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Please quote our reference: **PFA/NW/00112163/2024/TBM**

Dear Madam,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,
24 OF 1956 (“the Act”): EB WILLIAMS & TWO MINORS (“Ms Williams”) v
HORTORS GROUP PENSION FUND (“fund”)**

[1] INTRODUCTION

- 1.1 This complaint concerns the allocation of a death benefit following the death of its member, Mr CJ Williams (“the deceased”).
- 1.2 The Adjudicator received the complaint on 25 April 2024. On 22 May 2024, a letter was sent to Ms Williams informing her that the matter was referred to the fund for possible resolution. On the same date, a notification of the complaint was sent to the fund, affording it until 22 June 2024 to resolve it. On 26 June 2024, an acknowledgement of the complaint was sent to Ms Williams pursuant to the failure of the fund to resolve it. On the same date, correspondence was forwarded to the fund, informing it that the matter remains unresolved. It was afforded a further opportunity to file its response by 15 July 2024. On 16 July 2024, a follow-up letter was sent to the fund pursuant to the

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expiry of the date afforded to it to resolve the matter. It was afforded a further opportunity until 25 July 2024 to file its response. A response was received from the fund on 02 August 2024.

- 1.3 Having considered the written submissions, the Adjudicator considers holding a hearing in this matter unnecessary. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 Ms Williams is the deceased's life partner and the mother of his children, Veronique Williams ("Veronique"), Taylian Williams ("Taylian"), and Shylen Williams ("Shylen"). The deceased was a member of the fund when he passed away on 27 December 2022.
- 2.2 Following the death of the deceased, a gross death benefit of R3 588 169.00 before tax became available for allocation in terms of section 37C of the Act. The fund allocated the death benefit as follows:

Name	Relationship	Age	Allocation	Mode of Payment
Elmirie Babietjie Williams ("Complainant")	Life Partner	46	25.1%	Cash – R900 192.00
Taylian Williams ("Taylian")	Son	7	32%	Trust – R1 149 986.00
Shylen Williams ("Sheylen")	Stepson	14	25.1%	Trust – R899 959.00
Veronique Williams ("Veronique")	Daughter	18	17.8%	Cash – R638 050.00

[3] COMPLAINT

- 3.1 Ms Williams is aggrieved with the allocation of the death benefit. She submitted that she was also not informed why Shylen and Taylen's benefit was paid to a beneficiary fund. She also stated that Veronique

was also allocated a large portion of the death benefit, whereas she was not financially dependent on the deceased. She averred that she enquired with the fund regarding the reasons for its allocation, to no avail.

3.2 Thus, Ms Williams requests the Adjudicator to investigate the matter.

[4] RESPONSE

4.1 The fund confirmed that the deceased became its member from 01 November 1993 until 27 December 2022, when he passed away. It submitted that following his passing, a death benefit of R3 588 169.00 before tax became available for allocation to his beneficiaries. The death benefit comprises of the group life of R1 080 560.00 and the fund credit of R2 507 609.00.

4.2 The fund submitted that when it received the death benefit claim forms on 23 June 2023, it indicated that following thorough investigations, it identified four beneficiaries: Ms Williams, Shylen, Taylian, and Veronique. It confirmed that a death benefit was allocated on 04 April 2024. The fund submitted that from the total death benefit payable, R677 104.39 was paid to the South African Revenue Service ("SARS") as tax. An amount of R900 192.00 was allocated to Ms Williams, while R1 125 986.77 was paid into the Sanlam Trust Beneficiary Fund ("Sanlam") on behalf of R Shylen and Taylin. The fund submitted that R852 647.16 was paid to Veronique. However, it indicated that this was an overpayment, and that Veronique was requested to refund an amount of R347 713.29. It indicated that once this payment is made, it would be allocated to Shylen and Taylian.

4.3 The fund submitted that Ms Williams was advised to contact Sanlam regarding Shylen and Tailian's monthly needs.

[5] **DETERMINATION AND REASONS THEREFOR**

Introduction

- 5.1 The issue for determination is whether or not the board allocated the death benefit equitably in accordance with section 37C of the Act.

