a member of the respondent, a registered pension fund organisation in terms of the Act, by virtue of his employment. It appears from the submissions that he left active employment in 2007. The exact date on which he left service has not been specified in the submissions. There is no indication that his benefits were ever paid by the respondent after he left service. The complainant is the deceased's partner.

[3] COMPLAINT

3.1 The complainant is dissatisfied with the non-payment of a death benefit by the respondent following the deceased's death. She submits that no benefit has been paid since the date of the deceased's death despite all the requisite information having been provided to the respondent. An order that the outstanding benefit be paid by the respondent is sought by the complainant.

[4] RESPONSE

4.1 The respondent was requested to file a response to the complaint. To date, no response has been received from it.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

5.1 The deceased left active employment in 2007 and the complaint was lodged on 6 June 2012. This Tribunal must first determine whether or not it has jurisdiction to hear and determine the complaint.

Time-barring

5.2 Section 30I of the Act imposes certain time limits with regards to lodgement of complaints before this Tribunal and states that:

> "(1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.
>
> (2) The provisions of the Prescription Act, 1969 (Act No. 68 of 1969), relating to a debt apply in respect of the calculation of the three year period referred to in subsection (1)."

5.3 The provisions of section 30I preclude this Tribunal from investigating and adjudicating any complaint if the act or omission to which it relates occurred more than three years prior to receipt of a written complaint in that regard.

5.4 As already pointed out above, the deceased left active employment in 2007. In the absence of any indication to the contrary, he became entitled to payment of his withdrawal benefit at that time. Nothing indicates that the benefit was ever paid by the respondent until the deceased passed away on 17 April 2008. Because the exact date on which the deceased left employment has not been provided, the non-payment of the benefit occurred at the very latest, on 31 December 2007. The deceased had three years from 31 December 2007 to claim payment of the benefit. However, he passed away before the benefit could be paid to him. Upon his death, the benefit became payable to the deceased estate. In the absence of

factors that interrupted, impeded or suspended the running of the three year time limit in terms of Chapter III of the Prescription Act, the benefit due must have been claimed by no later than 30 December 2010. However, section 13(1)(h) of the Prescription Act provides that:

> "(1) If-
>
> *(h)* the creditor or the debtor is deceased and an executor of the estate in question has not yet been appointed; and
>
> *(i)* the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph *(a)*, *(b)*, *(c)*, *(d)*, *(e)*, *(f)*, *(g)* or *(h)* has ceased to exist,
>
> the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph *(i)*."

5.5 Therefore, where the deceased as the creditor has passed away, prescription is impeded until such time as an executor or executrix of his estate has been appointed. When appointed, the executor must claim the benefit within the original three year period if such a period would have in any event been completed more than a year after the executor's appointment. Where the three year time limit would have lapsed less than a year from the date of the executor's appointment, such an executor shall have one year from the date of his appointment within which to claim the outstanding benefit.

5.6 Nothing in the submissions before this Tribunal indicates that an executor of the deceased estate has already been appointed. In the absence of such indication, it would appear that the running of the three year time limit has been impeded in terms of section 13(1)(h). Therefore, the three year time limit has not commenced running against the deceased estate and this Tribunal may determine the complaint on its merits.

Non-payment of the benefit

5.7 The submissions placed before this Tribunal indicate that the deceased left active employment in 2007. He then passed away on 17 April 2008. Because the deceased passed away after leaving active service of the employer, no death benefit is payable. However, this does not absolve the respondent of its duty to pay any benefits that were payable to the deceased in terms of its rules by virtue of him having left service prior to his death.

5.8 No evidence before this Tribunal indicates that the respondent paid an incapacitation, retirement or withdrawal benefit to the deceased prior to his death. His benefits appear to remain retained in the respondent. Therefore, although no death benefit is payable, a *prima facie* case has been made out that a benefit is payable by the respondent by virtue of the deceased having left service prior to his death. Because there is no evidence that the benefit was ever paid to the deceased, the respondent must discharge its liability in this regard and pay the outstanding benefit into the deceased estate.

[6] <u>ORDER</u>

6.1 In the result, this Tribunal makes the following order:

6.1.1 The respondent is ordered to calculate a benefit that was due to the deceased in terms of its Rules by virtue of his exit from service in 2007 and pay this amount into the deceased's estate within three weeks from the date this determination.

6.1.2 The benefit to be paid in terms of paragraph 6.1.1 must be paid together with interest thereon computed at the rate of 15.5% *per annum*, from 31 December 2007 to the date of payment.

DATED AT JOHANNESBURG ON THIS 15TH DAY OF NOVEMBER 2012

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MA LUKHAIMANE

DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M filing: Magistrate's Court

Parties unrepresented