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Please quote our reference: **PFA/KN/00112802/2024/YVT**

Dear Madam,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,  
24 OF 1956 (“the Act”): LA MAGOSO v ESKOM PENSION AND PROVIDENT  
FUND (“fund”)**

**[1] INTRODUCTION**

- 1.1 This complaint concerns the allocation of a death benefit following the death Mr Z Madlala (“the deceased”).
- 1.2 The Adjudicator received the complaint on 07 May 2024. On 14 August 2024, LA Magoso was requested to submit further particulars. On 01 July 2024, a notification of the complaint was sent to the fund affording it until 31 July 2024 to resolve it. On the same date, a letter was sent to LA Magoso, notifying her that the complaint was forwarded to the fund. A response was received from the fund on 07 August 2024. A letter acknowledging receipt of the complaint was sent to LA Magoso on 14 August 2024. On the same date, the fund was requested to submit its response by 04 September 2024. On 14 August 2024, the fund response was forwarded to LA Magoso, requesting a reply by 28 August 2024. On 20 December 2024, the complaint was forwarded to Khombisile Madlala, Zintle Madala, Eslina Ngomane, and

Ingasingaphumelela Mtolo, requesting their responses by 13 January 2025. A response was received from Bafundi on 20 December 2024. A response was received from Eslina Ngomane on 23 December 2024. The fund made further submissions on 26 February 2025 and 10 March 2025. 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 26 December 2022. LA Magoso is the customary spouse of the deceased.
- 2.2 Upon the death of the deceased, a lumpsum death benefit of R560 160.00 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:

<b>Name</b>	<b>Relationship</b>	<b>Age</b>	<b>%</b>
LA Magoso (complainant)	Customary spouse	57	28%
Khombisile Madlala (Khombisile)	Major child	39	2%
Zintle Madlala (Zintle)	Major child	33	2%
Londiwe Madlala (Londiwe)	Major child	29	2%
Sphindile Madlala (Sphindile)	Major child	24	2%
Anele Madlala (Anele)	Minor child	16	30%
Eslina Ngomane (Eslina)	Life partner	50	28%
Ingasingaphumelela Mtolo (Ingasingaphumelela)	Major child	28	2%

## **[3] COMPLAINT**

- 3.1 LA Magoso is aggrieved with the decision of the board to allocate a portion of the death benefit to Eslina. LA Magoso submitted that Eslina

was purportedly nominated as a beneficiary of the deceased. Further, Eslina is unknown to the Madlala family. LA Magoso submitted that according to the information at her disposal, the deceased completed the beneficiary nomination form eight months prior to his passing during which period he was unwell. Therefore, she is disputing the authenticity of the signature on the beneficiary nomination form.

3.2 LA Magoso submitted that the fund failed to disclose all the relevant information.

3.3 LA Magoso requests the Adjudicator to investigate the matter.

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

4.1 The fund submitted that the deceased was registered as its member from 01 April 1984 until his passing on 26 December 2022. Upon the deceased's death, a lumpsum death benefit of R560 160. 00 became payable by the fund to his dependents.

4.2 The fund indicated that it received a claim from LA Magoso for herself and on behalf of the major children, Khombisile, Zintle, Londiwe, Siphindile as well as the minor child, Anele. The second claim was received from the deceased's life-partner, Eslina Ngomane, for herself only. The fund received three other claims from the deceased's major children, Bafundi, Ingasingaphumelela, and Lindokuhle.

4.3 The fund submitted that in determining whether or not to include Eslina, the board considered the following factors:

- Elsina was 50 years old and unemployed at the time of the deceased's death. She was still unemployed at the time of the investigation,
- The deceased nominated Eslina to receive 10% of the death benefit,
- Eslina stated in an affidavit that she was dependent on the deceased for maintenance and support,

- The fund stated that considering her age, Eslina's income earning potential is very slim and that she had more than 15 years before she could qualify to receive an old age grant,
- Eslina was in receipt of a spouse's pension from the fund of R6 612.19 only,
- Eslina qualified as the deceased's factual dependent, and it was necessary to consider her in the allocation of the death benefit.

