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REGISTERED POST

Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): MEJ NEL (“complainant”) v NETCARE 1999 PENSION FUND (“first respondent”) AND ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD (“second respondent”)

[1] INTRODUCTION

1.1 This complaint concerns the allocation and distribution of a death benefit.

1.2 The complaint was received by this Tribunal on 29 August 2016. On 31 August 2016, a letter acknowledging receipt thereof was sent to the complainant. On the same date, the complaint was forwarded to the respondents affording them an opportunity to file their responses by 1 October 2016. A response was received from the first respondent on

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30 September 2016. The complainant made further submissions on 3 October 2016, 4 October 2016 and 6 October 2016. The second respondent made further submissions on 15 November 2016. On 16 January 2017, the National Prosecution Authority (“NPA”) made a telephonic submission to this Tribunal. 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 PJ Beetge (“the deceased”) was a member of the first respondent until he passed away on 27 December 2015. The complainant is the sister of the deceased.
- 2.2 The deceased completed a beneficiary nomination form in 2013, nominating his wife, Ms EM Beetge (“wife”), as the sole beneficiary of his death benefit. The deceased’s wife predeceased him.
- 2.3 Upon the death of the deceased, a death benefit in the amount of R2 263 973.17 became available for distribution to his beneficiaries. The board resolved to allocate the death benefit as follows:

TC Lekalakala	Deceased’s wife’s minor grandson	100%
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[3] COMPLAINT

- 3.1 The complainant is aggrieved with the allocation of the death benefit. The complainant submitted that the deceased and his wife, Ms EM Beetge (“wife”) were murdered on 26 December 2015. The daughter

of the deceased's wife, Ms BG Lekalakala ("accused"), her boyfriend and a third party are currently in custody for the murders. A police report is available under case number 195/12/2015. The complainant submitted that the only dependant of the deceased, was his late wife who was murdered first, on the same day. The accused and her two year old son, TC Lekalakala ("minor"), were living with the deceased and his late wife. The accused was not willing to work in order to be able to maintain herself or her son. The complainant submitted that the deceased never mentioned to her that he intended to adopt the minor child.

- 3.2 The complainant submitted that the deceased was not the biological father of the accused or the minor child, neither were they adopted by him. The complainant submitted that in terms of the final divorce order between the deceased's late wife and her former husband, the latter was granted full custody over the accused.
- 3.3 The complainant submitted that the minor child was allocated the entire death benefit. She submitted that both the minor's mother and father has a "bloedige hand" and will therefore, indirectly benefit from the deceased's death benefit. The complainant further submitted that the deceased's late wife did not have custody over the accused as her former spouse was awarded full custody over her and therefore, over the minor.
- 3.4 The complainant submitted that the deceased completed a beneficiary nomination form wherein he nominated his late wife and his mother as the beneficiaries of his death benefit. However, the board decided to allocate the deceased's entire death benefit to the minor child. The complainant is aggrieved with the board's decision. She submitted that the minor child was only part of the deceased's life for a period of two years and the accused will get her hands on his benefit. The complainant submitted that the deceased's siblings should benefit from

his death benefit. The accused and the minor child were not related to the deceased. Further that, the latter had no obligation towards the minor child and only supported him out of courtesy. She attached a copy of the deceased's benefit statement as at February 2015, reflecting a fund credit in the amount of R1 361 245.19.

Further submissions

3.5 On 3 October 2016, the complainant submitted that the accused was in receipt of a child grant for the minor child. Therefore, the minor child was financially dependent on the accused. The complainant submitted that the board failed to conduct a proper investigation. She submitted that the board's decision was based on affidavits. On 4 October 2016, the complainant submitted that the complaint cannot be dismissed as she provided copies of affidavits and other substantial evidence to the first respondent. She submitted that the board should reconsider the allocation of the death benefit. On 6 October 2016, the complainant submitted that the siblings of the deceased questioned if their affidavits were ever considered by the board. She attached copies of various affidavits in support of her complaint.

