



4th Floor
Riverwalk Office Park
Block A, 41 Matroosberg Road
Ashlea Gardens, Extension 6
PRETORIA
SOUTH AFRICA
0181

P.O. Box 580, **MENLYN**, 0063
Tel: 012 346 1738, Fax: 086 693 7472
E-Mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Please quote our reference: **PFA/GP/00011262/2014/TD**

REGISTERED POST

Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): SM MAPHOTHOMA (“complainant”) v TELKOM RETIREMENT FUND (“first respondent”) AND MOMENTUM RETIREMENT ADMINISTRATORS (PTY) LTD (“second respondent”)

[1] INTRODUCTION

- 1.1 This complaint concerns the distribution of a death benefit by the first respondent following the death of its member, Mr DP Maphothoma, (“the deceased”).
- 1.2 The complaint was received by this Tribunal on 5 September 2014. A letter acknowledging receipt of the complaint was sent to the complainant on 10 September 2014. On the same date, a copy of the complaint was forwarded to Old Mutual Life Assurance Company (SA) Limited (“Old Mutual”), the previous administrator of the first respondent, requesting it to file its response by 10 October 2014. A

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act, 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)

response was received from Old Mutual on 23 September 2014. Old Mutual forwarded the complaint to the second respondent. A response dated 29 September 2014 was received from the first respondent on 30 September 2014. On 5 November 2014, the second respondent was joined as a party to this complaint in terms of section 30G(d) of the Act and was given until 5 December 2014 to file its response. On 10 November 2014, a copy of the first respondent's response was forwarded to the complainant requesting her to file further submissions on or before 24 November 2014. Further submissions were received from the complainant on 12 November 2014.

- 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 deceased was a member of the first respondent during his lifetime. The complainant is the deceased's widow. The deceased died on 14 January 2014 and is survived by the following:

- | | |
|-------------------------------|-------------------------------|
| - MT Monyemangane | Deceased's customary law wife |
| - SM Maphothoma (complainant) | Deceased's civil law wife |
| - RL Makano | Deceased's daughter |
| - BJ Mollo | Deceased's daughter |
| - BP Moselakhomo | Deceased's daughter |
| - NK Modise | Deceased's son |
| - O Nkadimeng | Deceased's son |
| - PS Maphothoma | Deceased's brother |

- 2.2 A death benefit in the amount of R531 879.84 became available for distribution in terms of section 37C of the Act. Following the death of the deceased, the first respondent made an allocation and distributed the death benefit as follows:

- | | |
|-------------------|-----|
| - MT Monyemangane | 15% |
|-------------------|-----|

- SM Maphothoma (complainant)	15%
- RL Makano	15%
- BJ Mollo	15%
- BP Moselakhomo	10%
- NK Modise	10%
- O Nkadimeng	10%
- PS Maphothoma	10%

[3] COMPLAINT

- 3.1 The complainant is dissatisfied with the allocation and distribution of the death benefit.
- 3.2 She mentioned that the first respondent failed to disclose how the death benefit was distributed. She stated that the first respondent paid a portion of the death benefit to the deceased's alleged two wives. She submitted that the first respondent failed to pay the full death benefit to her as the deceased's legal wife.
- 3.3 The complainant is requesting this Tribunal to order the first respondent to reverse its decision and pay the full death benefit to her.

[4] RESPONSES

First respondent

- 4.1 The first respondent submitted that the deceased was employed by Telkom SA Soc Ltd on 4 June 1990 until 14 January 2014 when he passed away. It stated that upon the deceased's death, it became aware that he nominated his brother, Mr PS Maphothoma as a sole beneficiary.
- 4.2 It mentioned that the deceased was married twice (legally as well as customary) and involved in different short term relationships at the time

of his demise from which relationships five children were born with different mothers.

- **Circumstances regarding traditional marriage with Ms MT Monyemangane**

The deceased and Ms MT Monyemangane were married in customary union by indigenous law and custom on 16 December 2007. No children were born from the marriage. Ms MT Monyemangane was caring and staying with the deceased at the time of his demise in their house in Diepkloof.

- **Circumstance regarding civil marriage to Mrs SM Maphothoma**

The deceased was legally married to Mrs SM Maphothoma on 1 February 2011. No children were born from the marriage. Mrs SM Maphothoma was aware that the deceased was staying with Ms MT Monyemangane, but visited her at home during holidays.

