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**REGISTERED POST**

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Dear Mesdames,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,  
24 OF 1956 (“the Act”): S IGESUND AND ANOTHER (“complainants”) v  
KWAZULU-NATAL MUNICIPAL PENSION FUND (“first respondent”) AND AC  
TEMPLIN (“second respondent”)**

**[1] INTRODUCTION**

- 1.1 The complaint concerns the distribution of a death benefit following the death of a member of the first respondent.
- 1.2 The complaint was received by this Tribunal on 11 September 2013. A letter acknowledging receipt thereof was sent to the complainant on

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23 September 2013. On the same date, the complaint was forwarded to the first respondent, giving it until 25 October 2013 to file its response. A response was received from the first respondent on 25 October 2013. The response was forwarded to the complainant's legal representatives on the same date, requiring the complainants' further submissions (if any) by no later than 11 November 2013. After noting the point in *limine* raised by the first respondent of the complainants' failure to join the second respondent as a party to the proceedings, the complainants' legal representatives caused the service of the complaint on the second respondent. The complainants' further submissions were received on 11 November 2013. The second respondent's legal representative filed a response with this Tribunal on 17 December 2013. The complainants' legal representative filed a reply thereto on 20 December 2013. No further submissions were received from the parties.

- 1.3 After considering the submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. As the background facts are known to the parties, they will be repeated only to the extent that they are pertinent to the issues raised herein. The determination and reasons therefor appear below.

## **[2] FACTUAL BACKGROUND**

- 2.1 The complainants are Ms Shannon Igesund and Ms Casey Leigh De Lange, the deceased's nieces. They shall henceforth be referred to jointly as "the complainants", save where it is necessary to differentiate them, in which event they shall be referred to as Ms Igesund and Ms De Lange.
- 2.2 Mr F Templin ("the deceased") passed away on 22 June 2013. During his lifetime, he was employed by the eThekweni Municipality from 5 February 1982, which employment endured to the date of his death.

The deceased was a member of the first respondent by virtue of his employment.

- 2.3 The deceased was married to the second respondent from 22 June 1996 until they divorced on 11 February 2008. He had also concluded a will in terms of which he bequeathed 50% of his estate to Ms Igesund and the remaining 50% to Ms De Lange. Furthermore, he concluded and signed a nomination of beneficiary form in terms of which he nominated the second respondent to receive a 100% share of his benefits from the first respondent in the event of his death.
- 2.4 Upon the death of the deceased, a death benefit became payable to the deceased's eligible dependants and beneficiaries in terms of section 37C of the Act. The board of the first respondent resolved to allocate 100% of the death benefit to the second respondent.

### **[3] COMPLAINT**

- 3.1 The complainants are dissatisfied with the board's decision to allocate 100% of the death benefit that became payable upon the deceased's death to the second respondent. They submitted that the deceased bequeathed 50% of his estate to each of them. They submitted that he also bequeathed all his insurance policies and retirement annuities to them as evidence of his intentions for all his funds to devolve upon the complainants. They submitted that they are not sure why the deceased nominated the second respondent as his beneficiary of the death benefit. However, the fact that he left everything else to them is evidence that he wanted them to receive the death benefit too.
- 3.2 The complainants submit that the provisions of the will cannot be rejected in favour of the nomination of beneficiary form that was signed in 2008. They further submit that while the death benefit is not an asset of the deceased estate and cannot be subjected to the provisions of

the will, the contents of such a will are clear evidence of the deceased's state of mind and intentions. The board has a discretion, despite what appears in the nomination of beneficiary form, to distribute the death benefit in the manner they deem appropriate. They further submit that the second respondent did not visit the deceased when he was in hospital as their relationship turned sour soon after the divorce. They further submitted that the board relied only on the nomination of beneficiary form in distributing the benefit, which is improper.

- 3.3 The complainants seek an order setting aside the decision of the board of the first respondent and directing that the death benefit be paid to them.

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

##### *First respondent*

- 4.1 The first respondent submitted that it has not yet paid the death benefit because where there are no dependants but only nominees, the board has to wait for twelve months before paying the death benefit. The twelve month period will lapse on 22 June 2014. Upon the expiry of the twelve month period, the death benefit will be paid to the second respondent. It submitted that its view is that in the present circumstances, it does not have any discretion to distribute the death benefit. It submitted that the second respondent should be joined to the proceedings as she has an interest in the resolution of the complaint.
- 4.2 The first respondent submitted that the deceased was not survived by any dependants as defined in section 1 of the Act. The deceased completed three nomination forms (on 16 July 2003, 18 October 2005 and 14 February 2008), in terms of which he nominated the second

respondent to receive 100% of the death benefit that becomes payable upon his death.

