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REGISTERED POST

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): GD LUMBELA (“complainant”) v MINEWORKERS PROVIDENT FUND (“first respondent”) AND KLOOF GOLD MINE (“second respondent”)

[1] INTRODUCTION

- 1.1 This complaint concerns the non-payment of a death benefit by the first respondent.
- 1.2 The complaint was received by this Tribunal on 12 November 2014. A letter acknowledging receipt thereof was sent to the complainant on 4 February 2015. On the same date, the complaint was forwarded to the respondents requesting them to file their responses by 4 March 2015. The first respondent’s response was forwarded to the complainant on 16 February 2015, requesting further submissions, if any, by 3 March 2015. The complainant’s reply was received on

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26 March 2015. Further submissions were received from the complainant and the first respondent on 24 June 2015.

- 1.3 Having considered the written submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

[2] **FACTUAL BACKGROUND**

- 2.1 Mr Maculane (“the deceased”) passed away in 2008. The deceased was employed by the second respondent and was as a result, a member of the first respondent. The complainant is Mr GD Lumbela on behalf of Miss ED Lumbela. The complainant is the brother of Miss ED Lumbela (the deceased’s wife), the translator and the contact person to this Tribunal on behalf of Miss ED Lumbela.

- 2.2 Following the death of the deceased, a death benefit became due and payable to the deceased’s beneficiaries. The board of the first respondent identified the deceased’s wife and the deceased’s four children as beneficiaries. The board of the first respondent resolved to distribute the death benefit as follows:

Name	Relationship	Percentage	AGE
ED Lumbela	wife	R62 716.65	44
L Maculane	daughter	R22 268.96	11
R Maculane	Son	R34 994.07	17
C Maculane	Daughter	R41 356.63	5
D Maculane	Son	R47 356.19	3

- 2.3 The board of the first respondent identified that an error was made in the distribution of the death benefit, as Mr R Maculane’s age was incorrectly captured at the time of distribution. The board of the first respondent resolved to re-distribute the death benefit as follows:

Name	Relationship	AMOUNT	AGE
ED Lumbela	wife	R62 716.65	44
L Maculane	daughter	R22 268.96	11
R Maculane	Son	R 3 000.00	17
C Maculane	Daughter	R68 170.18	5
D Maculane	Son	R81 804.21	3

2.4 The wife of the deceased was paid a death benefit in the amount of R84 985.61 on 12 December 2008. The benefits of Mr D Maculane and Miss C Maculane were placed into a beneficiary Fund. The benefits of Mr R Maculane, D Maculane and Miss C Maculane remain unpaid. The outstanding amount payable is currently R152 974.39 which includes fund growth.

[3] COMPLAINT

- 3.1 The complainant is aggrieved with the non-payment of the death benefit. In particular, he is dissatisfied with the fact that the board of the first respondent (“the board”) has not paid the benefits due to the deceased’s beneficiaries.
- 3.2 The complainant submitted that the deceased’s passed away in a car accident in 2008. He submitted that the deceased’s wife was paid R95 000.00 and approximately R70 000.00 remained in the first respondent. The complainant submitted that he was informed that the unpaid portion of the death benefit will be placed in a beneficiary fund and monthly payments would be made to the deceased’s wife.
- 3.3 The complainant submitted that he and the deceased’s wife made enquiries with the first respondent from 2008. The complainant submitted that he approached the first respondent on five occasions and was promised that the deceased’s wife will receive the monthly beneficiary payments from the first respondent.

- 3.4 The complainant submitted that in 2011, he approached the first respondent at its head office and was informed that the payments will be made. Furthermore, that he followed up with the first respondent and was informed that the first respondent cannot assist the deceased's wife unless she travelled to South Africa from Mozambique.
- 3.5 The complainant requests this Tribunal to order the payment of the death benefit to the deceased's wife.