- **Circumstances regarding the deceased relationship with Ms KG Makano**

The deceased was in a short term relationship with Ms KG Makano. One child Lehlogonolo (16 years), was born from the relationship. The child is currently residing with her mother. The deceased paid an amount of R600.00 per month for maintenance.

- **Circumstances regarding the deceased relationship with Ms MMS Mollo**

The deceased was in a short term relationship with Ms Mollo. One child Boitumelo (15 years), was born from the relationship. The child is currently residing with her mother. The deceased paid an amount of R500.00 per month for maintenance.

- **Circumstances regarding the deceased relationship with Ms WW Maselakhomo**

The deceased was in a short term relationship with Ms Maselakhomo. One child, Bontle (13 years) was born from the relationship. The child is in the care of her mother.

- **Circumstances regarding the deceased relationship with Ms KH Modise**

The deceased was in a short term relationship with Ms Modise. One child, Nelson (5 years) was born from the relationship. The child is residing with his mother.

- **Circumstances regarding the deceased relationship with Ms MM Nkadimeng**

The deceased was in a short term relationship with Ms Nkadimeng. One child Ofentse (4 years), was born from the relationship. The child is currently residing with his mother. The deceased paid an amount of R700.00 per month for maintenance.

- 4.3 The first respondent submitted that the deceased nominated his brother, Mr PS Maphothoma as his sole beneficiary during 2013. The first respondent attached to its response its benefit committee resolution stating that Mr PS Maphothoma was not dependent on the deceased. The resolution further stated that the nomination does not seem fair and reasonable as the deceased did not take into consideration his wives and children when he made his nomination. It stated that in terms of section 37C of the Act, the legal dependants of the deceased should be taken into consideration in the payment of the lump sum death benefit. The first respondent deviated from the nomination and divided the death benefit as follows:

Name	Relationship	Percentage	Amount
Troida (51 years)	Traditional wife	15%	R79 781.97
Selina (39 years)	Legal Wife	15%	R79 781.97
Ofentse (4 years)	Son	15%	R79 781.97 (in Trust)
Kamogelo (5 years)	Son	15%	R79 781.97 (in Trust)
Bontle (13 years)	Daughter	10%	R53 187.98 (in Trust)
Boitumelo (15 years)	Daughter	10%	R53 187.98 (in Trust)
Letlhogonolo (16 years)	Daughter	10%	R53 187.98 (in Trust)
Puleng (37 years)	Brother	10%	R 53 187.98

- 4.4 The first respondent's benefits committee resolution mentioned that the monthly widow's pension will be divided equally between the two qualifying widows, the death benefit lump sum was allocated and would be paid in the manner indicated in paragraph 4.3 above; the portions allocated to Ofentse, Kamogelo, Bontle, Boitumelo and Letlhogonolo would be paid into trusts for their care until they reach the age of majority. It submitted that the deceased's two wives and five children are entitled to the lump sum death benefit.

Second respondent

4.5 The second respondent confirmed that the deceased was a member of the first respondent. It stated that it paid the death benefit as per the provisions of the resolution received from the board of the first respondent. It attached to its response, the resolution of the board and confirmation of payment containing details of the beneficiary funds into which the minor children's benefits were paid.

Complainant's further submissions

4.6 The complainant, through her legal representatives disputed the alleged fact that the deceased was married both legally and customarily. She stated that she fails to understand the meaning of legally and customary as a person can only marry legally and this includes customary marriage. She disputed the fact that she had knowledge of the deceased's customary marriage to Ms MT Monyemangane. She further stated that she found it irrelevant for the first respondent to mention the deceased's previous and extramarital relationships. She mentioned that even if the deceased had other children, extramarital affairs or any dependency, she is entitled to payment of the death benefit.

4.7 The complainant submitted that the first respondent must prove that the children are indeed the biological children of the deceased and the deceased was obliged by law to maintain them. She disputed that the deceased died while staying with another woman as he was married and staying with her at the time of his death. She also disputed the authenticity of the alleged lobola letter. She mentioned that there has never been lobola negotiation and that people who alleged to have signed the lobola letter must come forward to give evidence and prove that there was indeed lobola negotiation between the two families. She

requested the first respondent to provide her with the full report of the investigation in order to make submissions. She stated that the first respondent acted irresponsibly by refusing to pay the death benefit to her and paid people who allege to be married and children of the deceased without proof.