- 4.3 The first respondent submits that the provision of the will relied upon by the complainants does not entitle them to the death benefit. It empowers the utilisation of a trust in the event that there are benefits that are due to a minor. The clause did not apply where a benefit is payable to a major beneficiary. Although the affidavits received from family members painted the deceased's relationship with the second respondent in a poor light, a transcription of electronic communications between the complainants' mother and the second respondent shows that the latter was very close to the deceased and his family.
- 4.4 In one of the communications, the complainants' mother confirmed that the deceased still had a picture of the second respondent in his wallet and that she was very precious to his family. The transcription also shows that the second respondent would visit the deceased shortly before his death. The deceased also amended his nomination of beneficiary form shortly after the divorce in the second respondent's favour. This is an indication that it is not impossible that the deceased intended for the second respondent to receive benefits upon his death.
- 4.5 The second respondent qualified as the sole nominee of the deceased based on the 2008 nomination form. The will does not specifically refer to the first respondent and the contents thereof were never communicated by the deceased. Therefore, the complainants cannot be regarded as nominees for the purposes of section 37C of the Act. The first respondent has concluded that the deceased was survived by one nominee and no dependants. Therefore, the scenario is regulated by section 37C(1)(b) of the Act. Therefore, the board concluded that the second respondent is the sole nominee and accordingly, intends paying her the total death benefit at the end of the twelve month period. Therefore, the complaint should be dismissed. The payment of the

benefit will be held in abeyance until such time as this Tribunal has issued a ruling in this regard.

*Second respondent*

- 4.6 The second respondent submitted that the various statements and affidavits provided by persons purporting to comment on her relationship with the deceased subsequent to the divorce are irrelevant for the present purposes. She submitted that the deceased was aware of the fact that they divorced on 11 February 2008 and was aware of the contents of their settlement agreement. That notwithstanding, he specifically nominated her to receive benefits upon his death. He had also previously nominated her as such. The deceased must be regarded as having known precisely what he was doing and what would be necessary to alter the nomination.
- 4.7 The complainant further submitted that she maintained a cordial relationship with the deceased long after the divorce. The deceased also visited her on 1 February 2011 when she gave birth to a child born of her subsequent marriage. She also visited the deceased at his home after giving birth. This is evidence of her good relationship with the deceased.

**[5] DETERMINATION AND REASONS THEREFOR**

- 5.1 This Tribunal must determine whether or not in deciding to allocate the death benefit to the second respondent, the board of the first respondent acted equitably and reasonably in the circumstances.
- 5.2 The payment of death benefits by a pension fund organisation is regulated by section 37C of the Act. Section 37C gives the board discretionary powers, to be exercised fairly and reasonably, in the distribution of the death benefit. The main object of the section is to

ensure that those persons who were dependent on the deceased at the time of his death, irrespective of whether or not the deceased was legally required to maintain them, are not left destitute and without financial support after his death. Section 37C imposes three primary duties on the board when distributing a death benefit. It needs to first identify and trace all the dependants and nominated beneficiaries of the deceased. Secondly, the board must effect an equitable distribution of the death benefit; and finally, the board must determine an appropriate mode to pay the benefit.

- 5.3 This Tribunal has to determine whether or not the board properly discharged its duties imposed by section 37C of the Act, i.e. that it considered all the relevant factors to the exclusion of the irrelevant factors and did not fetter its discretion in the circumstances. Where it is found that the board failed to take into account relevant factors, or took into account irrelevant factors, its decision shall be reviewable on the grounds that it exceeded its powers or that the decision constituted an improper exercise of its powers (see *Jordaan v Protektor Pension Fund* [2001] 2 BPLR 1593 (PFA) at 1596 F-G and 1597B-D).
- 5.4 The complainants' dissatisfaction with the allocation of the death benefit to the second respondent is essentially premised on two grounds. The first is that the deceased bequeathed his entire estate to them in equal shares and the distribution of the death benefit must be in accordance with the provisions of his last will. The second is that the board "blindly" followed the provisions of the nomination of beneficiary form without exercising its legislative discretion.
- 5.5 The two grounds advanced by the complainants appear to this Tribunal to be somewhat incompatible and it is not clear if in raising the second ground in their reply, the complainants abandoned their reliance on the provisions of the deceased's will. In the first instance, the complainants contended that the board of the first respondent should have followed

the provisions of the will in distributing the benefit. In their reply to the first respondent's response, they conceded that while the death benefit cannot be distributed in terms of the will, the board of the first respondent had discretionary powers on the distribution of the benefit. In the absence of any express indication from the complainants, it cannot be concluded that the second ground was advanced in substitution of the first ground. Therefore, this Tribunal shall deal with the complaint in such a manner as to encompass both grounds relied upon by the complainants.

