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**REGISTERED POST**

Dear Madam,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,  
24 OF 1956 (“the Act”): MN MAKOLA (“complainant”) v ESKOM PENSION AND  
PROVIDENT FUND (“respondent”)**

**[1] INTRODUCTION**

- 1.1 This complaint concerns the quantum and allocation of a death benefit following the death of Mr MW Makola (“the deceased”).
- 1.2 The complaint was received by this Tribunal on 11 November 2014. On 13 November 2014, a letter acknowledging receipt thereof was sent to the complainant. On the same date, the complaint was dispatched to the respondent giving it until 15 December 2014 to file its response to the complaint. A response was received from the respondent on 12 December 2014. On 7 January 2015, a copy of the respondent’s response was forwarded to the complainant requesting a reply by 21 January 2014. A reply was received on behalf of the complainant on

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21 January 2015. On 23 January 2015, further submissions were received from the respondent.

- 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 The complainant is the widow of the deceased who was employed by Eskom Limited (“the employer”) until he passed away on 19 October 2013. He was a member of the respondent by virtue of his employment.
- 2.2 Prior to his marriage to the complainant, the deceased was previously married to Nancy Makola who pre-deceased him. They had three children, namely Koboro Makola, Mafenye Makola and Thapedi Makola. At the time of his death, the deceased was married to the complainant and they had three children, namely Precious Siphokazi Makola, Promise Mathapelo Makola and Philemon Sefagole Makola. The complainant had her own child whom she brought into the marriage, namely Nkosinathi.
- 2.3 Following the death of the deceased, a death benefit in the amount of the R279 984.00 was paid to his beneficiaries. The quantum of the death benefit and the distribution thereof is the basis of this complaint.

## **[3] COMPLAINT**

- 3.1 The complainant is dissatisfied with the quantum of the death benefit. She asserts that the amount of R279 984.00 is irreconcilable with the deceased’s 30 years of employment. She is further dissatisfied with the

allocation of the benefit. She avers that the amount allocated to her children was R125 994.00 and as the deceased's spouse she was allocated an amount of R69 996.00.

- 3.2 The complainant avers that she is distressed in that the amount paid to her is insufficient to pay off her debts and those of the deceased. She contends that the respondent failed to provide an explanation about how the apportionment of the death benefit was arrived at.
- 3.3 Accordingly, the complainant requests an order compelling the respondent to provide her with a detailed response on the apportionment of the benefit.

#### [4] **RESPONSE**

- 4.1 The respondent avers that the deceased was its member from 2 March 1983 until he passed away on 19 October 2013. Under its rules, the respondent avers that on the death of an in-service member, a lump sum benefit as well as a monthly pension becomes payable to the eligible dependants.
- 4.2 The respondent avers that it conducted an investigation into the dependants of the deceased as required by Section 37C of the Act. The submission continues that in its deliberations, the respondent relied on the matter of *Segal and others v Lifestyle Retirement Annuity Fund [2001] 1 BPLR 1519 (PFA)* where this Tribunal found that, when distributing a death benefit, the board must consider the following factors:
- The ages of the dependants and/or nominees
  - Their relationship to the deceased
  - The extent of their dependency
  - The financial affairs of the dependants and;
  - The future earning potential and prospects of the dependants.

- 4.3 Pursuant to the aforementioned considerations, the respondent avers that it conducted an investigation and its findings are set out below.
- 4.4 The respondent avers that at the time of the deceased's death, he was in a civil marriage with the complainant, with whom he had three children. The children's names are Promise, Precious and Philemon. The complainant had another child whom she brought into the marriage, namely Nkosinathi. According to the respondent, this finding was confirmed under oath by the deceased's brother, one Petrus.
- 4.5 The findings of the respondent regarding the financial circumstances of the potential beneficiaries were that Nkosinathi was employed by TruFM as a disc jockey with a monthly income of R27 000.00. However, he deposed to an affidavit stating that he was raised and supported by the deceased. Moreover, the investigation revealed that, Precious, the deceased's elder child was a part-time student and in the employ of Santam with a monthly salary of R12 000.00. According to the respondent, Precious stated in an affidavit that the deceased was responsible for her tuition fees and accommodation costs. The minor children, namely Promise and Philemon were studying Office Administration and doing grade 8 respectively.
- 4.6 According to the respondent, the complainant requested that the minor children's portions be paid into instalment sum accounts until they reached age 21.
- 4.7 The investigation further revealed that the deceased had been previously married to one Nancy Mokola who predeceased him. Together they had three children, namely Koboro, Mafenye and Thapedi. This information was confirmed by the divorce order and nomination form completed by the deceased. The divorce order made no provision for the payment of a pension interest to Nancy. The

respondent avers that it received affidavits from the three children indicating that the deceased never maintained them.

