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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”): RM MPHAHLELE (“complainant”) v AON UMBRELLA PENSION FUND (“first respondent”) AND AON SOUTH AFRICA (PTY) LTD (“second respondent”)**

**[1] INTRODUCTION**

- 1.1 This complaint concerns the failure by the first respondent to pay the complainant a death benefit in accordance with the late member’s wishes, as evidenced by the nomination form.
- 1.2 The complaint was received by this Tribunal on 19 March 2013. On 2 April 2013, an acknowledgement letter was sent to the complainant. On the same day, the complaint was dispatched to the respondents giving them until 2 May 2013 to file their responses. On 29 May 2013, a follow up letter was sent to the respondents to respond by 4 June 2013. On 5

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June 2013, a response was received from the second respondent on behalf of both the first and second respondents. On 10 June 2013, a copy of the response was forwarded to the complainant to reply thereto by 17 June 2013. On 14 June 2013, a reply to the respondents' response was received from the complainant. No further submissions were received from the parties.

- 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 late Mr MN Thamaga ("the deceased") was employed by Menzies Aviation (SA) (Pty) Ltd ("employer") until his death on 13 December 2011. By virtue of his employment with the employer, he became a member of the first respondent. The second respondent is the administrator of the first respondent. The complainant is the sister of the deceased and the sole nominee of the deceased.
- 2.2 As a result of the death, a death benefit in the amount of R139 217.88 became available for distribution to the deceased's beneficiaries. This comprises of R20 413.92 of member's share of the fund and R118 803.96 insured benefit. The first respondent considered the following potential beneficiaries and distributed the benefit as follows:

Beneficiary	Relationship with Deceased	Date of Birth	Age when Trustees' decision was made	Status	Benefit Allocation %
Ditiro Malope	Son	09/04/2000	12	Student	50%

Mahlabane Tjale					
Modipadi Ramatsimele Thamaga	Daughter	03/11/1995	17	Student	30%
Karabo James Matlala Tjale	Son	02/12/1992	20	Student	20%
Mabatho Sophia Thamaga	Daughter	03/10/1984	28	Employed	0%
Khomotjo Ramoloetji Thamaga	Daughter	18/06/1979	33	Employed	0%
Monica Ramolwetji Mphahlele	Sister	28/10/1952	60	Pensioner	0%
Maria Masemole Tjale	Ex-spouse	23/07/1960	52	Divorced	0%

### [3] **COMPLAINT**

3.1 The complainant submits that following the death of the deceased, she lodged a claim for the payment of a death benefit with the employer. She submits that she was informed by the employer of the existence of a nomination form completed by the deceased in which she was nominated to receive a 100% of the benefit. She submits that she was surprised to discover that the first respondent has decided to award the entire benefit to the children and excluded her. She submits that she accepts that the children may be entitled to share in the benefit, but that, as a nominee, she ought to have been awarded a share of the benefit as well. The complainant submitted further that twelve months have passed since the death of the deceased, but the benefit is yet to be paid. She submits that this constitutes an inordinate delay on the

part of the respondents and there is no justifiable reason why the benefit has not been paid.

- 3.2 The complainant submits that she is aggrieved by the respondents' failure to abide by the deceased's wishes and seeks this Tribunal to order the first respondent to pay her a share of the benefit as instructed by the nomination form and to order the payment of the benefit without further delay.

**[4] RESPONSE**

- 4.1 The second respondent provided a response on behalf of both respondents and confirmed the information as appears in the factual background of the issues. It submits that the board of the first respondent was guided by section 37C in identifying, allocating and distributing the benefit to the beneficiaries. The respondents submit that the first respondent's board did all this and identified seven potential beneficiaries including the complainant who was the sole nominee but was not dependant on the deceased. They submit that after looking into the personal circumstances of each and the size of the benefit, the board decided to allocate the benefit to the three youngest children of the deceased who were also factually dependent on the deceased. It submits that the dependency of these children was established and all of them were students at registered institutions, which it confirmed with the relevant institutions.
- 4.2 The second respondent submits that the board applied section 37C of the Act, and considered a basket of relevant factors when it exercised its discretion, such as; the wishes of the deceased, the amount available for distribution and the personal circumstances of the potential beneficiaries such as; the financial status of the beneficiaries,

their future earning capacity, the extent of dependency and the ages of the beneficiaries.

- 4.3 The respondents submit that the fact that the complainant was nominated should not be interpreted as a guarantee that she is going to receive a benefit, more so when it was established that she was not a dependant of the deceased. The respondents submit that section 37C(1)(bA) makes it clear that the fact that there are dependants or nominees 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.”