### *Provisions of the will*

5.6 In this regard, this Tribunal must determine whether or not the provisions of the deceased's last will are applicable in the distribution of the death benefit and in fact binding on the board of the first respondent. Section 37C(1) of the Act provides that:

“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 sections 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...” (Our underlining)

5.7 Therefore, section 37C(1) of the Act specifically excludes death benefits from the deceased estate. Because the death benefit that became payable upon the deceased's death is specifically excluded from forming part of the deceased estate, and it being true that the deceased's last will was meant to govern the disposition of his estate upon his death, it follows that the will does not apply to any assets that do not form part of the deceased estate, including the death benefit. Therefore, the provisions of the deceased's last will are inapplicable in the distribution of the death benefit and are not binding on the board of



the first respondent in this regard. The benefit must be distributed in terms of section 37C of the Act and not the provisions of the will.

*Nomination and the board's discretion*

- 5.8 As explained above, the board enjoys certain discretionary powers in the distribution of death benefits upon a deceased member's death. Section 37C of the Act requires the board to first identify and trace all the dependants and nominated beneficiaries of the deceased. Secondly, the board must effect an equitable distribution of the death benefit; and finally, the board must determine an appropriate mode to pay the benefit.
- 5.9 The first respondent submitted that it could not trace any dependants of the deceased and only became aware of the second respondent who was nominated to receive benefits upon the deceased's death. Her nomination has not been disputed by the parties. Furthermore, the complainants have not alleged that they financially depended on the deceased or that they are aware of people who financially depended on the deceased and qualified to be considered in the distribution of the death benefit. The fact that the deceased bequeathed his estate to them does not on its own, render them his dependants. Therefore, there is nothing which indicates that the deceased was survived by any dependants. Section 37C(1)(b) of the Act deals with instances where no dependants have been identified by the board and the deceased nominated a beneficiary to receive benefits and provides that:

"If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member, and the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the benefit or such portion of the benefit shall be paid to such nominee: Provided that where the aggregate amount of the debts in the estate of the member exceeds the aggregate amount of the assets in his estate, so much of the benefit as is equal to the difference

between such aggregate amount of debts and such aggregate amount of assets shall be paid into the estate and the balance of such benefit or the balance of such portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee.”

- 5.10 Therefore, in such an instance, the board must pay the benefit to the relevant nominee in accordance with the nomination form after the twelve month period lapses. However, this is provided that where the deceased estate’s liabilities exceed its assets, the difference between the amount of the estate’s assets and its liabilities shall first be deducted from the benefit before the remaining balance is paid to the nominee.
- 5.11 The complainants submitted that the board should not have blindly followed the nomination of beneficiary form and should have exercised its discretion. While it is true that the board has a discretion on the distribution of the death benefit, the provisions of section 37C of the Act are peremptory in instances where the deceased is survived by a nominee and the board does not become aware of dependants of the deceased within twelve months of his death. In such an instance, the Act requires the board to first reduce the benefit by the amount of the deficit of the deceased estate, after which the nominee shall be paid his or her share of the benefit. However, where the deceased is survived by dependants and nominees or by dependants only, it must exercise its discretion and not blindly follow the nomination form, which is not the case in this matter.
- 5.12 However, this Tribunal must express concern about the first respondent’s relatively quick conclusion that the deceased was not survived by any dependants without explaining how it arrived at this conclusion. It has not provided evidence of steps taken to trace and ascertain the existence of such dependants. Therefore, it cannot merely wait for the expiry of the twelve month period before paying the benefit to the second respondent. Before deciding to pay the benefit to the second respondent, it must take diligent and reasonable steps to trace

and identify any surviving dependants of the deceased. If it becomes aware of such dependants, it must investigate their eligibility to receive the death benefit and exercise its discretion in that regard. If it does not become aware of such dependants, it may proceed to deal with the benefit in the manner provided in section 37C(1)(b).

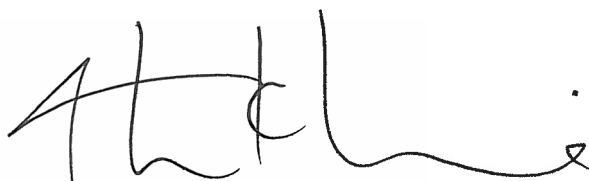
**[6] ORDER**

6.1 In the result, this Tribunal makes the following order:

6.1.1 The first respondent is ordered to take reasonable and diligent steps to trace and identify any existing dependants of the deceased and if successful in this regard, distribute the death benefit in terms of section 37C of the Act; and

6.1.2 Should the first respondent be unsuccessful in its investigations as contemplated in 6.1.1 above, it is hereby ordered to deal with the benefit as contemplated in section 37C(1)(b) of the Act.

**DATED AT PRETORIA ON THIS 24<sup>TH</sup> DAY OF FEBRUARY 2014**



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**MA LUKHAIMANE**

**PENSION FUNDS ADJUDICATOR**

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**Section 30M Filing: High Court**

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*For the second respondent: Meumann White Attorneys*