[5] DETERMINATION AND REASON THEREFOR

Introduction

5.1 The issue for determination is whether or not the first respondent allocated the death benefit in terms of section 37C of the Act.

Payment of a death benefit

5.2 The payment of a death benefit is regulated in terms of section 37C of the Act, which provides as follows:

“37C. Disposition of pension benefits upon death of member

(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)(5)(b)(i) and subject to the provisions of section 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) ...

(b) ...

(bA) If a member has a dependant and the member has also designated in writing to the fund a nominee to receive the benefit or such portion

of the benefit as is specified by the member in writing to the fund, the fund shall within twelve months of the death of such member pay the benefit or such portion thereof to such dependant or nominee in such proportions as the board may deem equitable: Provided that this paragraph shall only apply to the designation of a nominee made on or after 30 June 1989: Provided further that, in respect of a designation made on or after the said date, this paragraph shall not prohibit a fund from paying the benefit, either to a dependant or nominee contemplated in this paragraph or, if there is more than one such dependant or nominee, in proportions to any or all of those dependants and nominees.”

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 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) 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 The law recognises three categories of dependants based on the deceased member’s liability to maintain such a person, namely, legal dependants, non-legal dependants and future dependants. In principle, a member is legally liable for the maintenance of a spouse and children as they rely on the member for the necessities of life. In the case of non-legal dependants, where there is no duty of support, a person might still be a dependant if the deceased in some way contributed to the maintenance of that person. The person alleging to be a factual dependant will have to prove that he was dependent on the deceased, despite the deceased not having a legal duty to maintain at the time of the member’s death.

5.6 Following the death of the deceased, a death benefit in the amount of R531 879.84 became available for distribution. The board of the first respondent identified and allocated the benefit to the deceased’s dependants as indicated in paragraph 4.3 above. This Tribunal provided the complainant with the first respondent’s response indicating the amount and the allocation of the death benefit. The complainant is dissatisfied with the payment of the death benefit to the deceased’s other beneficiaries. In *casu*, the deceased had five children born from

different mothers. The deceased's five children qualify as his legal dependants in terms of section 1(a) of the Act as he had a legal obligation to maintain them.

5.7 It appears that the complainant is under an impression that the entire amount of the death benefit should have been paid to her. During the board's investigations, it transpired that the deceased had two wives i.e the complainant and Ms MT Monyemangane. The complainant disputed that the deceased was married to Ms MT Monyemangane and as a result, submitted an objection without providing any proof to the contrary. The first respondent attached a lobola negotiation letter from Ms MT Monyemangane's family stating that lobola was paid for her on 16 December 2007. It also attached affidavits from Ms MT Monyemangane's family stating that she was customarily married to the deceased.

5.8 Section 3(1) of the Recognition of Customary Marriages Act 120 of 1998 ("Recognition of Customary Marriages Act") dealing with the requirement for validity of customary marriages provides as follows:

"3 Requirements for validity of customary marriages

- (1) For a customary marriage entered into after the commencement of this Act to be valid –
 - (a) the prospective spouses –
 - (i) must both be above the age of 18 years; and
 - (ii) must both consent to be married to each other under customary law; and
 - (b) the marriage must be negotiated and entered into or celebrated in accordance with customary law.
- (2) Save as provided in section 10(1), no spouse in a customary marriage shall be competent to enter into a marriage under the

Marriage Act, 1961 (Act 25 of 1961), during the subsistence of such customary marriage.”

- 5.9 It must be noted that the failure to register a customary marriage does not affect its validity thereof. Before the coming into effect of the Recognition of Customary Marriages Act on 15 November 2000, the deceased’s marriage to the complainant would have superseded and extinguished his customary marriage to Ms MT Monyemangane. The date of conclusion of the civil marriage with the complainant will be the deciding factor to ascertain whether such marriage is valid where the deceased had entered into a prior customary marriage. It must be noted that the deceased married the complainant on 1 February 2011 after the commencement of the Recognition of Customary Marriages Act. Therefore, in terms of section 3(2) of the Recognition of Customary Marriages Act, the deceased was not competent to enter into a civil marriage with the complainant as he was already a spouse in a customary marriage with Ms MT Monyemangane. The rules of the first respondent define a qualifying spouse as follows:

“QUALIFYING SPOUSE: a surviving partner of the MEMBER, PENSIONER, C-PENSIONER or female A- or B-PENSIONER in a RECOGNISED MARITAL UNION existing at the time of the death of the MEMBER, PENSIONER, C-PENSIONER or female A- or B-PENSIONER; provided that in the event of the death of a PENSIONER or C-PENSIONER such RECOGNISED MARITAL UNION must already have existed at the earlier of the PENSIONER’S or C-PENSIONER’S NORMAL RETIREMENT DATE or his actual retirement date.