[4] RESPONSE

First and second respondent

4.1 The first respondent submitted that section 37C of the Act gives the board a wide discretion as to who amongst the identified beneficiaries the death benefit has to be allocated and what proportions. The death benefit is not paid out in accordance with the deceased's wishes or the expectations of the family and is distributed in terms of a very wide discretion given to the board of management of the first respondent.

4.2 The second respondent submitted that section 37C of the Act, does not specify the criteria for the board to follow and requires it to act fairly. In order to effect a fair distribution, the board must use the following guiding factors as derived and accepted from case law:

- The ages of beneficiaries;
- The wishes of the deceased;
- The extent of dependency on the deceased;
- The beneficiaries' relationships with the deceased;
- Future earning capacity/potential of the beneficiaries;
- Financial status of the beneficiaries; and
- The amount available for distribution.

The first respondent submitted that the aforementioned factors are not intended to substitute the board's discretion in terms of section 37C of the Act and are only to be used as a guide. The first respondent submitted that whilst the board needs to consider all the relevant information and ignore irrelevant facts, it should not adhere to a policy rigidly or fetter their discretion.

4.3 The first respondent submitted that the board conducted an investigation in terms of section 37C of the Act and identified the following potential beneficiaries:

- Mrs EM Beetge (deceased's wife)
- Mrs MEJ Serfontein (Deceased's mother)
- TC Lekalala (deceased's wife grandson)
- BG Lekalala (deceased's step daughter)

4.4 The first respondent submitted that taking into account the information placed before the board, it resolved to allocate the entire death benefit to the minor child. The first respondent submitted that the deceased did not have any children of his own. The accused is his step daughter. However, she has been excluded from being allocated a

benefit as she was involved in the murder of the deceased. It is a generally accepted principle that one cannot benefit from the proceeds of a death that he/she has caused. As a result, the accused has been excluded. The first respondent further submitted that one does not need to be a biological child or grandchild of a deceased member in order to be allocated a death benefit. In terms of the investigation that was conducted, the minor child was found to be financially dependent on the deceased. Therefore, in terms of section 37C of the Act, the minor child qualifies as a factual dependant of the deceased. His factual dependency was established through the deceased having provided for him. The minor child lived with the deceased and his wife. The first respondent submitted that the deceased and his wife had the intention to adopt the minor child as they were already living with him and taking care of him. The first respondent attached a copy of an affidavit from a friend of the deceased in support of its submissions.

- 4.5 The first respondent submitted that in 2010, the deceased nominated his wife and mother as the beneficiaries of his death benefit. In 2013, the deceased amended his nomination, following the death of his mother, nominating his wife as the sole beneficiary of his death benefit. The first respondent submitted that the board identified all the relevant dependants and exercised its discretion in a manner giving rise to equitable results. Therefore, the board submitted that its decision is well considered, reasonable and justifiable. However, the complainant has not submitted substantial reasons pointing to the board fettering its discretion. The board resolved to pay the death benefit into a trust fund for the benefit of the minor child.
- 4.6 The first respondent submitted that section 37C of the Act provides for a disposition of a death benefit upon the death of an active member. Section 37C of the Act provides that a death benefit is not part of the deceased's estate. This section restricts freedom of testation and was

intended to serve a social function and to protect dependency over the clear wishes of the deceased.

Further submissions

4.7 On 15 November 2016, the second respondent submitted that the death benefit is in the amount of R2 263 973.17.

National Prosecution Authority (“NPA”)

4.8 On 16 January 2017, Advocate Molokwane from the NPA telephonically submitted to this Tribunal that BG Lekalakala is to appear in the High Court on 22 April 2017 for the criminal charges against her. He requested that the payment of the death benefit be withheld pending finalisation of the criminal case.

