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Dear Madam,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,
24 OF 1956 (“the Act”): PJ MAKHONGOANA v PHUTHADITJHABA PENSION
FUND (“fund”)**

[1]INTRODUCTION

1.1 This complaint concerns the allocation of a death benefit following the death of Mr TA Makhongoana (“the deceased”).

1.2 The Adjudicator received the complaint on 04 March 2024. On 11 April 2024, a letter acknowledging receipt of the complaint was sent to PJ Makhongoana. The complaint was forwarded to the fund on the same date, requesting its response by 01 May 2024. A response was received from the fund on 31 May 2024. On 12 June 2024, the fund response was forwarded to PJ Makhongoana, Pinkie Makhongoana

(“Pinkie”), Thato Makhongoana (“Thato”), Trevor Makhongoana (“Trevor”), and Tiisetso Makhongoana (“Tiisetso”) requesting their replies by 26 June 2024. Responses were received from PJ Makhongoana, Pinkie, Thato, Trevor, and Tiisetso on 26 June 2024. On 27 June 2024, the responses were forwarded to the fund

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requesting a reply by 08 July 2024. The fund made further submissions on 08 July 2024. PJ Makhongoana made further submissions on 15 July 2024. The matter was referred for conciliation on 30 September 2024. The matter remained unresolved and was referred back for adjudication. PJ Makhongoana and Thato made further submissions on 14 October 2023. 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 31 January 2021. PJ Makhongoana is the spouse of the deceased.

2.2 Upon the deceased's death, a lumpsum death benefit of R4 276 960.48 became available for allocation to his dependants in terms of section 37C of the Act. The board of management of the fund ("the board") initially resolved to allocate the death benefit as follows:

Beneficiary	Relationship	Age	%
PJ Makhongoana (PJ Makhongoana)	Spouse	57	20%
TR Makhongoana ("Thato")	Major son	19	30%
TM Makhongoana ("Trevor")	Major son	30	20%
TI Makhongoana ("Tiisetso")	Major daughter	29	30%
PJ Makhongoana ("Pinkie")	Major daughter	39	0%

2.3 The PJ Makhongoana previously lodged a complaint with the Adjudicator under case number *PFA/FS/00093301/2022*. The Adjudicator issued a determination on 08 December 2023 ("previous determination") wherein the board's decision in paragraph 2.2. above was set aside.

2.4 The board reconsidered the matter and resolved to allocate the death benefit as follows:

Beneficiary	Relationship	Age	%
PJ Makhongoana (PJ Makhongoana)	Spouse	58	20%
TR Makhongoana ("Thato")	Major son	20	30%
TM Makhongoana ("Trevor")	Major son	31	15%
TI Makhongoana ("Tiisetso")	Major daughter	30	25%
PJ Makhongoana ("Pinkie")	Major daughter	40	10%

2.5 The complaint was referred for conciliation on 30 September 2024. On 07 October 2024, the conciliator advised that PJ Makhongoana agreed to refer the matter back for adjudication.

[3] COMPLAINT

3.1 PJ Makhongoana is aggrieved with the board's decision to allocate only 20% of the death benefit to her and 80% to the major children of the deceased. She submitted that after the previous determination, the board decided to change the allocation made to the major children of the deceased. However, the benefit allocated to her remained unchanged. PJ Makhongoana submitted that the major children should be self-supporting.

3.2 PJ Makhongoana submitted that she was the deceased's legal spouse and is entitled to 50% of the death benefit.

3.3 PJ Makhongoana requests the Adjudicator to investigate the matter.

Further submissions

3.4 On 26 June 2024, PJ Makhongoana replied to the fund response. She is aggrieved by the delay in finalising the matter. She submitted that she claimed a death benefit in June 2021. However, the fund only interviewed her in January 2024 after the Adjudicator issued the previous determination. Further, she was only informed of the quantum of the lumpsum death benefit on 12 June 2024.