[4] RESPONSE

First respondent

- 4.1 The first respondent submitted that the deceased was its member at the time of his death. The first respondent submitted that its investigation revealed that the deceased was married to ED Lumbele. Following his death, a death benefit in the amount of R209 055.50 became payable. The deceased's wife was paid an amount of R84 895.61 on 12 December 2012. The balance of the death benefit with regard to the minor children was placed in a beneficiary fund.
- 4.2 The first respondent submitted that the delay in the payment of the balance of the benefit is as a result of outstanding documents for R Maculane. Furthermore, the other portion of the benefit is payable to the deceased's wife in respect of the minor children. The first respondent submitted that the deceased's wife did not initial the bank statement it has in its possession. The first respondent submitted that upon receipt of the outstanding documentation, the balance of the benefit will be paid.
- 4.3 The respondent referred to the case of *Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) where the Adjudicator dealt with the binding nature of the rules of a fund. The first respondent

requested that it be granted 60 days pending receipt of the outstanding documents for the distribution of the death benefit.

Further submission

- 4.4 On 24 June the first respondent submitted to this Tribunal during a telephone conversation that the benefit paid to Miss ED Lumbela of R84 985.61, includes the portion that was payable to Miss L Maculane. Furthermore, the first respondent submitted that there was a redistribution of the deceased's death benefit as the age of Mr R Maculane was incorrectly captured.

Further submission

- 4.5 The complainant made a further submission on 26 March 2015, stating that he requests that the payment be made to the deceased's wife account and that the deceased's wife did not give permission for the minor children's benefits to be paid into a beneficiary fund.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

- 5.1 The issue for determination is whether or not the first respondent is justified in delaying the payment of the death benefit.
- 5.2 The rules of a fund are supreme and binding on its officials, members, shareholders and beneficiaries and anyone so claiming from the fund (See Section 13 of the Act and *Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28]).
- 5.3 Section 37C of the Act governs the disposition of death benefits. It places a duty on the board to identify the beneficiaries of a deceased member and also vests the board with discretionary powers on the

proportions and manner of distributing the proceeds of a death benefit. As with the exercise of any discretionary power, in effecting an equitable distribution, the board is required to give proper consideration to relevant factors and exclude irrelevant ones from consideration. The board may not unduly fetter its discretion by following a rigid policy that takes no account of the personal circumstances of each beneficiary and of the prevailing situation.

5.4 A dependant is defined in section 1 of the Act 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 dependant 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;”

5.5 Section 37C was primarily introduced to ensure that death benefits are paid in accordance with the object of the Act. The relevant section is 37C(1) and it provides as follows:

- “(1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit (other than a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules) payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19(b)(5)(i) and

subject to the provisions of section s 37A(3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:

- (a) If the fund within twelve months of the death of the member becomes aware or traces a dependant or dependants of the member, the benefit shall be paid to such dependant or, as may be deemed equitable by the board, to one of such dependants or in proportions to some of or all such dependants;”

5.6 Further, the board must not rigidly adhere to a policy or fetter its discretion in any other way. The board has to consider the following factors (*See Sithole v ICS Provident fund And Another* [2000] 4 BPLR 430 (PFA)):

- 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.

5.7 Following the death of the deceased, a death benefit became due and payable to the deceased’s beneficiaries. The board of the first respondent identified the deceased’s common law wife and his four children as beneficiaries. The board of the first respondent resolved to distribute the death benefit as follows:

Name	Relationship	Percentage	AGE
ED Lumbela	wife	R62 716.65	44
L Maculane	daughter	R22 268.96	11

R Maculane	Son	R34 994.07	17
C Maculane	Daughter	R41 356.63	5
D Maculane	Son	R47 356.19	3

- 5.8 The board of the first respondent identified that an error was made in the distribution of the death benefit, as R Maculane's age was incorrectly captured at the time of distribution. The board of the first respondent resolved to re-distribute the death benefit as follows:

Name	Relationship	Percentage	
ED Lumbela	wife	R62 716.65	
L Maculane	daughter	R22 268.96	
R Maculane	Son	R3 000	
C Maculane	Daughter	R68 170.18	
D Maculane	Son	R81 804.21	