4.4 The fund submitted that its rules provide for a widow's pension as well as a spouse's pension. It submitted that in terms of Rule 9.4.4 of its rules, where the deceased is survived by more than one spouse, each spouse is allocated an equal share of 60% of the pension he would have been entitled to at retirement.

4.5 The fund stated that in determining life-partnership between the deceased and Eslina, the board considered the following evidence:

- The deceased and Eslina had been in a relationship since 2014, and they did not have any children together,
- The deceased and Eslina lived together since the inception of their relationship and have been sharing household costs,
- On 09 November 2019, the deceased paid a portion of lobola to the Ngomane family. This was confirmed by the Lobola letter submitted to the fund by Eslina,
- The deceased's cousin Constance Dudu Zungu, the deceased's friends, Jerry Mdluli, Lindiwe Mguni and Jan Calush Tlou, the deceased's neighbours Victor Khumalo and Nqelile Khoza, Ms Ngomane's siblings, Vusi Ngomane, Mable Ngomane, and Carson Ngomane, confirmed this information in their affidavits,
- According to the last updated beneficiary nomination form dated 12 May 2022, the deceased nominated Eslina to receive 10% of the death benefit. She was designated as the partner of the deceased,
- The fund stated that Eslina qualified as the deceased's permanent life-partner.

4.6 The fund stated that Eskom Soc Limited's ("employer") Human Resources department is responsible for the administration of nomination forms, which are kept securely. Thus, it makes it impossible

for another third-party individual to tamper with the nomination form. The fund submitted that it is satisfied with the evidence submitted before it, that Eslina was in a relationship with the deceased, and a portion of lobola was paid to her family as confirmed by the lobola letter as well as the affidavits submitted in confirmation thereof. Eslina was identified as the permanent life-partner of the deceased. The fund has also been provided with the information confirming Eslina's financial dependency.

4.7 The fund stated that it is unable to inform the dependants of the investigations based on, *inter alia*, the following reasons:

- Confidentiality: Rule 8.3 of the Fund's Promotion of Access to Information Act (PAIA) manual, which is in line with Section 11 of the Protection of Personal Information Act ("POPI Act"), prohibits sharing of personal information to third parties unless the interested party requests through the PAIA request form which is available on the fund's website,
- Efficiency: Informing other possible dependents of the investigations could lead to possible intimidations, bribery, and cohesion.

4.8 The fund submitted that Eslina was identified as the life-partner and not the customary widow of the deceased. It stated that in the event that LA Magoso seeks to question the validity of the customary union, she may refer same to the High Court for judgment. Further, based on the fraud allegation relating to the validity of the customary union, LA Magoso may also refer same to the South African Police Service ("SAPS") for further investigation.

#### *Fund's further submissions*

4.9 On 26 February 2025, the fund provided copies of the following supporting documents:

- The board resolution in respect of the allocation of the death benefit,

- Online beneficiary nomination form dated 12 May 2022, wherein the deceased nominated LA Magoso to receive 80%, Anele 5%, Sphindile 5% and Eslina 10% of the death benefit,
- The fund received affidavits from FC Ngomane, MQ Ngoma, KV Ngomane, JC Tlou, LB Nguni, NP Khoza, MJ Mdhluli, VS Khumalo, CD Zungu confirming the deceased's relationship with Eslina (see 4.5 above),
- Bank statement from Eslina for the period May 2022 to February 2023 reflecting various deposits from P Ngomane between R1 200.00 and R5 000. The bank statement also reflects a pension of R350.00 on 22 August 2022 and R2 760.00 on 03 February 2023. Further, the bank statement reflects a deposit of R11 000.00 from C Ndhlovu on 23 July 2022,
- Lobolo letter dated 09 November 2019.

4.10 On 10 March 2025, the fund submitted that the deceased's pensionable emoluments at the date of death was R280 080.00.

4.11 The fund submitted that from the investigations, it was established that the deceased resided in Witbank with Eslina. LA Magoso resided in KwaZulu-Natal. The latter would visit the deceased from time to time. However, she did not reside with the deceased on a full-time basis.