[5] DETERMINATION AND REASONS THEREFOR

5.1 The issues to be determined are 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.

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 allocation of the death benefit. The complainant submitted that the minor child was only part of the deceased's life for a period of two years and the accused will get her hands on his benefit. The complainant submitted that the deceased's siblings should instead benefit from his death benefit. The accused and the minor child were not related to the deceased. Further that, the

latter had no obligation towards the minor child and only supported him out of courtesy. She submitted that both the minor's mother and father has a "bloedige hand" and will therefore, indirectly benefit from the deceased's death benefit. The complainant further submitted that the deceased's late wife did not have custody over the accused as her former spouse was awarded full custody over her and therefore, over the minor child.

- 5.6 The first respondent submitted that the deceased did not have any children of his own. The accused is his step daughter. However, she has been excluded from being allocated a benefit as she was involved in the murder of the deceased. It is a generally accepted principle that one cannot benefit from the proceeds of a death that he/she has caused. As a result, the accused has been excluded. The first respondent further submitted that one does not need to be a biological child or grandchild of a deceased member in order to be allocated a death benefit. In terms of the investigation that was conducted, the minor child was found to be financially dependent on the deceased. Therefore, in terms of section 37C of the Act, the minor child qualifies as a factual dependant on the deceased. His factual dependency was established through the deceased having provided for him. The minor child lived with the deceased and his wife. The first respondent submitted that the deceased and his wife had an intention to adopt the minor child as they were already living with him and taking care of him. Therefore, the board resolved to allocate the entire death benefit to the minor child. The board resolved to pay the death benefit into a trust fund for the benefit of the minor child.
- 5.7 The deceased completed a beneficiary nomination form in 2013, nominating his wife as the sole beneficiary of his death benefit. However, the nomination form serves merely as a guide to assist the board in the exercise of its discretion (see *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 3705I-

3706C). If the board strictly adheres to the beneficiary nomination, then it cannot exercise its discretion equitably and therefore, fetters its discretion. Section 37C of the Act serves a social purpose and intends to protect people who were dependent on the deceased during his lifetime and to ensure that they continue to be provided for (see *Matlkane v Royal Parrafin Provident Fund* [2003] 6BPLR 4785 (PF)).

- 5.8 “*De bloedige hand en neemt geen erfenis*” is an established common law legal principle which means that a person who has unlawfully caused the death of another is disqualified from benefiting financially from that death. In the matter of *Makhanya v Minister of Finance and Others* (2004) 3BPLR 5514 (D) the High Court held that the principle could also be applied to benefits conferred by statute rather than in terms of a deceased’s Will or in accordance with the laws governing intestate succession. In the *Makhanya* matter, the court held that this legal principle/maxim could also be applied to benefits conferred by statute. Therefore, although the matter relates to the Government Employees Pension Fund, the principle should also be extended to the Pension Funds Act and the public policy principle should apply. It is important to preserve the *boni mores* of society and it is unlikely that the legislature, when drafting section 37C of the Act, would have intended for the section to go against or contradict public policy. In the matter of *Danielz v De Wet and Another* [2008] 4 All SA 549 (C), the court held that any person who deliberately participates in the vicious assault of another person which ultimately caused his death cannot benefit from those consequences. Thus, on the grounds of public policy, the widow could not benefit from the life policy. The court further held that the maxim has been part of our common law since Roman times. Section 37C of the Act has never been subjected to interpretation where issues similar to the ones in the *Makhanya* and *Danielz* were raised. Therefore, it will be proper for this Tribunal to err on the side of caution and follow the interpretation of the two cases. Therefore, funds should withhold the payment of benefits in terms of

section 37C of the Act allocated to the accused person pending the outcome of a criminal/civil investigation and proceed with the allocation of the death benefit to the other beneficiaries of the deceased. Once the accused has been prosecuted or acquitted the allocation of the balance of the death benefit should be finalised. Therefore, only once the accused was found not guilty, may a portion of the death benefit allocated be paid to her, otherwise it should be re-allocated to other beneficiaries not implicated in the death of the deceased.

