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Please quote our reference: **PFA/GA/3985/2010/TD**

Your reference: **MR MPHULOANE**

REGISTERED POST

Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 (“the Act”): MR MAAKE (OBO R MAAKE) (“complainant”) v MUNICIPAL EMPLOYEES PENSION FUND (“first respondent”) AND AKANI RETIREMENT FUND ADMINISTRATORS (PTY) LTD (“second respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the allocation and distribution of a death benefit following the death of Mr MA Mokgata (“the deceased”).
- 1.2 The complaint was received by this Tribunal on 24 November 2010. A letter acknowledging receipt thereof was sent to the complainant on 5 April 2011. On 4 April 2011, a letter was dispatched to the second respondent to file its response to the complaint by 9 May 2011. On 20 June 2011 and 15 September 2011, follow-up response letters were forwarded to the

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second respondent to file its response to the complaint. A response was received from the first respondent on 8 March 2011. A copy of the response was forwarded to the complainant on 26 June 2012 to file her further submissions, in the event that she wished to do so. On 10 July 2012, the complainant indicated an intention to file her further submissions but no further submissions were received.

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

[2] FACTUAL BACKGROUND

- 2.1 The complainant is the mother of one of the deceased's children, Reagile Maake ("Reagile"). The deceased was a member of the first respondent during the tenure of his employment.
- 2.2 Upon the death of the deceased, a death benefit became available for distribution. The board of trustees conducted the investigations and identified beneficiaries of the deceased's death benefit.

[3] COMPLAINT

- 3.1 The complainant is dissatisfied with the allocation of a death benefit to the deceased's other beneficiaries to the exclusion of Reagile.
- 3.2 The complainant requests this Tribunal to investigate this matter.

[4] RESPONSE

Point in limine

- 4.1 The first respondent submitted that the complaint has prescribed in terms of section 30l of the Act as the act or omission occurred more than three years before lodging the complaint.

Merits

- 4.2 The first respondent submitted that the deceased was married by customary law to Ms RD Senama (“Ms Senama”) and the marriage was confirmed by the Headman of the village where the deceased and his spouse resided. The deceased’s elder brother also filed an affidavit confirming the existence of the deceased’s marriage.
- 4.3 The first respondent further submitted that Ms Senama was appointed as the executor of the deceased’s estate and furnished it with all the necessary documents to process the death claim.
- 4.4 The first respondent submitted that the deceased in his nomination form listed all three of his children with Ms Senama (Katlego, Raesetsa and Mokgaetsi). The only child that was not listed on the nomination form was Ouma because she was born on 9 April 2006, after the death of the deceased (6 February 2006).
- 4.5 The first respondent further submitted that it is still holding money in Trust for the deceased’s children that were allocated the death benefit. The first respondent submitted that it is in a process of re-distributing funds to accommodate the said child. However, the fund received two other claims and it will be difficult to re-distribute the funds until the other two claims are finalised.

[5] DETERMINATION AND REASONS THEREFOR

5.1 The issue that falls to be determined is whether or not the board of trustees of the first respondent failed to conduct a proper investigation into the possible beneficiaries of the deceased. The complainant is aggrieved about an issue which arose in February 2006 following the death of the deceased. This Tribunal shall prior to addressing the merits of the complaint, determine whether or not it has jurisdiction to hear the complaint.

Point in limine

5.2 Section 13(1)(a) of the Prescription Act, 68 of 1969 provides as follows:

“(a) If the creditor is a minor or is insane or is a person under curatorship or is prevented by superior force including any law or any order of court from interrupting the running of prescription as contemplated in section 15 (1);

(b) – (h) ...

(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)”.

5.3 The complainant’s child was still a minor at the time of the deceased’s death and as a result, prescription period does not run against a minor child. Therefore, this Tribunal has jurisdiction to investigate and adjudicate this matter.

Merits

5.4 The distribution of a death benefit is governed by section 37C of the Act. Section 37C of the Act gives the board a wide discretion to distribute a death benefit amongst the beneficiaries of the deceased in a manner and proportion that is just and equitable.

5.5 It is the board's responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the beneficiaries, to thereafter decide on an equitable distribution and finally to decide on the most appropriate mode of payment of the benefit payable. Their duties in this regard were summarised in *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA), at paragraph 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 form 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.”

5.6 Section 1 of the Act defines a dependant as follows:

“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) ...
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died.”

5.7 The definition of a dependant creates three categories. Paragraph (a) requires the beneficiaries to be dependent on the member for maintenance, where such dependency is as a result of a legal duty, which may arise out of a statutory provision or the common law. Paragraph (b) regulates the position of beneficiaries dependent on the member where there is no duty of support in terms of the law, for example, a self-maintaining independent adult child. The third category outlined in paragraph (c) refers to persons who are currently not dependent on the member for maintenance, but in respect of whom the member would have become liable for maintenance at some future date had he notionally survived his death (see *Mokele v SAMWU National Provident Fund* [2002] 12 BPLR 4175 (PFA) paragraph 15).

5.8 In *casu*, the deceased’s children qualify as legal dependents in terms of section 1(a) of the Act. The board of trustees in their decision regarding the distribution of the deceased’s death benefit to the exclusion of Reagile, failed to conduct a diligent investigation into the circle of beneficiaries and their particular social circumstances especially considering factors of *inter*

alia, age and extent of dependency, which must be considered when making an equitable distribution. The board of trustees are not bound by the nomination form completed by the deceased, instead the nomination form serves merely as a guide to assist them in the exercise of their discretion (see *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 3705I-3706C).

- 5.9 However, in the light of the fact that the board of trustees took into account factors that were irrelevant, ignored relevant factors, the decision of the board of trustees to allocate the death benefit to the deceased's other beneficiaries to the exclusion of Reagile cannot be allowed to stand.

[6] ORDER

- 6.1 In the result, the order of this Tribunal is as follows:

6.1.1 The decision of the board of trustees to allocate the death benefit to the deceased's other beneficiaries to the exclusion of Reagile is hereby set aside.

6.1.2 The first respondent's board of trustees is directed to re-exercise its discretion within eight weeks of this determination in terms of section 37C of the Act, in the allocation and distribution of the deceased's death benefit with due regard to the factors considered in this determination; and

6.1.3 The first respondent's board of trustees is further directed to report its decision, reasons therefor and all factors considered, in writing, to this Tribunal and to the complainant, within one week thereof.

DATED AT JOHANNESBURG ON THIS 19th DAY OF NOVEMBER 2012

MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M filing: Magistrate's Court

Complainant represented

Respondent unrepresented