- 5.9 The investigation conducted by the board of the first respondent revealed the deceased's wife and the deceased's four children as beneficiaries of his death benefit. The wife of the deceased was paid a death benefit in the amount of R84 985.61 on 12 December 2008. The benefits of Mr D Maculane and C Maculane were placed into a beneficiary Fund. The benefit paid to the deceased's wife also included the allocation of R22 268.96 payable to L Maculane. The benefits of R Maculane, D Maculane and C Maculane remain unpaid. The outstanding amount payable is currently R152 974.39 inclusive of fund growth.
- 5.10 In the response, the first respondent did not indicate its reasons for paying the minor children's benefit into the beneficiary fund. It is normal practice that when paying a benefit to a minor, the benefit is often paid to the natural guardian of the minor. As the natural guardian of a minor child, a parent has a duty, *inter alia*, to administer the property and assets of her minor child. Thus, the payment of the minor child's benefit to her natural or legal guardian should be done in the ordinary course of events unless there are cogent reasons for depriving the guardian of

the duty to take charge of her minor child's financial affairs and the right to decide how the benefit due to the minor should be utilised in the best interests of the minor child (see *Malatjie v Idwala Provident Fund* [2005] 1 BPLR 45 (PFA) at paragraph [12]). This Tribunal notes that the board elected to pay the allocation due to the minor children into a beneficiary fund, the beneficiary fund would administer the funds on their behalf to ensure that the benefit is used for the purposes of providing for the minor children.

- 5.11 In this case, the board has failed to advance any valid reasons for its decision to pay the minors portion of the benefit into a beneficiary fund. The board has fettered its discretion by following a rigid policy that takes no account of the personal circumstances of each beneficiary and of the prevailing situation. Thus, in the light of the board fettering its discretion by failing to consider the relevant factors set out above, this Tribunal should set aside the decision of the board. This matter should be remitted to the board to re-exercise its discretion in respect of its failure to conduct a diligent investigation into the status of the deceased's wife regarding the appropriate mode of payment in respect of Mr D Maculane and Miss C Maculane.
- 5.12 This Tribunal notes that the deceased's wife has not received the income from the beneficiary fund owing to outstanding documentation. The deceased's wife submitted a bank statement to the first respondent and this information was used to pay her portion of the death benefit. Therefore, the first respondent has the requisite documentation and information needed to process the payment of the outstanding death benefit to the deceased's wife. The complainant need not submit a copy of her banking details as this would be irrelevant in the circumstances. Mr R Maculane should also be ordered to submit his outstanding documents to enable the first respondent to pay him his portion of the death benefit as he is no longer a minor in terms of the law.

5.13 The duty of this Tribunal is not to decide what is the fairest or most generous distribution, but rather to determine whether or not the board has acted rationally and arrived at a proper and lawful decision (see *Ditshabe v Sanlam Marketers Retirement Fund and another (2)* [2001] 10 BPLR 2579 (PFA) at 2582F–G).

[6] ORDER

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

6.1.1 The decision of the board of the first respondent's decision to place benefits of Mr D Maculane and Miss C Maculane in a beneficiary fund is hereby set aside;

6.1.2 The first respondent is ordered forthwith re-exercise its discretion in respect of the status of the deceased's wife regarding the appropriate mode of payment in respect of Mr D Maculane and Miss C Maculane pay the death benefit to the dependants within ten weeks from the date of this determination; and

6.1.3 Mr R Maculane is ordered to submit the outstanding information to the first respondent, within two weeks from the date of this determination;

6.1.4 The first respondent is ordered to pay the outstanding death benefit payments to Mr R Maculane, together with interest thereto at the rate of 9% *per annum* from February 2014 to the date of payment, within four weeks of the date of this determination; and

6.1.5 The respondent is further directed to inform this Tribunal and

the complainant of the breakdown of the payment made in terms of paragraph 6.1.3 above, within one week of making such payment.

DATED AT PRETORIA ON THIS 30TH DAY OF JUNE 2015

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M Filing: High Court

Parties: Unrepresented