4.12 The fund submitted that during the investigation, LA Magoso stated that the deceased supported her and the major children, Khombisile, Zintle, Londiwe, Sphindile and Anele. However, she and the children were unable to provide evidence of their financial dependency except through affidavits. The major children, Ingasingaphumelela and Bafundi did not have any proof of financial dependency and claimed as legal dependants. The major child, Lindokuhle did not have proof of financial dependency and claimed as a nominee and legal dependant. The life partner was unemployed and resided with the deceased. Thus, she was solely dependent on him. This information was confirmed through affidavits. The fund submitted that when the board decided on the allocation of the death benefit to LA Magoso and Eslina, it considered their ages and future income earning potential. The fund further considered the spouse's pension that the complainant and the life partner receive from the fund.

*Eslina Ngomane*

4.13 On 23 December 2024, Eslina submitted that she was satisfied with the allocation made. Further, she is aware that the deceased had many dependants.

*Other beneficiaries of the deceased*

4.14 The complaint was also forwarded to Khombisile, Zintle and Ingasingaphumela. However, no responses were received from them.

4.15 The investigator in this matter also attempted to contact, Londiwe, Sphindile, Anele, and Lindokuhle, to no avail.

4.16 Bafundi stated that he does not know LA Magoso and that he has no further comments.

## **[5] DETERMINATION AND REASONS THEREFOR**

*Introduction*

5.1 The issue for determination is whether or not the board of the fund conducted a proper investigation and decided on an equitable allocation of the death benefit in terms of section 37C of the Act.

5.2 Section 37C(1) 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...”

Section 37C(1) of the Act provides that the payment of pension to a spouse or child must be dealt with in terms of the rules of a fund.

5.3 In *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 the 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.

5.4 Rule 9.1 of the fund provides for death benefits and reads as follows:

9.1 In this RULE –

9.1.1 SPECIFIED PERCENTAGE shall at any time mean the percentage in the following table which accords with the number of ELIGIBLE CHILDREN at that time and whether there is at that time a WIDOW or WIDOWER or not:

Widow or Widower Children	Number of Eligible Children	Percentage
Yes	0	60
	1	90
	2 or more	100
No	1	60
	2 or more	100

Provided that whenever the Board is satisfied that under the provisions



of Rule 9.4.4 rightful claimants from more than one Marriage exists, the Specified Percentage shall not exceed 100%...”

Whereas, potential pension shall mean:

in the case of a MEMBER, a PENSION equal to the proportion shown in RULE 8.1 of his FINAL AVERAGE EMOLUMENTS per month of the PENSIONABLE SERVICE that he would have completed if he had remained in SERVICE to the date on which he would have attained PENSIONABLE AGE; or in the case of a PENSIONER the PENSION to which he became entitled on retirement before commutation, if any, including the increases subsequently granted in terms of these RULES, if any...”

Further, Rule 9.2 provides as follows:

“9.2.1 Subject to section 37C of the Act, if a Member dies in Service, before attaining Pensionable Age, a lumpsum equal to twice the Member’s annual Pensionable Emoluments shall become payable.

9.2.2 If Widow or Widower of Eligible Child is left, there shall be paid to or in respect of such person, a Pension, the amount of which shall at any time be equal to the Specified Percentage of the Member’s Potential Pension, at that time, as set out in Rule 9.1.”

A widow’s pension is payable to a widow as defined in the fund rules. A Widow is defined in the rules of the fund as a surviving spouse. Whereas the definition of spouse in the fund rules is in alignment with the definition of a spouse in section 1 of the Act.

5.5 Rule 9.4.4 of the fund provides as follows:

“If a deceased Member or Pensioner is survived by more than one Widow, Widower or Eligible Children from more than one Marriage, a Pension shall be granted to each Widow or Widower equal to 60% of the Member’s or Pensioner’s Potential Pension divided by the number of Widows or Widowers...”

The fund rules allow for the pension to be paid to multiple spouses. Thus, where the deceased member is survived by more than one

spouse, each spouse is allocated an equal share of 60% of the pension the deceased would have been entitled to at retirement. In this instance, Eslina qualified as a spouse and is in receipt of a monthly spouse's pension of R6 612.19 from the fund.