3.5 PJ Makhongoana submitted that she received a lumpsum death benefit from the National Fund of Municipal Workers ("NFMW"). She submitted that NFMW allocated her 47.7% (R280 000.00) and the balance of 52.3% was allocated to the major children. Further, the deceased also had a benefit with Central Retirement Annuity Fund ("CRAF") She was allocated 47.7% (R150 398.00)

and the balance of 52.3% was allocated to the major children. Further, the deceased had a risk-benefit of R4 467 072.90. However, the benefit has not yet been paid. Therefore, the deceased's total benefits are R5 204 470.90. PJ Makhongoana submitted that the allocations made by NFMW and CRAF were equitable. She wants 50% of the death benefit from the fund.

3.6PJ Makhongoana submitted that Thato is entitled to a greater benefit as he is the youngest child and has not yet completed his studies. Further, he has not received the 10% child pension from the fund as he was still a minor at the date of death of the deceased. Therefore, he should receive a child pension from 31 January 2021 (date of death of the deceased) until he reached the age of 18 years.

3.7PJ Makhongoana submitted that an allocation of 12% to Tiisetso should be sufficient to cover the financial assistance she received from the deceased.

3.8PJ Makhongoana submitted that she was allocated 20% as per the beneficiary nomination form and for no other reason. She averred that the deceased signed another beneficiary nomination form wherein he excluded Tiisetso. However, she cannot recall when the other beneficiary nomination form was signed. Further, she never witnessed the deceased signing a beneficiary nomination form wherein he only allocated her 20% of his death benefit.

3.9PJ Makhongoana agreed that the matter be referred for conciliation.

3.10On 15 July 2024, PJ Makhongoana stated that the fund previously failed to interview her and to explain the process in terms of section 37C of the Act. She submitted that the board resolution for the allocation of the death benefit was only issued to her on 12 June 2024, and previously, the death benefit amount was not revealed. She wants to be allocated 50% of the death benefit as the legal spouse of the deceased. Further, she was fully financially dependent on him.

3.11PJ Makhongoana submitted that the deceased's children are all majors and therefore, they should not be considered financially dependent on him from the age of 18 years. She submitted that Thato can only commence his studies in 2025 due to the delay in finalising this matter.

3.12 On 14 October 2024, PJ Makhongoana confirmed that she does not accept the 20% allocation made to her. She wants 50% of the benefit to be allocated to her. Further, she agreed that the matter be referred back for adjudication.

3.13 PJ Makhongoana submitted that Thato was 16 years old at the date of death of the deceased. She submitted that he was entitled to a child's pension until the age of 18 years.

[4]RESPONSE

Fund

4.1 The fund indicated that the deceased completed a beneficiary nomination form dated 20 October 2017 wherein he designated PJ Makhongoana, Pinkie, and Trevor to receive 20% each and Thato 40% of his benefit.

4.2 The fund submitted that the board conducted interviews with the following beneficiaries:

- PJ Makhongoana (PJ Makhongoana): She confirmed that she was allocated 50% of the deceased's death benefits from NFMW and CRAF. Further, she is in receipt of a monthly spouse's pension in respect of the fund. She indicated that she does not dispute Tiisetso being included in the allocation.
- Pinkie: She is the major daughter of the deceased. She confirmed that she is unemployed, married, and has two children. She advised that she does not dispute the allocation made to Tiisetso.
- Trevor: He is the major son of the deceased and resided with him at the time of his death. He is currently unemployed. He does not dispute Tiisetso's inclusion in the allocation.
- Thato: He is the major son of the deceased and is currently a student. He wants to further his studies.
- Tiisetso: She is the major daughter of the deceased from a previous marriage. She was not residing with the deceased at the date of his death. In 2023, she was a student but could not continue in 2024 due to outstanding fees.

4.3 The board resolved to allocate the death benefit as per paragraph 2.4 above based on the following:

- PJ Makhongoana: She receives a spouse's pension in respect of the fund. She also received benefits from NFMW and CRAF. She was nominated by the deceased to receive 20% of the death benefit. The board resolved to allocate her 20% of the death benefit.
- Pinkie: She was nominated by the deceased to receive 20% of the death benefit. She did not reside with the deceased at the date of his death, is unemployed and married. The board resolved to allocate her 10% of the death benefit.
- Trevor: He was nominated by the deceased to receive 20% of the death benefit. He resided with the deceased at the date of his death and is unemployed. The board resolved to allocate him 15% of the death benefit.
- Thato: He was nominated by the deceased to receive 40% of the death benefit. He was a minor at the date of death of the deceased and is now a major. He is still at school and not self-supporting. The board resolved to allocate him 30% of the death benefit.
- Tiisetso: The deceased supported Tiisetso at the time of his death with R1 500.00 in respect of a maintenance order. She could not finish her studies due to outstanding fees. She was allocated 25% of the death benefit to assist her with the debt.

