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Please quote our reference: **PFA/KZN/31526/2009/TD**

REGISTERED POST

Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 (“the Act”): C SANGWENI (“complainant”) v THE PRIVATE SECURITY SECTOR PROVIDENT FUND (“first respondent”) AND NBC FUND ADMINISTRATION SERVICES (PTY) LTD (“second respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the allocation and distribution of a death benefit following the death of Mr MD Mbhele (“the deceased”).
- 1.2 The complaint was received by this Tribunal on 3 February 2009. A letter acknowledging receipt thereof was sent to the complainant on 4 March 2009. On 5 February 2009, letters were dispatched to the respondents giving them until 6 April 2009 to file their responses to the complaint. On 3 June 2009, a follow-up response letter was forwarded to the respondents to file their responses on or before 10 June 2009. A response was received from the first respondent on 9 July 2009. A copy of this response was forwarded to the complainant on 7 August 2009 for her to file her further submissions by 18 August 2009, in the event that she

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wished to do so. 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 ("Qinisile"). 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 the beneficiaries of the deceased.

[3] COMPLAINT

- 3.1 The complainant is dissatisfied with the allocation of a death benefit to the deceased's spouse ("Ms Morrison") to the exclusion of the deceased's other beneficiaries.
- 3.2 The complainant requests this Tribunal to investigate this matter.

[4] RESPONSE

- 4.1 The first respondent submitted that a death benefit in the amount of R43 130.52 was paid to the dependant on 29 February 2008, based on the information available. The first respondent attached the search results

carried out by The Data Factory.

[5] DETERMINATION AND REASONS THEREFOR

- 5.1 The issue that falls for determination is whether or not the first respondent failed to comply with its duties in terms of section 37C of the Act and its rules with regard to the payment of the death benefit to the complainant.
- 5.2 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.
- 5.3 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.”

5.4 A fund is only permitted to act in terms of its registered rules (See *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA). Section 13 of the Act further provides that:

“Subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming.”

5.5 From the investigations conducted, the death benefit was distributed as follows:

Name	Relationship to deceased	Proportion allocated
Ms Morrison	Spouse	100%

5.6 The complainant is dissatisfied with the board of trustees’ decision to allocate 100% of the death benefit to Ms Morrison to the exclusion of the deceased’s other beneficiaries. The first respondent attached the search results carried out by The Data Factory to its response. The search result indicated that the deceased was married to Ms Morrison and had six children with different women. Four of the six children were majors whilst two were minors at the time of the deceased’s death. The search result indicated that all the deceased’s children or their guardians confirmed their dependency by way of affidavits.

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

“Dependent, 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.”

5.8 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).

5.9 In *casu*, the deceased’s children qualify as legal dependents in terms of section 1(a) of the Act. The board of trustees did not mention anything in respect of the financial dependency of the deceased’s four major children. The board of trustees in their decision regarding the distribution of the deceased’s death benefit to Ms Morrison failed to conduct a proper

investigation into potential 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.

5.10 However, in the light of the fact that the board of trustees took into account factors that were irrelevant, ignored relevant factors and fettered its discretion, the decision of the board of trustees to allocate 100% of the death benefit to Ms Morrison is hereby set aside.

[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 100% of the death benefit to Ms Morrison is hereby set aside.

6.1.2 The first respondent's board of trustees is directed to re-exercise its discretion within 4 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 6 weeks of this determination.

DATED AT JOHANNESBURG ON THIS 7TH DAY OF AUGUST 2012

MA LUKHAIMANE

DEPUTY PENSION FUNDS ADJUDICATOR