- 4.8 The respondent avers that according to the employer's human resources division, the deceased nominated the complainant to receive his leave pay and pro-rata bonus. Accordingly, an amount of R20 573.39 was paid to her. For his death benefit, the deceased nominated the complainant and his children in the following proportions;

<b>Name of beneficiary</b>	<b>Relationship</b>	<b>Portion</b>
Complainant	Spouse	65%
Precious	Child	5%
Promise	Child	5%
Philemon	Child	10%
Koboro	Child	5%
Mafenye	Child	5%
Thabedi	Child	5%

- 4.9 The respondent avers that the distribution of the death benefit was made in the following proportions;

<b>Name of beneficiary</b>	<b>Relationship</b>	<b>Portion</b>
Complainant	Spouse	25%
Precious	Child (major)	5%
Promise	Child	20
Philemon	Child	20%
Koboro	Child	10%
Mafenye	Child	10%
Thabedi	Child	10%

- 4.10 The breakdown of the death benefit was as follows;

**Pensionable earnings per month at the time of death**

$$R11\ 666.00 \times 12 = R139\ 992.00$$

2x annual pensionable salary

$$R139\ 992.00 \times 2 = R279\ 984.00$$

The respondent asserts that no other person or dependant who might have a claim to the benefit was mentioned or could be traced during the investigation.

- 4.11 The respondent avers that the deceased's step-child (Nkosinathi) was not allocated any benefit owing to his reasonably higher income, which persuaded the board that he was in a better financial position relative to other children.
- 4.12 Precious was employed and also a part time student at the time of the deceased's death and during the investigations. The board was satisfied that she was entitled to be allocated a small portion of the benefit.
- 4.13 The deceased major children, Korobo, Mafenye and Thapedi were unemployed at the time of the investigation. They were never maintained by the deceased although he had a legal duty to do so. Accordingly, they were allocated a small portion of the benefit in their capacity as legal dependants of the deceased.
- 4.14 In conclusion, the respondent asserts that the lump sum death benefit paid to the deceased's dependants was the correct benefit payable. The respondent asserts that it conducted a proper investigation in terms of Section 37C to establish the deceased's dependants, the extent of their dependency and financial circumstances. It submits that the allocation was done fairly and equitably and no further benefit is due and payable to the deceased's dependants. Accordingly, it requests an order dismissing the complaint.

*Further submissions by the respondent*

4.15 The respondent avers that the complainant is currently receiving a monthly pension of R6 208. 44 per month. The deceased's two minor children, Promise Makola and Philemon Makola are eligible children in terms of the respondent's rules. Accordingly, they are in receipt of a monthly payment of R2 069.48 each until they reach age 21.

*Further submissions by the complainant*

4.16 The complainant avers that it is not clear to her how the respondent arrived at the amount of R11 666.00. If this was the total of the deceased's total contributions, the complainant requests clarity as to why it was only multiplied by 12. Further, the complainant avers that the deceased completed a nomination form in terms of which 65% of the death benefit was allocated to her and 5% was allocated to five of the deceased's children. A further 10% was allocated to one of the children. The complainant requests an explanation for the respondent's departure from the nomination form.

**[5] DETERMINATION AND REASONS THEREFOR**

*Introduction*

5.1 The issues which fall for determination are firstly, whether or not the death benefit was correctly computed. Secondly, whether or not the distributions of the benefit was fair and equitable.

*Quantum of the death benefit*

5.2 The complainant is dissatisfied with the quantum of the death benefit. She asserts that the amount of R279 984.00 is not reconcilable with the

deceased's 30 years of service. In response, the respondent set out the rule in terms of which the death benefit was computed. Rule 26(2) of the first respondent's rules provides as follows;

Subject to Section 37C of the Act, if a MEMBER dies in the SERVICE before attaining the PENSIONABLE AGE, the benefits set out in paragraph (a) or (b) below, whichever is the applicable shall be paid

(a) If a WIDOW or WIDOWER or ELIGIBLE CHILD is left, there shall be paid to or for such person:

- (i) a lump sum equal twice his annual PENSIONABLE EMOLUMENTS;  
and
- (ii) a PENSION, the amount of which shall at any time be equal to the specified percentage of the MEMBER'S potential PENSION at that time, as set out in this rule.

