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REGISTERED POST

Dear Madam,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,
24 OF 1956 (“the Act”): FB ADAMS (“complainant”) v METAL INDUSTRIES
PROVIDENT FUND (“fund”)**

[1] INTRODUCTION

- 1.1 This complaint concerns the allocation of a death benefit by the fund following the death of ED Adams (“the deceased”).
- 1.2 The complaint was received by the Adjudicator on 29 November 2023. A letter acknowledging receipt of the complaint was sent to the complainant on 14 December 2023. On the same date, the complaint was forwarded to the fund requesting its response by 22 January 2024. On 14 December 2024, the complaint was forwarded to Augustine Lee-Ann Adams (Augustine), Tyrrelle Donovan Adams (Tyrrelle), and Celeste Candice Balgobind (Candice) requesting their responses by 16 March 2024. On 29 January 2024, a follow-up letter was sent to the fund requesting its reply by 09 February 2024. A response was received from the fund on 14 February 2024. On the same date, the fund response was forwarded to the complainant requesting a reply by

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28 February 2024. A response was received from Augustine Adams on 19 February 2024. A response was received from Tyrrelle Adams on 04 March 2024. No further submissions were received from the parties.

- 1.3 Having considered the written submissions before the Adjudicator, it is considered unnecessary to hold a hearing in this matter. As the background facts are well known to all the parties, only those facts that are pertinent to the issues raised herein shall be repeated. The determination and reasons therefor appear below.

[2] **FACTUAL BACKGROUND**

- 2.1 The deceased was a member of the fund until he passed away on 04 May 2022. The complainant is the spouse of the deceased.
- 2.2 Upon the death of the deceased, a lumpsum death benefit of R1 743 909.90 became available for allocation to his beneficiaries in terms of section 37C of the Act. The board of management of the fund (“the board”) resolved to allocate the death benefit as follows:

Name	Relationship	Age	%
FB Adams (complainant)	Spouse	57	1.43%
Augustine Adams (Augustine)	Daughter	31	42.14%
Tyrrelle Adams (Tyrrelle)	Son	40	25%
Candice Balgobind (Candice)	Daughter	34	30%
Deceased's children			1.43%

[3] **COMPLAINT**

- 3.1 The complainant submitted that she and the deceased were married on 28 November 2007. She submitted that the deceased did not want her to work and supported her financially. Further, she took care of the deceased when he was sick.
- 3.2 The complainant averred that the fund failed to conduct a proper investigation. She submitted that the deceased's children claims that she and the deceased were estranged. She claims that the deceased's children were not part of his life.
- 3.3 The complainant submitted that she was fully financially dependent on the deceased. She wants to be allocated a greater portion of the death benefit.
- 3.4 The complainant requests the Adjudicator to investigate the matter.

[4] RESPONSE

- 4.1 The fund submitted that the deceased was registered as is member from January 2007 until he passed away on 04 May 2022. It submitted that the deceased and the complainant were married on 28 November 2007. However, they have been separated for six years prior to his death. The fund submitted that at the date of his death, the deceased resided with his daughter, Augustine.
- 4.2 The fund submitted that on 27 February 2023, the complainant telephonically confirmed that she and the deceased were separated from 2016 until his passing. She filed for divorce in 2017. However, it has not been finalised. The divorce summons stated that the deceased failed to care for her financial needs. On 18 January 2024, the complainant telephonically confirmed that she received *ad hoc* payments from the deceased for miscellaneous items between R500.00 and R1 000.00.

4.3 The fund submitted that:

4.3.1 The deceased's daughter, Augustine, claimed the death benefit. She is unemployed and was dependent on the deceased for 50% of the rent and groceries.

4.3.2 The deceased's daughter, Candice, claimed the death benefit. She is unemployed, lives on a social child grant, and was dependent on the deceased for rent, food, and her children's school supplies.

4.3.3 The deceased's son, Tyrrell, claimed a death benefit. He is employed but the deceased assisted him with money for a home loan.

4.3.4 The deceased's son, Shale Adams (Shale), waived his death benefit claim and confirmed that he was not dependent on the deceased.

4.3.5 The deceased's girlfriend, Ranaye Ronale Wales (Ranaye), confirmed that they had been in a relationship since 2021. However, it was not a long-term relationship, and the deceased only visited her whenever he was around. She was not dependent on the deceased but received money from him sporadically for miscellaneous items.

4.4 The fund indicated that the deceased completed beneficiary nomination forms dated 31 January 2007 and 08 September 2021 wherein he nominated Augustine as the sole beneficiary of his death benefit. The fund provided copies of the beneficiary nomination forms in support of its submissions.