- 5.9 In this instance, although a death benefit was not allocated to BG Lekalakala, she is the biological mother of the minor child and might gain access to his award. On 16 January 2017, Advocate Molokwane from the NPA telephonically submitted to this Tribunal that BG Lekalakala will appear in the High Court on 22 April 2017 for the criminal charges against her. He requested that the payment of the death benefit be withheld pending finalisation of the criminal case. However, this Tribunal cannot withhold payment of the minor child benefit as he was dependant on the deceased.
- 5.10 The board of the first respondent needs to ascertain the level of dependency of the identified dependants. Section 37C of the Act imposes two duties on the board of management of a fund, namely to conduct an investigation to locate and determine dependants and nominees of the deceased, and to effect an equitable distribution amongst the dependants and nominees taking into consideration the factors in paragraph 5.4 above. The deceased and his wife were murdered on 27 December 2015. BG Lekalakala is currently in custody for the murder and was excluded from the allocation of the death benefit. The complainant submitted that in terms of the final divorce order between the deceased's late wife and her former husband, the latter was granted full custody over BG Lekalakala. Therefore, her biological father was responsible for her maintenance.

- 5.11 The deceased's wife's former husband was awarded full custody over the accused and was therefore, responsible for her maintenance. The first respondent submitted that the deceased and his wife intended to adopt the minor child and relied on an affidavit from a friend of the deceased which is neither here nor there in establishing dependency. Therefore, this Tribunal does not accept this affidavit as a fact. Further, a biological relationship is not the sole factor considered in the distribution of a death benefit. The Act provides for dependency, rather than a biological relationship, as a crucial factor in determining whether or not anyone should be allocated a death benefit (see *Kekana v Nedcor Defined Contributions Provident Fund* [2010] 3 BPLR 295 (PFA)). The complainant provided the first respondent with various affidavits from the deceased's siblings. However, the board cannot merely rely on affidavits and needs to conduct a proper investigation in terms of section 37C of the Act, into the extent of the financial dependency of the beneficiaries on the deceased. The complainant submitted that a portion of the death benefit should be allocated to her and the other three siblings of the deceased. However, neither the complainant nor any of the deceased's siblings pleaded dependency on him. Therefore, the board should consider the extent of their dependency on the deceased as they qualify as factual dependants based on a reciprocal duty of support between brothers and sisters (see *Nduku v VWSA Provident Fund* PFA/EC/14187/2007/NVC). Therefore, this Tribunal is of the view that the first respondent failed to consider the extent of the financial dependency of the minor child on the deceased. Further, it failed to establish the extent of dependency of the complainant and the deceased's other three siblings on him.
- 5.12 The board is vested with discretionary powers to decide on an equitable distribution of the death benefit. It is only in cases where it has exercised its powers unreasonably and improperly or unduly fettered the exercise thereof, that its decision can be reviewed (see *Mongale v Metropolitan Retirement Annuity Fund* [2010] 2 BPLR 192

(PFA)). In the circumstance, the decision of the first respondent's board to allocate and distribute the death benefit must be set aside and the board must be ordered to re-exercise its discretion in respect of the allocation made to the minor child.

[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 is hereby set aside;

6.1.2 The first respondent is ordered to re-investigate the allocation of the death benefit in terms of section 37C of the Act, in respect of the minor child and the deceased's siblings, considering all the factors including their age, their relationship with the deceased and the extent of their financial dependency on the deceased, within eight weeks from the date of this determination;

6.1.3 The first respondent is ordered proceed with the allocation and distribution of the death benefit in terms of section 37C of the Act, within two weeks from the finalisation its investigation in paragraph 6.1.2 above;

6.1.4 The first respondent is ordered to provide this Tribunal and the complainant with its report, within two weeks after finalising its investigations in paragraph 6.1.2 above.

DATED AT PRETORIA ON THIS 14TH DAY OF FEBRUARY 2017

**MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR**

Section 30M filing: High Court

Parties unrepresented