5.3 Pursuant to the above rule, the respondent avers that the deceased's death benefit was computed as follows;

Pensionable earnings per month at the time of death

**R11 666.00 X 12= R139 992.00**

2x annual pensionable salary

R139 992.00 X 2= R279 984.00

5.4 Under rule 26(2), the lump sum portion of the deceased's death benefit comprises of twice his annual pensionable emoluments. According to the respondent, the complainant earned a monthly salary of R11 666.00. To calculate his annual income, this amount was multiplied by 12 months and it came to R139 992.00, which was in turn multiplied by 2 pursuant to the rules.

5.5 In addition to the lump sum, rule 26(2)(ii) of the respondent's rules makes provision for the payment of a pension to a widow and/or eligible

child. The respondent asserts that the complainant is currently receiving a monthly pension of R6 208.44, which will be paid to her for the rest of her life pursuant to the said rule. On the other hand, the deceased's minor children, namely Promise Makola and Philemon Makola are eligible children as defined. They are therefore currently receiving a monthly payment of R2 069.48 each until they reach age 21.

- 5.6 The complainant should therefore not lose sight of the fact that the benefits provided for in sub-rules (i)-(ii) of rule 26(2) are cumulative components of a single death benefit, and are not mutually exclusive. It follows that the lump sum portion of the deceased's death benefit was correctly computed. The number of years the deceased was in the employ of the employer does not enter the enquiry. Therefore, the complainant's reliance thereon is misguided.

*Allocation of the death benefit*

- 5.7 The payment of a death benefit is regulated by section 37C of the Act read with the definition of a dependant in section 1. The primary purpose of this section is to protect those who were dependent on the deceased during his lifetime. In effect, section 37C takes precedence over the freedom of testation of the deceased. It is the board's responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the dependants, thereafter decide on an equitable distribution and finally decide on the most appropriate mode of payment.

- 5.8 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 a 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 a 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

5.9 The complainant is also dissatisfied with allocation of the death benefit. She contends that she was allocated an amount of R69 996.00 whereas her children were allocated an amount of R125 994.00. The respondent's response in this regard is fully set out above. Accordingly, it shall not be necessary to repeat it here. All that is necessary is to make a finding on the fairness and equitability or lack thereof. The respondent placed reliance on the determination of this Tribunal in the matter of *Segal v Lifestyle Retirement Annuity Fund* [2001] 1 BPLR 1519 (PFA). It correctly argues that, in that matter, it was found that the following criteria are instructive in achieving an equitable allocation of a death benefit:

- The ages of the dependants and/or nominees
- Their relationship to the deceased
- The extent of the dependency
- The financial affairs of the dependants and;
- The future earning potential and prospects of the dependants.

5.10 The reasoning of the respondent is legally sound. It is a fine example of how the above criteria find application in practice. The individual circumstances of the dependants were individually examined and an equitable allocation, in the discretion of the board, was then made. The board did not fetter its discretion by giving undue weight to any

predetermined individual criterion. It does not fall upon this Tribunal to determine whether the most equitable or generous allocation was made. However, the true test is whether or not the board properly applied its mind (see *Berge v Alexander Forbes Retirement Fund (Pension Section) 2009 JDR 0123 (W)*). To that extent, it is found that the board demonstrably applied its mind by considering all the relevant factors and ignored irrelevant ones.

- 5.11 The complainant's assertion that her children received more than her is not well founded. Each of her minor children was allocated 20% of the benefit, and the major child was allocated 5%. The deceased's children were individually and independently dependent on him. It is therefore incorrect to view the allocation made to them cumulatively.

*The nomination form*

- 5.12 That the deceased completed a nomination form before he died is common cause. The complainant contends that it was not competent for the board to depart from its contents. It is so that the board had an obligation in law to consider all the deceased's nominees. However, all the nominees were also his dependants. Therefore, the board only had to depart from the allocation proposed by the deceased in the nomination form. Such departure is well justified by the respondent as has already been found above. The court had occasion to deal with the legal force of a nomination form (see *Mashazi v African Products Retirement Benefit Provident Fund [2002] 8 BPLR 3703 (W)*). In this matter, the court found that a nomination form is a non-binding guide to the board in the exercise of its discretion at the allocation stage. Therefore, the decision of the board not to uphold the apportionment proposed in the nomination form cannot be faulted.

5.13 In the circumstances, it is found that the board exercised its discretion properly according to the law. Therefore, a case has not been made to set its decision aside.

**[6] ORDER**

1. In the result, this complainant cannot succeed and it is hereby dismissed.

**DATED AT PRETORIA ON THIS 28<sup>TH</sup> DAY OF JANUARY 2015**

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**MA LUKHAIMANE**  
**PENSION FUNDS ADJUDICATOR**

**Section 30M Filing: High Court**

*Parties: unrepresented*