4.5 The fund stated that the lump sum death benefit available for allocation was R1 743 90.90. The board initially decided to allocate the death benefit as follows:

Name	Relationship	Age	%
complainant	Spouse	57	1.43%
Augustine	Daughter	31	42.14%
Tyrrelle	Son	40	25%
Candice	Daughter	34	30%

Ranaye	Girlfriend	Not provided	1.43
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- 4.6 The fund submitted that the board initially decided to allocate a portion of the death benefit to his girlfriend, Ranaye, pending confirmation of the status of her relationship and the extent of her dependency on the deceased. However, upon further investigation, it was established that Ranaye and the deceased did not have a life-partnership relationship and that she was not financially dependent on him. Further, Ranaye and the deceased did not share a common household. Therefore, the portion of the death benefit initially awarded to Renaye was reallocated equally amongst the children of the deceased.
- 4.7 The fund stated that the complainant was still legally married to the deceased at the time of death. However, she is not entitled to 50% of the death benefit. The fund submitted that the death benefit does not form part of the assets of the deceased's estate. Further, section 37C of the Act allows the board a discretion to apportion the death benefit in a manner which it deems equitable.
- 4.8 The fund submitted that the board equitably allocated the death benefit between the beneficiaries of the deceased. It submitted that all relevant factors were considered.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

- 5.1 The issues for determination are whether or not the board of the fund conducted a proper investigation and made an equitable allocation of the death benefit in terms of section 37C of the Act.
- 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 deceased

(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 deceased 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 deceased, 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 deceased, but shall be dealt with in the following manner:

(a) If the fund within twelve months of the death of the deceased becomes aware of or traces a dependant or dependants of the deceased, 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 deceased has a dependant and the deceased 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 deceased in writing to the fund, the fund shall within twelve months of the death of such deceased 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 and the deceased were legally married at the date of his death. She averred that she was financially dependent on the deceased and specified to the fund that she received *ad hoc* payments for miscellaneous items between R500.00 and R1 000.00. Therefore, she wants to be allocated a greater portion of the death benefit.

5.4 The deceased and the complainant were married at the date of his death. However, they were separated for six years until the date of

death of the deceased. The complainant qualifies as a legal dependant of the deceased as defined in section 1 subparagraph (b)(ii) of the Act. It should be noted that the purpose of section 37C is to restrict a deceased member's freedom of testation to the benefits payable by the fund in the event of death. The guiding principle is that such assets do not form part of the deceased's estate and are required to be distributed per a statutory scheme which gives preference to need and dependency above the member's choice. The section imposes an onerous duty on the board of management of the fund to determine the need and to effect an equitable distribution among the deceased's dependants and nominees. It cannot be argued, therefore, that marriage entitles the surviving spouse to 50% of a death benefit as the whole of the death benefit clearly falls outside of the assets of the estate. Therefore, the whole of the death benefit is available for distribution at the discretion of the board in such manner as it deems equitable in accordance with section 37C(1)(a) of the Act (see *Brummelkamp v Babcock Africa (1997) Pension Fund and Another* [2001] 4 BPLR 1811 (PFA)). The complainant is not automatically entitled to 50% of the death benefit.

- 5.5 In this instance, the complainant was 57 years old at the date of the death of the deceased. She telephonically confirmed to the fund that they were separated from 2016. She filed for divorce in 2017. However, the divorce was not finalised. The fund stated that the divorce summons provide that the deceased failed to care for the complainant's financial needs. The complainant stated to the fund that she received *ad-hoc* payments from the deceased between R500.00 and R1 000.00. The board decided to allocate her 1.43% of the death benefit.
- 5.6 The deceased had four major children, Augustine, Tyrrelle, Candice and Shale. The deceased's children qualify as legal dependants in terms of section 1(b)(iii) of the Act by virtue of being his

children (see *Zwane v National Fund for Municipal Workers and another* [2019] 3 BPLR 905 (PFA) and consequently qualify for allocation of the death benefit (see *Bruce v Lifestyle Retirement Annuity Fund* [2001] 7 BPLR 2198 (PFA)). The deceased's children have a right to be considered for a death benefit. Whether or not such dependants will at the end receive anything, will be subject to the factors of dependency as presented before the board (see *Wilkinson and Another v The Pension Funds Adjudicator and Others* PFA73/2019 Financial Services Tribunal paragraph 4.7). Dependency must be established at the time the board makes its decision. In this instance, the fund considered all the deceased's children in the allocation of the death benefit. The deceased resided with Augustine at the date of his death. Augustine is unemployed and was dependent on the deceased for 50% of the rent and groceries. Augustine was 31 years old at the date of death of the deceased and has income earning potential. The board decided to allocate her 42.14% of the death benefit as a legal dependant of the deceased. Candice is unemployed and lives on a social child grant. She was dependent on the deceased for rent, food, and her children's school supplies. Candice was 34 years old at the date of death of the deceased with income earning potential. The board decided to allocate her 30% of the death benefit. Tyrrelle is employed but the deceased assisted him with money for a home loan. The board decided to allocate him 25% of the death benefit as a legal dependant of the deceased. The deceased son, Shale, waived his death benefit claim and confirmed that he was not financially dependent on the deceased. Therefore, he was allocated nil.