*Payment of a lumpsum death benefit*

5.6 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.”

5.7 It is the board’s responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the beneficiaries and to, thereafter, decide on an equitable distribution and to, finally the most appropriate mode of payment of the benefit payable. In *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA), at paragraph 24 and 25, the court summarized the duties of the board as follows:-

“When making an “equitable distribution” amongst dependants the board of management has to consider the following factors:

- the age of the dependants – younger, minor children may need to be allocated larger amounts of the benefit, as they may need a longer period of dependency before they are capable of supporting themselves;
- the relationship with the deceased – the board must ensure that it does not fetter its discretion by favoring legal dependants over factual dependants without justification;
- the extent of dependency – the board must consider whether a beneficiary was totally or partially dependent on the deceased. The person’s dependency in relation to other beneficiaries should also be compared. Those who were more dependent would probably need greater assistance and therefore a greater benefit;
- the wishes of the deceased placed either in the nomination form and/or his last will – this is merely one of the factors to be considered by the board when effecting an equitable distribution and the board must ensure it does not fetter its discretion;

- financial affairs of the dependants including their future earning capacity potential – the board should consider the beneficiaries, this includes income expenses and other assets and liabilities. The board should examine any bequest made to the beneficiaries by the deceased, the standard of living and life insurance proceeds paid to any beneficiary;
- future earning capacity – the board must look at the beneficiaries' employment prospects and consider if they are in financial difficulties and whether the financial hardship is of a temporary nature and the prospects of securing gainful employment;
- amount available for distribution – benefits available for distributions may not be enough to cover the maintenance needs of all beneficiaries forcing the board to consider other factors when determining an equitable distribution. This may lead to awarding a benefit which is less than maintenance needed of a dependant or a nil benefit in certain circumstances.

## 5.8 Section 1 of the Act defines a dependant as follows:

**“Dependant**, in relation to a deceased, means –

- (a) a person in respect of whom the deceased is legally liable for maintenance;
- (b) a person in respect of whom the deceased is not legally liable for maintenance, if such person –
  - (i) was in the opinion of the board, upon the death of the deceased in fact dependent on the deceased for maintenance;
  - (ii) is the spouse of the deceased,
  - (iii) is a child of the deceased, including a posthumous child, an adopted child and a child born out of wedlock.
- (c) a person in respect of whom the deceased would have become legally liable for maintenance, had the deceased not died.”

- 5.9 It is imperative to note that the law recognises three categories of dependants based on the deceased's liability to maintain such a person, namely, legal dependants, factual dependants and future dependants. In principle, a deceased is legally liable for the maintenance of a spouse and children as they rely on him or her 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.
- 5.10 The fact that a person qualifies as a legal or factual dependant 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)). The object of Section 37C of the Act is to ensure that those persons who were dependent on the deceased are not left destitute by the death of the deceased.
- 5.11 LA Magoso is aggrieved with the decision of the board to allocate a portion of the death benefit to Eslina. She is disputing the beneficiary nomination form and stated that Eslina is unknown to the Madlala family. LA Magoso is not disputing the allocation made to the children of the deceased. Therefore, the Adjudicator will only address the allocation made to Eslina.
- 5.12 LA Magoso and the deceased were customarily married at the date of his death. LA Magoso qualifies as a legal dependant as defined in section 1 subparagraph (b)(ii) of the Act. LA Magoso was 57 years old at the date of death of the deceased and only has a few years left until retirement date. The deceased nominated her to receive 80% of the death benefit. The board resolved to allocate LA Magoso 28% of the death benefit as the legal spouse of the deceased.

