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**REGISTERED POST**

Dear Madam,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): NG MKHUNGO (“complainant”) v TRENTYRE PROVIDENT FUND (“first respondent”); NBC UNCLAIMED BENEFIT FUND (“second respondent”) AND NBC FUND ADMINISTRATION SERVICES (PTY) LTD (“third 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 26 June 2016. On 27 June 2016, a letter acknowledging the complaint was sent to the complainant. On the same date, the complaint was forwarded to the respondents requesting responses by 27 July 2016. Follow-up letters were sent to the respondents on 29 July 2016, requesting their responses by 12 August 2016. A response was received from the third

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respondent on 10 August 2016. The third respondent made further submissions to this Tribunal on 15 November 2016. 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 Mr J Weideman (“the deceased”) was a member of the first respondent by virtue of his employment with Trentyre (Pty) Ltd (“employer”). The deceased passed away on 1 August 2001. The complainant is the daughter of the deceased.
- 2.2 Upon the death of the deceased, a death benefit in the amount of R60 650.59 became available for distribution amongst his beneficiaries. However, the first respondent failed to distribute the death benefit.
- 2.3 The third respondent provides administration and consulting services to the first and second respondents, registered funds in terms of section 4 of the Act.

## **[3] COMPLAINT**

- 3.1 The complainant submitted that in 2001, the deceased passed away leaving behind herself, her brother and her grandmother as beneficiaries. She submitted that when the deceased passed away, he was employed with the employer. She further submitted that the

employer was communicating with the second respondent regarding payment of the death benefit and all the required documents were submitted to the second respondent by the employer. However, the employer relocated and contact between the third respondent and the beneficiaries ceased. She submitted that in 2014, she wrote to the third respondent and the latter confirmed that the death benefit is with it. She submitted that the third respondent advised her to confirm a few things before the claim can be finalised. She further submitted that everything was finalised in 2015, however, she received an email from the third respondent advising her that the death benefit has been transferred to the second respondent which will trace all beneficiaries. The complainant submitted that she is dissatisfied with the decision of the first respondent to transfer the death benefit to the third respondent despite the fact that she was communicating with it. She submitted that the first respondent decided to transfer the benefit to the third respondent 16 years after the death of the deceased, despite it identifying the beneficiaries. She further submitted that since the death of the deceased in 2001, the first respondent has failed to pay the death benefit.

- 3.2 The complainant requests this Tribunal to investigate the matter and order the first respondent to pay the death benefit without any further delay.

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

- 4.1 The third respondent submitted that the deceased was a member of the first respondent until he passed away on 1 August 2001. It submitted that upon his death, a death benefit became available for distribution to his beneficiaries in terms of section 37C of the Act. It

further submitted that in terms of section 37C of the Act, the board of the first respondent is required to conduct investigations and identify the deceased's beneficiaries and to distribute the death benefit in proportions it deems equitable to the identified beneficiaries.

- 4.2 It submitted that the board of the first respondent has conducted the necessary investigations and identified all persons who were dependent on the deceased at the time of his death. It submitted that the board has allocated portions of the benefit to the identified beneficiaries.
- 4.3 It submitted further that the distribution of a death benefit is regulated by section 37C of the Act. Further that, payment in terms of section 37C of the Act is peremptory and any deviation from paying a death benefit in accordance with this section will be contrary to the Act. It submitted that section 37C of the Act places an obligation on the board to allocate a death benefit of a member in a manner that it deems equitable. In order for the board to achieve this, it must trace and identify the existence of individuals who were dependent on the deceased, decide on the amount that each dependant must receive and how the allocated amount should be paid.
- 4.4 The third respondent submitted that the Act defines what is meant by a dependant. Further that, it imposes three important duties on the board of a fund, in the context of apportionment and allocation of the death benefit in the following order:
- The board must investigate and identify all potential dependants (nominees and dependants) of the deceased;
  - It must decide on the amount that each dependant must receive; and
  - It must decide on the mode of payment or how the amounts allocated should be paid out.

4.5 It submitted that the board is further required to exercise its discretion properly, by taking into consideration all relevant factors ignoring irrelevant ones. It further submitted that this Tribunal in *Van Schalkwyk v Mine Employees' Pension Fund and Another* [2003] 8 BPLR (PFA), stated that the first task in distributing a death benefit in terms of section 37C of the Act is to identify all potential beneficiaries (nominees and dependants). It submitted that the section requires the board to proactively search for the existence of potential dependants of the deceased and not depend on them to come forward to the fund in order to lay a claim.