Further submissions

4.4 On 08 July 2024, the fund provided a copy of the deceased's beneficiary nomination form dated 03 October 2017 as per paragraph 4.1 above.

Pinkie

4.5 Pinkie disputes that she agreed to an allocation made in respect of Tiisetso. She submitted that Tiisetso is a major. She wants the board to allocate 50% of the death benefit to PJ Makhongoana. She agreed that the matter be referred for conciliation.

Thato

4.6 Thato is aggrieved with the delay in finalising the matter. He submitted that he was in grade 10 at the date of the deceased's death. He submitted that he

could not afford his school fees. Further, he wants to further his studies. He wants the board to allocate 50% of the death benefit to PJ Makhongoana and the balance to be distributed equally between the major children. He submitted that Tiisetso wants a paternity test to be conducted in respect of himself and Trevor. He agreed that the matter be referred for conciliation.

4.7 On 14 October 2024, Thato confirmed that the fund requested him to provide his banking details and tax reference number in order to pay him a child's pension.

Tiisetso

4.8 Tiisetso submitted that she still has outstanding study fees. She is aggrieved with the delay in finalising the matter. She confirmed that she still wants a paternity test to be conducted in respect of Thato. She agrees to an allocation of 25% of the death benefit.

Trevor

4.9 Trevor submitted that the fund failed to inform him of the process to be followed in the allocation of the death benefit. He submitted that he has a Telkom contract of R15 000.00 and a personal loan of R150 000.00 which his parents agreed to reimburse him with. He wants to further his studies and obtain employment. He wants the board to make an equitable allocation of the death benefit.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

5.1 The issues for determination are whether or not the fund conducted a proper investigation and decided on an equitable allocation of the death benefit in terms of section 37C of the Act. Further, whether there was an unreasonable delay in the allocation of the death benefit by the fund.

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 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)...

5.3 It is the board's responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the beneficiaries, to thereafter decide on an equitable distribution, and finally to decide on the most appropriate mode of payment of the benefit payable. Their duties in this regard were summarised in *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA), at paragraph 24 and 25, 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.

5.4 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.”

5.5 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)).

Spouse

5.6 PJ Makhongoana was married to the deceased at the date of his death, and they shared a mutual household. PJ Makhongoana qualifies as a legal dependant as defined in section 1 subparagraph (b)(ii) of the Act. She is entitled to a portion of the death benefit. PJ Makhongoana is 58 years old with a few years left before she reaches retirement age. She is unemployed and was financially dependent on the deceased. PJ Makhongoana received benefits from NFMW and CRAF. She is also in receipt of a spouse's pension from the fund. She was nominated to receive 20% of the death benefit. The board decided to allocate her 20% of the death benefit.

Children

5.7 The deceased had four major children, Thato (20), Trevor (31), Tiisetso (30), and Pinkie (40). The deceased's children qualify as his 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 the deceased's children in the allocation of the death benefit. Thato is currently 20 years old. He was a minor and schooling as at the date of death of the deceased. He resided with the deceased and was financially dependent on him. The board resolved to allocate him 30% of the death benefit as he still requires financial support to finish his studies. Trevor is 31 years old, unemployed, and resided with the deceased at the date of his death. He was financially dependent on the deceased. Trevor has income earning potential. The board decided to allocate him 15% of the death benefit. Pinkie is 30 years old, married, and did not reside with the deceased at the date of his death. The board decided to allocate Pinkie 10% of the death benefit. Tiisetso is 30 years old, and the deceased was still paying maintenance of R1 500.00 per month at the date of his death. Therefore, Tiisetso qualifies as a legal dependant as defined in section 1 subparagraph (a) of the Act. The board resolved to allocate her 25% of the death benefit.