- 5.7 The deceased had a girlfriend, Ranaye. Their relationship commenced in 2021. The board initially decided to allocate her 1.43% of the death benefit. However, Ranaye confirmed that she and the deceased were not in a permanent life partnership relationship and did not share a common household. Further, she was not financially dependent on the deceased. Therefore, the board decided to allocate her nil. The benefit

of 1.43% initially allocated to her was reallocated equally amongst the children of the deceased.

Beneficiary nomination

5.8 The deceased completed beneficiary nomination forms dated 31 January 2007 and 08 September 2021 wherein he nominated Augustine as the sole beneficiary of his death benefit. In the matter of *Swart N.O (née Van der Merwe) and others v Lukhaimane N.O and others* [2021] JOL 49952 (GP) (“Swart matter”) at paragraph 32, the court stated as follows:

“...although I accept that the Fund is not bound by the wishes of a deceased person, the wish expressed in a nomination form or in a will is not to be lightly ignored. It is one of a number of factors to be taken into account, but it is a substantial factor. Therefore, before the Fund decided to ignore the nomination, it should have considered whether there were compelling reasons to do so. If it would result in an injustice or be inequitable should the deceased’s wishes be given effect to, then the Fund would be justified in deviating from the deceased’s wishes. Here there is no evidence that the Fund placed any weight at all on the nomination.”

5.9 As stated in the *Swart* matter, the beneficiary nomination form is a substantial factor which must be given the necessary credence in reaching the decision to distribute a death benefit. In this instance, it is not clear whether the fund considered the deceased’s beneficiary nomination form. The deceased updated his beneficiary nomination on 08 September 2021 shortly before his passing in May 2022. Therefore, it is clear that he wanted Augustine to receive his entire death benefit. However, the fund also considered the deceased’s other children in the allocation of the death benefit as his legal dependants as he also assisted them financially.

Ad hoc

- 5.10 It is trite law that the extent to which a dependant was dependent on the deceased is a significant factor to consider by the board when allocating the death benefit (see *Robinson v Central Retirement Annuity Fund* [2001] 10 BPLR 2623 (PFA)). It should be noted that dependency is the critical point to consider in the allocation of the death benefit.
- 5.11 The complainant submitted to the fund that she received *ad-hoc* payments from the deceased. Therefore, even if the deceased provided the complainant with financial support on an *ad-hoc* basis, this does not create an obligation entitling the complainant to acquire a right to be maintained by the deceased. In order to be considered as a factual dependant of the deceased, there should be a need for such maintenance on a regular basis (see *Van Schalkwyk v Old Mutual Superfund Pension Fund and another* [2021] 3 BPLR 869 (PFA)). The divorce summons stated that the deceased failed to care for the complainant's financial needs. Therefore, it is clear that the deceased did not provide the complainant with regular financial support.

Conclusion

- 5.12 Each factor listed in the *Sithole* case cannot be considered in isolation of the other factors. The board must weigh the various factors in arriving at its decision. In this instance, considering the amount available for distribution, the number of beneficiaries, their ages, their income earning potential, the deceased's wishes and their relationship with the deceased, the Adjudicator is satisfied that the board considered all the relevant factors and made an equitable allocation of the death benefit in terms of section 37C of the Act under the circumstances.
- 5.13 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 at 195F (PFA)). As with the exercise of any discretionary power, in effecting an equitable distribution, the board is required to consider relevant factors and to exclude irrelevant ones from consideration. 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)).

5.14 In light of the above, the Adjudicator is satisfied that the board considered all the relevant factors and that it made an equitable allocation of the death benefit in terms of section 37C of the Act. Therefore, the complaints should be dismissed.

[6] ORDER

6.1 In the result, the complaint cannot succeed and is hereby dismissed.

DATED AT PRETORIA ON THIS 30TH DAY OF APRIL 2024

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M Filing: High Court
Parties unrepresented