4.6 The third respondent submitted that after the death of the deceased, a death benefit in the amount of R60 650.59 became available for distribution. It submitted that during the investigations the board identified the following people to be the potential dependants of the deceased.

- AJ Ranasgaka
- WR Khambule
- NG Mkhungo (“the complainant”)

4.7 It submitted that the board was satisfied that it took all reasonable steps to trace and identify all potential beneficiaries. Further that, the Act does not prescribe what factors the board need to consider when determining an equitable distribution, however, guided by case law, the board considered and weighed the circumstances of each beneficiary. It submitted that this Tribunal, in *Sithole v ICS Provident Fund and Another* [2004] 4 BPLR 430 held that:

“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 or last Will; and
- Financial affairs of the dependants including their future earning capacity potential.”

4.8 The third respondent submitted that taking into consideration the factors above, the board in its analysis decided to distribute the death benefit in the following manner:

- AJ Ranasgaka 10%
- WR Khambule 45%
- The complainant 45%

It submitted that the board is satisfied that the distribution of the death benefit was guided by the principles outlined in paragraph 4.7 above.

4.9 It submitted that the board believes that it has acted in accordance with the mandate imposed on it by the Act, it has taken into consideration all the relevant factors of the case and distributed the death benefit in a manner that it deems equitable and appropriate. It further submitted that the board stands by its decision to allocate the death benefit in a manner it did.

4.10 The third respondent provided this Tribunal with a copy of the board’s distribution report dated 2007, confirming the allocation of the death benefit. It further submitted that the death benefit was transferred to the second respondent and the beneficiaries must submit claim documents including certified copies of their identity documents and original bank statements. It submitted that the original claim form and the supporting documents must be posted or hand delivered to its address below:

PO Box 1680  
**CAPE TOWN**  
8000

Or

1 Thibault Square, 12<sup>th</sup> Floor  
Long Street  
**CAPE TOWN**  
8001

*Further submissions*

4.11 On 2 November 2016, the third respondent submitted that its administrators attempted to locate the investigation file for the matter in order to establish the factors, the board took into account when allocating the death benefit. However, the administrators have confirmed that they do not have the records of how the allocation was made as the matter is more than ten years old. It further submitted that the payment will be made in accordance with the board's resolution. The second respondent submitted that the amount available for distribution to date is an amount of R170 655.72.

**[5] DETERMINATION AND REASONS THEREFOR**

- 5.1 The issue to be determined is whether or not the board of management of the first respondent failed to carry out its duties in terms of section 37C of the Act by failing to pay the death benefit within a reasonable time.
- 5.2 Section 37C of the Act governs the disposition of death benefits. It places a duty on the board of management of the fund 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 of management 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.

5.3 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;”

5.4 When making an equitable distribution amongst dependants of the deceased, the board of management 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.

5.5 The complainant is aggrieved with the delay in the payment of the death benefit by the first respondent.

5.6 The third respondent submitted that the deceased was a member of the first respondent by virtue of his employment with the employer until he passed away. It submitted that upon the death of the deceased, the board of the first respondent identified and allocated the death benefit in accordance with the board's distribution report dated 2007 as follows:

- AJ Ranasgaka 10%
- WR Khambule 45%
- The complainant 45%

It submitted that payment of the death benefit will be made as soon as the board has received the completed and signed claim forms together with copies of the identified dependant's identity documents and their original bank statements.

5.7 Section 37C(1) of the Act provides as follows:-

“(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) ...

(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 proportion 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.

In light of the above provision, the board has twelve months to identify the dependants of the deceased and to allocate and pay a death benefit. The deceased passed away on 1 August 2001. However, the board of the first respondent only allocated the death benefit in 2007 in terms of resolution provided to this Tribunal, six years after the death of the deceased. The third respondent failed to provide any plausible reasons for such delay. Thus, the board of the first respondent failed to investigate the matter within the prescribed period in terms of the Act. This Tribunal requested the first respondent to provide it with the investigation report detailing how the allocation was made. However, the third respondent indicated that due to the fact that the matter is over ten years old, it no longer has the records except for the board's resolution it provided to this Tribunal.