*Lifer partner*

- 5.13 Section 1 of the Act defines spouse as *a person who is the permanent life partner or spouse or civil union partner of a member in accordance with the Marriage Act, 1961 (Act No. 68 of 1961), the Recognition of Customary Marriages Act, 1998 (Act No. 68 of 1997), or the Civil Union Act, 2006 (Act No. 17 of 2006), or the tenets of a religion.*
- 5.14 The legislation referred to in the definition does not define a permanent life partner. As to what will constitute, a permanent life partner must be decided on the facts of each case, and it will be ill-advised to produce an exhaustive list of factors that must be present in order to constitute the existence of a permanent life partner. In this regard, it should be noted that co-habitation is not decisive. Indeed, there are many marriages, unions, and permanent life partnerships in South Africa where the parties are not always in co-habitation together due to economic circumstances, which may require one spouse to live away from the other for extended periods of time. Such a lack of co-habitation does not necessarily terminate the permanent life partnership between the parties.
- 5.15 It will be sufficient to demonstrate that the claimant and the deceased member entered into a permanent conjugal relationship and that they took steps that indicated that they intended to continue spending the rest of their lives in such a relationship, which steps may include a commitment to formalise their relationship at a later stage by entering into a marriage or civil union, as the case may be. This approach is consistent with that which was adopted by the Adjudicator in *Hlathi v University of Fort Hare Retirement Fund and Others* [2009] 1 BPLR 37 (PFA) at paragraph [26] where it was stated:

*“The use of the word “permanent” in the definition of spouse in the Act clearly depicts that the legislature intended that parties or persons who profess to be spouses under this context have an element of permanency to their life partnership. The question then is whether permanency is measured according to the intention of the parties or the duration of the existence of the*

*relationship. However, one of the basic principles of our law is that each matter should be decided upon its own merits.”*

- 5.16 *In casu*, the deceased and Eslina were in a relationship from 2014 until the date of his death. The fund stated that they shared a common household. The deceased paid a portion of Eslina’s lobola. The fund received a lobola letter dated 09 November 2019. The deceased’s cousin Constance Dudu Zungu, the deceased’s friends, Jerry Mdluli, Lindiwe Mguni and Jan Calush Tlou, the deceased’s neighbours Victor Khumalo and Nqelile Khoza, Ms Ngomane’s siblings, Vusi Ngomane, Mable Ngomane and Carson Ngomane, confirmed this information in their affidavits. Therefore, Eslina qualifies as a legal dependant as defined in section 1 subparagraph (b)(ii) of the Act. Eslina was 50 years old and unemployed. She still has a number of years left until she qualifies for a state old age grant. She was nominated by the deceased to receive 10% of his death benefit. She is in receipt of a spouse’s pension of R6 612.19 from the fund. The board decided to allocate her 28% of the death benefit.

#### *Beneficiary nomination*

- 5.17 The deceased completed a beneficiary nomination form dated 12 May 2022, wherein he nominated LA Magoso to received 80%, Anele 5%, Sphindile 5% and Eslina 10% of the death benefit.
- 5.18 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, 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."

- 5.19 As stated in the *Swart* matter, the beneficiary nomination form is a substantial factor that must be given the necessary credence in reaching the decision to distribute a death benefit. It is clear that the fund failed to follow the beneficiary nomination. There must be good reason for a fund not to give effect to a nomination to justify its decision to deviate from the wishes of the deceased. The deceased completed the beneficiary nomination form in May 2022, shortly before his passing in December 2022. Thus, it was his wish that LA Magoso receive 80% and Eslina only 10% of the death benefit. LA Magoso was 57 years old and closer to retirement age than Eslina. The board decided to allocate LA Magoso and Eslina 28% each of the death benefit. The minor child, Anele, was allocated 30% of the death benefit as she was still 16 years old and requires financial support for a number of years before she will become self-supportive. The fund confirmed that when the board decided on the allocation of the death benefit, it considered the ages of LA Magoso and Eslina, their future income-earning potential, and the fact that they are in receipt of spouses' pensions from the fund.
- 5.20 Further, 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 a critical point to consider in allocating the death benefit. The deceased and LA Magoso did not reside together. The fund stated that she was unable to provide the fund with proof of her financial dependency on the deceased. The deceased and Eslina shared a common household. Further, Eslina was unemployed and financially dependent on the deceased for household expenses. The fund indicated that deceased's major children could also not provide the fund with proof of the extent of their financial dependency on the deceased and claimed as his legal dependants. The deceased pensionable emoluments as at the date of death were only



R280 080.00 and not significant. Therefore, although it was the deceased's wish that LA Magoso receive 80% of the death benefit, he resided with Eslina, who was unemployed and fully financially dependent on him at the date of his death. The fund indicated that the complainant and the deceased's major children failed to provide proof of the extent of their financial dependency on the deceased. However, there is a duty on the fund to actively investigate the extent of each of the beneficiaries' financial dependency on the deceased in order to decide on an equitable allocation of the death benefit.