Allocation of the death benefit

- 5.2 In the Supreme Court of Appeal (SCA) matter of *Municipal Employees Pension Fund v Mongwaketse* (969/2019) [2020] ZASCA 181 (23 December 2020) at paragraphs [42] to [44], Wallis JA held that the rules of a fund are its constitution, and that the doctrine of *ultra vires* applies. If the rules of a fund do not afford a fund the legal power or capacity to do something, then such purported act by the fund is *ultra vires* and accordingly *null* and *void*. The Constitutional Court affirmed the SCA's findings in *Municipal Employees Pension Fund and Another v Mongwaketse* (CCT34/21) [2022] ZACC 9 at paragraph [39] where it stated that the application of the *ultra vires* doctrine to pension funds is consistent with the constitutional principle of legality.
- 5.3 Further, section 37C of the Act regulates the allocation of a death benefit and provides as follows:

“37C Disposition of pension benefits upon the death of a 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) ...”

5.4 It is the board’s responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the beneficiaries, thereafter, decide on an equitable distribution and finally to decide on the most appropriate mode of payment of the benefit payable.

5.5 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.”

A spouse is defined as a person who is the permanent life partner or spouse or civil union partner of the member in accordance with the Marriage Act, 1961 (Act 68 of 1961), the Recognition of Customary Marriages Act, 1998 (Act 68 of 1997), or the Civil Union Act, 2006 (Act 17 of 2006) or the tenets of a religion.

- 5.6 The law recognises three categories of dependants based on the deceased member's liability to maintain such a person, namely, legal dependants, non-legal ("factual") 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.
- 5.7 The fact that a person qualifies as a legal or factual dependent does not automatically give them the right to receive a portion of a death benefit (see *Varachia v SA Breweries Staff Provident Fund and Another* [2015] 2 BPLR 314H-I (PFA)). The deciding factor is financial dependency (see *Morgan v SA Druggists Provident Fund and Another* (1) [2001] 4 BPLR at 1890G-H (PFA)).

Analysis

- 5.8 Ms Williams is aggrieved with the allocation of the death benefit by the fund. She stated that Veronique was not financially dependent on the deceased, however, she was allocated a large portion of the death benefit. Further, she is aggrieved that Shylen and Taylian's benefits were paid to a beneficiary fund. She stated that the fund did not provide reasons why the benefit was paid into a beneficiary fund.
- 5.9 It is common cause that the final obligation of the fund in terms of section 37C of the Act is to determine an appropriate mode of payment of the death benefit. In this matter, the fund paid Shylen and Taylian's

portion of the death benefit to a beneficiary fund. A death benefit can only be paid directly to a minor dependant in exceptional circumstances. In the matter of *Baloyi v Ellerines Holdings Staff Pension Fund* [2005] 7 BPLR 606 (PFA), the Adjudicator found that as a legal guardian, the parent of a minor child has a duty at common law to administer the asserts of the minor child. Thus, payment to a minor child's guardian should be effected in the normal course of events unless there are cogent reasons for depriving the parent of this duty.

5.10 In *Ramanyelo v Mineworkers Provident Fund* 2005 1 BPLR 67 (PFA), the Adjudicator set out the following factors to be considered when the fund is deciding on whether or not to effect payment of the minor's benefit to his guardians as follows:

- the amount of the benefit;
- the qualifications (or lack thereof) of the guardian to administer the benefit;
- the ability of the guardian to administer the benefit; and
- the benefit should be utilised in such a manner that it can provide for the minor child until he attains the age of majority.

5.11 A beneficiary fund primarily aims to protect minors' benefits and ensure money is used in their best interest. In determining whether the benefits will be used in the minor's best interests, the fund must assess the guardian and some of the factors, *inter alia*, to consider are the following:

- Nature of care – parent/legal guardian/caregiver;
- Education level of the guardian;
- Employment status and stability of employment;
- Financial position (credit record/asserts and liabilities/income and expenditure);
- Health of the guardian;
- Signs of substance abuse and mental health issues.

5.12 Ms Williams averred that she requested reasons from the fund as to why it paid Shylen and Taylian's benefits into a beneficiary fund to no avail. Hence, she is objecting to the mode of payment adopted by the fund in this regard. Therefore, based on the above factors, it is unclear why the fund paid the death benefit into a beneficiary fund. It is unclear if it assessed Ms Williams's ability to administer Shylen and Taylian's benefit. It follows that the mode of payment adopted by the fund regarding Shylen and Taylian's death benefit is unreasonable and stands to be set aside.