- 4.4 The respondents submit that this is confirmed by the High Court decision of *Mashazi v African Products Retirement benefit Provident Fund* [2002] 8 BPLR 3703 (W), the fact that a person has been nominated is only one of the issues that the trustees must consider in making an allocation, but is not the only issue.
- 4.5 It submits that the first respondent's board has fulfilled its mandate in terms of section 37C of the Act even though it excluded the complainant who was the sole nominee from the distribution.
- 4.6 The respondents submit further that the submission by the complainant that the delay is not justified, but malicious is not supported by the facts. They submit that due to the number of potential beneficiaries, the investigation took longer than twelve months and this was motivated by the first respondent's board's cautious approach to adhere to the provisions of section 37C of the Act. They submit that the inference that a different allocation would have been made if the distribution was done early, is not supported by the evidence. They submit that as a result, the complaint against the respondents has no merit and should be dismissed on both issues.

[5] **DETERMINATION AND REASON THEREFOR**

5.1 The issues for determination are whether or not the board of the first respondent did not fetter its discretion in allocating the benefit to the deceased's three youngest children to the exclusion of the complainant who was the sole nominee and whether the first respondent's failure to distribute the benefit within twelve months was unlawful.

5.2 Section 37C of the Act provides as follows:

**“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) If the fund within twelve months of the death of the member becomes aware of 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.
  - (b) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member, and the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the benefit or such portion of the benefit shall be paid to such nominee: Provided that where the aggregate amount of the debts in the estate of the member exceeds the aggregate amount of the assets in his estate, so much of the benefit as is equal to the difference between

such aggregate amount of debts and such aggregate amount of assets shall be paid into the estate and the balance of such benefit or the balance of such portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee.

- (c) 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 The complainant submitted that she is the sole nominee to the deceased's death benefit and as such the first respondent should have allocated the benefit to her as per the nomination form. She submits further that, she does not dispute that the children are entitled to share in the benefit. However, she challenges her total exclusion from sharing in the benefit. The respondents admit that the complainant is the sole nominee, but submit that the fact that the complainant is a nominee should not be interpreted as a guarantee that she will receive a share of the benefit, especially where there is no dependency established as in the present case. They submit that the first respondent's board still had to exercise its discretion in terms of section 37C of the Act. In terms of this section, the board of a fund is enjoined to conduct an investigation in order to identify the legal dependants of the deceased, the factual dependants of the deceased and the nominees and to also look into their personal circumstances before deciding on the allocation. The respondents submitted that the first respondent's board considered all the relevant factors and disregarded the irrelevant ones by

distributing the benefit to the deceased's three youngest children to the exclusion of the complainant and other potential beneficiaries. They submit that the first respondent's board has fulfilled its mandate in terms of section 37D of the Act.

- 5.4 The complainant also challenged the first respondent's delay in finalising the distribution and paying out the benefit. She submits that the delay was unjustified and unreasonable. The respondents object to this submission and deny any malicious intent on the first respondent's part for the delays in making payment and submit that the delay was necessitated by the number of potential beneficiaries and the time it took to verify their status, which was in line with the cautious approach of the first respondent's board to apply section 37C correctly.
- 5.5 The submission made by the complainant that she is the sole nominee is relevant in terms of section 37C(1) for her to be considered. However, as the respondents submitted, to be a nominee on its own is not a guarantee that a benefit shall be awarded. A basket of factors including the financial status of the beneficiaries and the amount available for distribution must still be considered. To be a nominee, guarantees that the person will be considered when the distribution is made, but that does not guarantee that a benefit will be awarded. Thus, the first respondent is not bound by the nomination form (see *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 3705J-3706C). This Tribunal also takes note of the fact that the board of the first respondent did not only exclude the complainant from sharing in the benefit, two of the deceased's oldest children who are legal dependants were similarly considered but were not awarded a share of the benefit. The complainant as well as the ex-wife who were found not to be factually dependent on the deceased, were also considered but not allocated a share. Section 37C(1)(bA) stipulates further that the fund may, if there is more than one such dependants or nominees, decide to pay one or more in proportions as

they may deem fit (see *Kaplan And Another NNO v Professional And Executive Retirement Fund And Others*; *Kaplan And Another NNO v VIP Retirement Annuity Fund And Others* 1998 (4) SA 1234 (W)).

- 5.6 As regards the issue of the delay in finalising payment, the deceased died in December 2011 and when the complainant lodged the complaint with this Tribunal in March 2013 fifteen months had passed since the death of the deceased, as contrasted to the twelve months stipulated in terms of section 37C. The respondents provided reasons why it took them that long in finalising the distribution, especially when there were indications that the distribution was likely to be contested. This Tribunal finds the delay not to be unreasonable under the circumstances (see *Khutswane v Malbak Group Pension Fund and Another* [2000] 12 BPLR 1354 (PFA)). However, the board is also reminded that the reason why the legislature provided a guiding time period is to remind the funds that there is no infinite period for completing the investigation.
- 5.7 In the event, this Tribunal can find no factual or legal grounds to suggest that the board of the first respondent fettered its discretion and as such, there is no lawful reason to interfere with the distribution by the first respondent.

**[6] ORDER**

1. In the result, the complaint cannot succeed and is dismissed.

**DATED AT PRETORIA ON THIS 11<sup>TH</sup> DAY OF NOVEMBER 2013**

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

**Section 30M filing: High Court**

*The complainant was assisted by Ikageng Legal Cost Assistance;*

*No legal representation for the respondents*