5.8 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 the allocation of the death benefit. Therefore, the board cannot only make its decision based on a biological relationship. The board must consider each potential beneficiary's dependency on the deceased.

5.9 Tiisetso is disputing the allocation and requested paternity tests in respect of Thato. It should be noted that a biological relationship is not the sole factor considered in the distribution of a death benefit. In the matter of *Kekana v Nedcor Defined Contributions Provident Fund* [2010] 3 BPLR 295 (PFA), the court held that the Act speaks of dependency, rather than a biological relationship, as a crucial factor in determining whether or not anyone should be allocated a death benefit. Further, it is only when the board of the fund finds itself confronted with a situation where the deceased did not have an opportunity to confirm the relationship with such a child and it needs a reliable method to determine whether or not the person so claiming, is indeed the deceased's child, that it may request DNA paternity testing. In this instance, Thato resided with the deceased at the date of his death and was financially dependent on him. Therefore, even if he does not qualify as a legal dependant, he still qualifies as a factual dependant as defined in section 1

subparagraph (b)(i) of the Act and is entitled to a portion of the death benefit. There was also no proof that the deceased ever contested or doubted Thato's paternity. The Adjudicator previously held that for the fund to even entertain such spurious claims from Tiisetso that impugn the dignity of PJ Makhongoana, Thato and the deceased is absurd.

5.10 The deceased completed a beneficiary nomination form dated 02 October 2017, wherein he nominated PJ Makhongoana, Pinkie, and Trevor to receive 20% each and Thato 40% of his death benefit.

5.11 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."

5.12 As stated in the *Swart matter*, the beneficiary nomination form is a substantial factor that must be given the necessary credence in deciding to distribute a death benefit. In the previous determination, the board's decision was set aside, and the fund was ordered to consider the beneficiary nomination form. The board decided to allocate PJ Makhongoana 20%, Trevor 15%, Thato 30%, and Pinkie 10% of the death benefit. However, the deceased was paying maintenance of R1 500.00 in respect of Tiisetso at the date of his death. Therefore, the fund had to consider Tiisetso when it decided on the allocation of the death benefit.

Benefits from other sources

5.13 When determining the financial circumstances of the beneficiaries, the board must always consider other benefits received as a result of the death of a member. Therefore, any receipt of a cash benefit directly impacts the financial status of a

beneficiary, which is one of the factors to be taken into account when making an equitable distribution (see *Van Vuuren v Central Retirement Annuity Fund and Another* [2000] 6 BPLR 661 (PFA)). In this instance, PJ Makhongoana received a benefit of R280 000.00 from NFMW and R150 398.00 from CRAF. She stands to receive a benefit from the deceased's insured benefit of R4 467 072.90. Further, it has been established in the previous determination that PJ Makhongoana receives a monthly spouse's pension of R17 173.68 from the fund.

5.14 It appears that PJ Makhongoana wants to be allocated 50% of the death benefit by virtue of her marriage to the deceased. The purpose of section 37C is to restrict a deceased member's freedom of testation in relation to the benefits payable by the fund in the event of death. Death benefits do not form part of the deceased's estate and are required to be distributed in accordance with a statutory scheme that 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 dependents and nominees. Therefore, whether the PJ Makhongoana and the deceased were married in community of property or not does not entitle her to 50% or any portion of death benefit as the whole of the death benefit falls outside of the assets of the estate. The whole of the death benefit is, therefore, available for distribution at the discretion of the trustees to such dependants as they are able to trace within a twelve month period and in such manner as they deem 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)). Thus, the death benefit is excluded from the estate of a deceased member and placed under the control of the board of management of a fund. PJ Makhongoana is not automatically entitled to 50% of the death benefit.

5.15 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. The lumpsum death benefit is R4 276 960.48 (before deductions) and is significant. 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.

5.16 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)).

5.17 In light of the above, the Adjudicator is satisfied that the board re-exercised its discretion and that it made an equitable allocation of the death benefit in terms of section 37C of the Act. Therefore, the complaint should be dismissed.

[6]ORDER

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

DATED AT PRETORIA ON THIS 31ST DAY OF OCTOBER 2024

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M Filing: High Court
Parties unrepresented