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REGISTERED POST

Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 (“the Act”): CCK SEFULARO (“complainant”) v POLITICAL OFFICE-BEARERS PENSION FUND (“first respondent”), ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD (“second respondent”), NA SEFULARO (“third respondent”), PI SEFULARO (“fourth respondent”), MD SEFULARO (“fifth respondent”), MB SEFULARO (“sixth respondent”), CP SEFULARO (“seventh respondent”), OSS SEFULARO (“eighth respondent”) AND TJ SAMANE (“ninth respondent”)

[1] INTRODUCTION

1.1 The complaint concerns the distribution of a death benefit following the death of Dr M Sefularo (“the deceased”).

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act No. 24 of 1956. The service offered by the Pension Funds Adjudicator is free to members of the public.

Centralised Complaints Helpline for All Financial Ombud Schemes 0860 OMBUDS (086 066 2837)

- 1.2 The complaint was received by this Tribunal on 11 August 2011. A letter acknowledging receipt thereof was sent to the complainant on 31 August 2011. On 12 October 2011, a letter was dispatched to the respondents giving them until 14 November 2011 to file their responses to the complaint. A response was received from the first respondent's legal representatives and was forwarded to the complainant on 15 November 2011 for her to file her further submissions by 30 November 2011, in the event that she wished to do so. The complainant forwarded her further submissions on 21 November 2011. The Adjudicator directed that the third to ninth respondents be joined as parties to this matter in terms of section 30G(d) of the Act and copies of the complaint and response were forwarded to the respondents on 23 February 2012 for them to file their submissions on or before 23 March 2012. The third, fourth, fifth, sixth, eighth and ninth respondents filed their submissions on 22 and 26 March 2012 respectively. No response was received from the seventh respondent.
- 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 widow of the deceased. 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 following:

- the Board of trustees' decision to include the deceased's siblings as beneficiaries;
- the percentage allocated to Nolitha (the deceased's child born out of wedlock with Ms Nosisi Dlambewu); and
- the failure of the Board of trustees to keep her informed of the process and of the reasons for the inclusion of other beneficiaries in the distribution of a death benefit.

3.2 The complainant further alleged that the Board member (Mr Ngwenya) tasked with the information gathering acted dishonestly and had a vested interest in the distribution of the death benefit.

3.3 The complainant requests this Tribunal to investigate this matter.

[4] RESPONSE

First respondent's response

- 4.1 This Tribunal received a response from the first respondent's legal representatives.
- 4.2 Regarding the inclusion of the deceased's siblings as beneficiaries, the first respondent submitted that based on the evidence before them, they fall within paragraph (b)(i) of the definition of a "dependant" in terms of the Act or alternatively paragraph (c) of the definition. The first respondent further submitted that it was therefore appropriate to include them in the pool of dependants.
- 4.3 The first respondent submitted that the Board of trustees conducted the investigations in terms of section 37C of the Act and identified the following dependants:

Name	Relationship to deceased	Proportion allocated
CCK Sefularo	Spouse	31%
Bonolo Sefularo	Daughter	6%
Masechaba Sefularo	Daughter	11%
Ipeleng Zanele Sefularo	Daughter	11%
Chere Monaisa Sefularo	Son	6%
Nolitha Lesedi Dlambewu	Daughter	20%
Ngwedi Nombulelo	Grandchild	5%
Ntsoaki Angeline Sefularo, Pule Isaac Sefularo and Mosimanegape Daniel Sefularo	Siblings	10% (shared in equal proportions between the 3 – i.e. each shall receive 3.33%)

- 4.4 The first respondent submitted that the Death Benefit Sub-committee, at its meeting held on 3 November 2011, recommended that the 10% allocated to the three siblings be split equally between all seven siblings (such that each would receive 1.43% of the benefit). It further submitted

that if the recommendation is adopted, it will impact only on the proposed distribution to Ntsoaki, Pule and Mosimanegape.