- 5.8 More than fifteen years have passed since the deceased's death, however, the first respondent has yet to pay the beneficiaries their benefit despite the allocation in 2007. The complainant submitted that she communicated with the third respondent in 2014. She submitted that she was advised to confirm a few things before her claim could be processed. However, the third respondent informed her that it transferred the death benefit to the second respondent. The complainant submitted that she is dissatisfied with the decision to transfer the death benefit to the second respondent despite the fact that the beneficiaries were identified. The third respondent failed to provide reasons for the delay in the payment of the death benefit and the transfer of the benefit to the second respondent save to indicate that the benefit will be paid once the claim documents are received.

5.9 Section 1 of the Act defines an unclaimed benefit as follows:

...

- (aA) a death benefit payable to a beneficiary under section 37C not paid within 24 months from the date on which the fund became aware of the death of the member, or such longer period as may be reasonably justified by the board of the fund in writing”...

In terms of the above definition, a death benefit that remains unpaid for a period of 24 months from the date the fund becoming aware of the death of its member may be transferred to an unclaimed benefit fund. The third respondent submitted that it transferred the benefit to the second respondent in April 2014, after it remained unpaid. The third respondent failed to provide an explanation why the beneficiaries were not paid after they were identified in 2007. This Tribunal notes with concern the action of the first respondent with regard to its handling of this death benefit claim. The first respondent owes a duty to act in good faith towards its member and their beneficiaries.

5.10 Section 7C(2)(f) of the Act provides as follows:

“(2) In pursuing its object the board shall-

...

- (f) have a fiduciary duty to members and beneficiaries in respect of accrued benefits or any amount accrued to provide a benefit, as well as a fiduciary duty to the fund, to ensure that the fund is financially sound and is responsibly managed and governed in accordance with the rules and this Act...”

The deceased passed away on 1 August 2001, however, despite identifying and allocating portions of the death benefit to the identified dependants in 2007, it has failed to pay the death benefit. The conduct of the first respondent is undesirable and unlawful. The first respondent

failed in its fiduciary duty to ensure that the complainant and other identified beneficiaries of the deceased are paid their benefit within a reasonable time. As a result of the first respondent's dilatory conduct, the deceased's beneficiaries suffered prejudice in that they have potentially been denied access to benefits which have become available to them had they received their benefit (see *Mothala v Metal Industries Provident Fund* [2004] 6BPLR 5797 (PFA)).

5.11 Considering the above, the board failed to act in terms of section 37C of the Act. The board should have paid the death benefit to the identified beneficiaries in the proportions proposed in its resolution dated 2007, within twelve months within the death of the deceased. The third respondent did not even attempt to provide this Tribunal with reasons why it has taken so long to pay the death benefit, despite a period of fifteen years having been passed since the death of the deceased. This Tribunal, like any court of law, has the power to grant compensatory damages in order to mark its displeasure with the conduct of a body if circumstances fit (see *Clase v Information Officer, SA Airways (Pty) Ltd* 2007 (5) SA (SCA) 469 at 475A-B and *PM v Eskom Pension and Provident Fund* [2008] 3 BPLR 240 (PFA)). Therefore, the first respondent should pay the complainant and other identified beneficiaries compensation in the amount of R423 164.49 being 15% compound interest from 2008 till today for its delay in paying the death benefit.

## [6] **ORDER**

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

6.1.1 The complainant and other identified beneficiaries are directed to complete and submit the attached claim forms together with

their identity documents and bank statements to the second respondent's below address, within two weeks of this determination: and

PO Box 1680

**CAPE TOWN**

8000

Or

1 Thibault Square, 12<sup>th</sup> Floor

Long Street

**CAPE TOWN**

8001

- 6.1.2 The first respondent is ordered to pay compensation in the amount of R423 164.49 to the second respondent, within two weeks of the date of this determination;
- 6.1.3 The second respondent is ordered to distribute the death benefit, together with the compensation referred to in paragraph 6.1.2 in accordance with the first respondent's resolution, within four weeks of receipt of the documents in paragraph 6.1.1 above; and
- 6.1.4 The second respondent is ordered to provide this Tribunal and the beneficiaries proof of payments of the amounts referred to in paragraph 6.1.3, within one week of such payment.

**DATED AT PRETORIA ON THIS 22<sup>ND</sup> DAY OF NOVEMBER 2016**

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**MA LUKHAIMANE  
PENSION FUNDS ADJUDICATOR**

**Section 30M filing: High Court**

Parties unrepresented