Veronique's dependency on the deceased

5.13 Ms Williams also objects to the large portion of the death benefit allocated to Veronique. She averred that Veronique was married, financially independent, and not residing with the deceased at the time of his passing. Veronique is the deceased's major child and qualifies as his legal dependant in terms of section 1(b)(iii) of the Act by 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)). Thus, she has a right to be considered for a death benefit. Whether or not she will, in 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).

5.14 However, the submissions indicate that Veronique was nominated to receive 5% of the death benefit by the deceased. The Financial Services Tribunal ("FST") in the matter of *Rogers v Momentum Metropolitan Life LTD and Others* PFA7/2023 relying on the decision of Murphy J in the matter of *Municipal Workers Retirement Fund v Mabula*

and Another ZAGPPHC 1153 wherein it was held as follows regarding a nomination form:

“Section 37C of the Act is intended to serve a social function. It was enacted to protect dependency, even over the clear wishes of the deceased. Its purpose is to alleviate, in part, the financial hardship in which the deceased’s dependants might find themselves under the loss of their source of income and support. The effect of the section is that the fund is expressly not bound by either a will or a nomination form. The section specifically restricts freedom of testation in order that no dependants are left without support and the fund is expressly not bound by a will, nor is it bound by the nomination form. The provision explicitly denies the member of a fund the right to determine how the benefit is to be disposed of by the fund.”

- 5.15 Further, it should be noted that although it is accepted that the legislature intended to favour dependants over nominated beneficiaries, it does not mean that the fund can unilaterally ignore beneficiary nominations. This was highlighted in the matter of *Swart N.O and Others v Lukhaimane N.O and Others* [2021] JOL 49952 (GP). The High Court considered aspects of section 37C of the Act, including the significance of the deceased's wishes as set out in a beneficiary nomination. It was held as follows in paragraph 32:

“Finally, although I accept that the Fund is not bound by the wishes of a deceased person, the wish expressed in a nomination form or 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...”

- 5.16 Although the board needs to consider the beneficiary nomination as a guideline, it must also consider all the factors above, which were also confirmed in *Mohlomi v Evergreen Provident Fund and Others* [2014] JOL 31440 (PFA). The Supreme Court of Appeal (“SCA”) in *Fundsatwork Umbrella Pension Fund v Guarnieri and Others* [2019]

JOL 42094 (SCA) cautioned that section 37C(1) of the Act does not entirely override the deceased's wishes as expressed in nomination forms. It is one of the important factors the fund should consider when allocating the death benefit.

- 5.17 As a nominee, Veronique has a right to be considered in the allocation of the death benefit. Further, nominees do not need to provide proof of financial dependency as their right to be considered for allocation flows from their nomination. Thus, Ms Williams's complaint against the allocation of a portion of the death benefit to Veronique stands to be dismissed.
- 5.18 The duty of the Adjudicator 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). The fund's task in distributing a death benefit in terms of section 37C of the Act is to identify all the potential beneficiaries (see *Van Schalkwyk v Mine Employees' Pension Fund and Another* [2003] BPLR 5087 (PFA) at paragraph 15).
- 5.19 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 casu*, the Adjudicator is satisfied that the board took into account relevant factors and ignored irrelevant ones in the allocation of the death benefit in terms of section 37C of the Act. However, the mode of payment adopted by the fund regarding Shylen and Tailian's death benefit is not reasonable is hereby and set aside. The fund should now investigate Ms Williams's ability to administer their benefit.

[6] ORDER

6.1 In the result, the order of the Adjudicator is as follows:

- 6.1.1 The complaint relating to the allocation of the death benefit is dismissed;
- 6.1.2 The decision of the board regarding the mode of payment of Shylen and Taylian's death benefit to a beneficiary fund is hereby set aside;
- 6.1.3 The fund is ordered to investigate Ms Williams's ability to administer Shylen and Taylian's benefits, within four weeks of this determination; and
- 6.1.4 The fund is ordered to effect the correct mode of payment regarding Shylen and Taylian's benefits and provide the Adjudicator and Ms Williams with reasons regarding mode of payment adopted, within two weeks of completing the investigation in terms of paragraph 6.1.3 above.

DATED AT PRETORIA ON THIS 04TH DAY OF OCTOBER 2024

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M Filing: High Court

Parties: Unrepresented