- 4.5 On the issue of the percentage of the death benefit allocated to Nolitha, the first respondent submitted that Nolitha is a dependant by virtue of paragraph (b)(iii) of the definition of “dependant” in the Act and is therefore entitled to such part of the death benefit as the Board decides is equitable. The first respondent further submitted the following: Bonolo and Chere, who were allocated 6% each, were aged 27 and 28 respectively and therefore grown up and able to make their own way in life; Masechaba and Ipeleng, who were allocated 11% each, were aged 22 and 15 respectively and towards the end of their full-time education and of their need for financial support from the deceased; and Nolitha, aged 6, was still a young child with many years of parental support and education ahead of her.
- 4.6 On the issue of the complainant not being informed of the process and the reasons for including the deceased’s siblings as dependants, the first respondent submitted that the board is under no obligation to provide information on the decision-making process to a dependant. The first respondent further submitted that the board must exercise its discretion without any external influence or its decision will be void.
- 4.7 The complainant further submitted that Mr Ngwenya, tasked with the information gathering acted dishonestly and had a vested interest in the distribution of the death benefit. The first respondent denied this allegation on the basis that had the Board not interviewed a wide range of people, it would not have been performing its obligations properly.

Third, fourth and fifth respondents’ responses

4.8 The third, fourth and fifth respondents submitted that they were dependent on the deceased during his lifetime and are of the opinion that the 10% allocated to the three siblings be shared equally amongst the deceased's siblings and cousin.

Sixth respondent's response

4.9 The sixth respondent submitted that he was dependent on the deceased during his lifetime and is of the view that the 10% allocated to the three siblings be shared equally amongst the deceased's seven siblings.

Seventh respondent's response

4.10 Even though the seventh respondent has been granted an opportunity to comment on the allegations as it is required in terms of section 30F of the Act, no response was received from him.

Eighth respondent's response

4.11 The eighth respondent submitted that he was dependent on the deceased during his lifetime and that the 10% allocated to the three siblings should be shared amongst the deceased's seven siblings equally.

Ninth respondent's response

4.12 The ninth respondent submitted that she was dependent on the deceased during his lifetime. She submitted that the 10% allocated to the deceased's three siblings should be shared equally amongst the deceased's seven siblings.

- 5.1 The complainant submitted that she questioned the Board's decision to include only some and not all of the deceased's siblings as she believed that if there was any dependency, they were all equally dependent.
- 5.2 The complainant further submitted that Mr Ngwenya came to see her and at no point did he take her through the form, except for one page and to ask her to provide some documents.
- 5.3 The complainant submitted that her request to be informed of the decision-making process was not to interfere with the Board's duties. She further submitted that she wanted to know the value of the death benefit but was not successful.

[6] DETERMINATION AND REASONS THEREFOR

- 6.1 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.
- 6.2 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.
- 6.3 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.”

6.4 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.”

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

Name	Relationship to deceased	Proportion allocated
CCK Sefularo	Spouse	31%
Bonolo Sefularo	Daughter	6%
Masechaba Sefularo	Daughter	11%

Ipeleng Zanele Sefularo	Daughter	11%
Chere Monaisa Sefularo	Son	6%
Nolitha Lesedi Dlambewu	Daughter	20%
Ngwedi Nombulelo	Grandchild	5%
Ntsoaki Angeline Sefularo, Pule Isaac Sefularo and Mosimanegape Daniel Sefularo	Siblings	10% (shared in equal proportions between the 3 – i.e. each shall receive 3.33%)

6.6 The complainant is dissatisfied with the board of trustees' decision to include the deceased's siblings as beneficiaries of the death benefit. The first respondent submitted that the Death Benefit Sub-committee, at its meeting held on 3 November 2011, recommended that the 10% allocated to the three siblings (see paragraph 4.4 above) be split equally between all seven siblings (such that each would receive 1.43% of the benefit).