- 5.21 The fund initially refused to provide the Adjudicator with its investigation report. The fund raised concerns about providing the Adjudicator with supporting documents related to a resolution passed by board, citing the need to protect beneficiaries' information.
- 5.22 As a public body as defined in the POPIA, the Adjudicator is permitted to process personal information while exercising its powers, duties, and functions in accordance with the Act. The Adjudicator falls within the meaning of "tribunal" as referred to in sections 12(2)(d)(iii) and 18(4)(c)(iii) of POPIA. These subsections allow the Adjudicator to collect personal information from sources other than the data subject when necessary for the conduct of proceedings that have been commenced or are reasonably contemplated. In these circumstances, notifying the data subject of the information required is unnecessary. Therefore, the fund is obliged to provide the requested information without obtaining consent from the beneficiaries.
- 5.23 In fulfilling their duties in terms of section 37C, the board must conduct thorough investigations and gather all relevant evidence from beneficiaries. In adjudicating disputes relating to death benefits, the Adjudicator's role is to assess whether the board acted rationally, reasonably, and in accordance with the law.

- 5.24 The board bears the onus of demonstrating to the Adjudicator that it has conducted a proper investigation in accordance with section 37C by providing the Adjudicator with the investigation report and supporting documentation, in order for the Adjudicator to ascertain whether the fund has acted in accordance with the Act. Therefore, the Adjudicator is entitled to the information which was before the fund when it made its decision.
- 5.25 Furthermore, the Financial Services Tribunal recently remarked that the Adjudicator should insist on investigation reports to ensure sufficient information is available to confirm the fund's reasoning behind an allocation (see *Semenya and Others v Old Mutual Superfund Pension Fund and Others*, FST, PFA 31/2024). This reinforces the need for funds to provide such reports and supporting documents relevant to the decision.
- 5.26 The fund subsequently provided copies of the documents listed in paragraph 4.9 above. From the outcome, it is clear that the Promotion of Access to Information Act 2 of 2000 ("PAIA") and the Protection of Personal Information Act, No. 4 of 2013 ("POPIA") may be used to hide a less than thorough investigation into the circumstances of the dependants of the deceased including the complainant.

### *Conclusion*

- 5.27 Each factor listed in the *Sithole* case cannot be considered in isolation from the other factors. The board must weigh the various factors in arriving at its decision. In this instance, considering the amount available for allocation, which is not significant, the number of beneficiaries, their ages, their income-earning potential, their relationship with the deceased, and the wishes of the deceased, the Adjudicator is not satisfied that the board considered all the relevant factors.

5.28 The board is vested with discretionary powers to decide on an equitable distribution of the death benefit. It is only in cases where the board has exercised its powers unreasonably and improperly or unduly fettered the exercise of its discretion that its decision can be reviewed (see *Mongale v Metropolitan Retirement Annuity Fund* [2010] 2 BPLR 192 (PFA)). The Adjudicator is not satisfied that the board conducted a proper investigation and that it decided on an equitable allocation of the death benefit in terms of section 37C of the Act. Therefore, the decision of the board stands to set aside.

## **[6] ORDER**

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

- 6.1.1 The decision of the board of the fund in allocating the death benefit is set aside;
- 6.1.2 This matter is referred back to the board to re-exercise its discretion in terms of section 37C of the Act, based on the reasons mentioned above, within eight weeks of the date of this determination; and
- 6.1.3 Once the board has re-exercised its discretion in terms of paragraph 6.1.2, it must notify the complainant and the other beneficiaries of its decision within two weeks thereof.

**DATED AT PRETORIA ON THIS 28<sup>TH</sup> DAY OF MARCH 2025**

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

**Section 30M Filing: High Court**

*Parties unrepresented*