- 5.10 In light of the above, the complainant does not qualify as a spouse in terms of section 1 of the Act as her marriage with the deceased is not valid (see “*The Recognition of Customary Marriages in South Africa: Law, Policy and Practice*, Law, Race and Gender Research Unit University of Cape Town page 2 and *Netshituka v Netshituka* (426/10) [2011] ZASCA 120 dated 20 July 2011). She also does not meet the requirements of a qualifying spouse in terms of the rules of the first

respondent as there was no recognized marital union between her and the deceased at the time of the deceased's death.

- 5.11 In this instance, Ms MT Monyemangane is entitled to the payment of the death benefit as she is the spouse of the deceased. The first respondent stated that the monthly widow's pension will be divided equally between the two qualifying widows. In light of the above, it is this Tribunal's conclusion that the first respondent erred in allocating the complainant a portion of the death benefit plus the widow's pension as she does not qualify as a spouse in terms of section 1 of the Act and the definition of a qualifying spouse in terms of the rules. This Tribunal would like to emphasize the fact that dependency is not based on the subsistence of a marriage. In *casu*, it does not appear that the first respondent investigated the financial affairs of the complainant and her dependency on the deceased. Therefore, the decision of the first respondent to allocate a portion of the death benefit plus the widow's pension to the complainant is hereby set aside. The first respondent must investigate the complainant's financial dependency on the deceased and her financial affairs in order to determine whether she qualifies as a factual dependant.
- 5.12 The first respondent submitted that the deceased nominated his brother Mr PS Maphothoma as his sole beneficiary. It stated that Mr PS Maphothoma was not dependent on the deceased. Section 37C of the Act determines how a death benefit from a pension fund is distributed. The first respondent allocated 10% of the death benefit to Mr PS Maphothoma. This Tribunal would like to highlight that the nomination form serves merely as a guide to assist the board of the first respondent in the exercise of its discretion (see *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 3705I-3706C). Even if the deceased nominated Mr PS Maphothoma as his sole beneficiary, the board of the first respondent is not bound by the nomination form completed by the deceased. The investigations

revealed that Mr PS Maphothoma was employed and not dependent on the deceased.

5.13 In this instance, the board of the first respondent investigated the financial dependency of Mr PS Maphothoma and nevertheless allocated 10% of the death benefit to him. The first respondent did not provide this Tribunal with compelling reasons for allocating a portion of the death benefit to Mr PS Maphothoma. The duty of this Tribunal is not to decide what is the fairest or most generous distribution, but rather to determine whether the board has acted rationally and arrived at a proper and lawful decision (see *Ditshabe v Sanlam Marketers Retirement Fund & Another (2)* [2001] 10 BPLR 2579 (PFA), at 2582 F-G). In light of the above, this Tribunal is not satisfied that the board of the first respondent took into account relevant factors and ignored irrelevant factors in the allocation of the deceased's death benefit. The death benefit was not properly allocated to the dependants of the deceased. This Tribunal finds it appropriate to set aside the board's decision to allocate the 10% of the death benefit to Mr PS Maphothoma as he was not dependent on the deceased at the time of his death.

[6] ORDER

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

6.1.1 The decision of the first respondent to allocate a portion of the death benefit to the complainant is hereby set aside;

6.1.2 The first respondent is ordered to investigate the complainant's financial affairs and dependency on the deceased based on the reasons mentioned above within four weeks of this determination;

6.1.3 The decision of the board of the first respondent to allocate 10% of the death benefit to Mr PS Maphothoma is hereby set

aside;

- 6.1.4 The board of the first respondent is ordered to re-consider its decision on the allocation and distribution of the death benefit to the deceased's beneficiaries based on the reasons mentioned above, within two weeks of this determination; and
- 6.1.5 The first respondent is ordered to pay the death benefit to the deceased's beneficiaries, within two weeks of completion of the exercise in paragraphs 6.1.2 and 6.1.4 above.

DATED AT PRETORIA ON THIS 23RD DAY OF JANUARY 2015

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M Filing: High Court

Complainant represented by Lebala Moloji Attorneys

Respondents unrepresented