6.7 The deceased's siblings and their financial status at the time of his death were as follows:

Name	Financial status
Pule Isaac Sefularo	was permanently employed as an administrator at a primary school
Oagile Sekeineng Steven Sefularo	was employed as a general worker at the municipality

Maruping Busaka Michael Sefularo	was employed as a general worker since April 2010
Chimane Peter Sefularo	was unemployed and his wife is employed
Mosimanegape Daniel Sefularo	was employed full time as a supervisor in a kitchen in Witrand Hospital
Ntsoaki Angelina Sefularo	was employed full time as a nurse
Tshepiso Joyce Samane	was working as a cashier on a contract basis

- 6.8 The duty of support also arises between brothers and sisters. The mere fact that a person is related to the deceased is not sufficient to be taken into account for a death benefit distribution. The claimant must prove that the deceased had a legal duty to support him. The sibling claiming will, however, have to prove that he/she was indigent and was indeed dependent on the deceased during his life time. In *Mokele v SAMWU National Provident Fund* [2002] 12 BPLR 4175 (PFA) it was held that the complainant in that case was not entitled to a death benefit merely by virtue of her being the sister of the deceased and neither could the Adjudicator find that she was financially dependent on the deceased for maintenance at the time of his death.
- 6.9 *In casu*, the deceased's siblings were not indigent taking into account that they were or their spouses were employed at the time of his death. The duty of support exists between brothers and sisters but it is restricted to where the claimant is indigent (See *Ex Parte Pienaar* 1964 (1) SA 600 (TO at 606A-B). Based on the above information, the deceased's siblings were not indigent and therefore the deceased owed them no duty of support. As a result, they do not qualify as legal dependants in terms of section 1(a) of the Act. The deceased's siblings submitted that they relied on the deceased for support but did not submit enough proof to indicate that they

were factually dependent on the deceased in terms of section 1(b)(i).

- 6.10 The complainant raised the issue of the percentage of the death benefit allocated to Nolitha. In allocating 20% of the death benefit to Nolitha, the board of trustees considered the ages of the dependants, the extent of their dependency and the financial affairs of dependants including their future earning capacity. Bonolo and Chere, aged 27 and 28 respectively, who were allocated 6% each, were adults who were able to make their own way in life. However, Chere indicated in the submissions forwarded to this Tribunal that distributing the death benefit as is with Ngwedi Nombulelo would be a perpetuation of internal unjust family dynamics where the deceased's biological benefit more than him. He further submitted that he is debt and strongly believe that the inclusion of Ngwedi Nombulelo is at his expense to the benefit of Bonolo Sefularo. Masechaba, aged 22, to whom 11% was allocated, was still studying full-time but was nearing the end of her studies and her need for financial support from the deceased. Ipeleng, aged 15 who was allocated 11%, was still at boarding school and still has many years of parental support and education ahead of her. Nolitha, aged 6, is still a young child with many years of parental support and education ahead of her.
- 6.11 In *casu*, the board of trustees in their decision regarding the distribution of the deceased's death benefit to Ipeleng and Nolitha 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.
- 6.12 The complainant raised her dissatisfaction with the board of trustees' failure to inform her of the process and the reasons for including other beneficiaries as dependants. Section 37C does not place an obligation upon trustees to provide any information to potential beneficiaries of a

death benefit when identifying the deceased's dependants (see *King v Edcon Provident Fund* [2010] 1 BPLR 95 (PFA)). During the investigation stage, the complainant is not entitled to the information, but after the completion of the investigation, she is entitled to the information.

- 6.13 The complainant submitted that Mr Ngwenya acted dishonestly and had a vested interest in the distribution of the death benefit. The board of trustees has to take all the necessary steps to identify and trace all possible dependants, so as to allow them to distribute the benefit in the most equitable manner. Mr Ngwenya had to interview a wide range of people in order to comply with section 37C of the Act. The complainant's allegation regarding the dishonesty of Mr Ngwenya cannot succeed.
- 6.14 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 10% to the third, fourth and fifth respondents is hereby set aside.

[7] ORDER

- 7.1 In the result, the order of this Tribunal is as follows:
- 7.1.1 The decision of the board of trustees to allocate 10% of the death benefit to the third, fourth and fifth respondents, is hereby set aside.
- 7.1.2 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
- 7.1.3 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 1ST DAY OF AUGUST 2012

MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M filing: High Court

Complainant: Unrepresented

First respondent: Represented

Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth respondents: Unrepresented