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Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,
24 OF 1956 ("the Act"): T MAPHOYISA ("complainant") v MUNICIPAL
GRATUITY FUND ("first respondent") AND SANLAM LIFE INSURANCE
LIMITED ("second respondent")**

[1] INTRODUCTION

1.1 This complaint concerns the allocation and distribution of the death benefit.

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act, 24 of 1956. The service offered by the Pension Funds Adjudicator is free to members of the public.

Centralised Complaints Helpline for All Financial Ombud Schemes 0860 OMBUDS (086 066 2837)

- 1.2 The complaint was received by this Tribunal on 21 November 2016. On 23 November 2016, a letter acknowledging receipt thereof was sent to the complainant. On the same date, the complaint was forwarded to the respondents affording them an opportunity to file responses by no later than 23 December 2016. On 19 December 2016, a response was received from the first respondent. On 13 February 2017, further submissions were received from the complainant's attorneys.
- 1.3 After reviewing the written submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 The complainant is the son of the late Mr M Mlungu ("the deceased") who passed away on 25 December 2003. The deceased was in the employ of the Ekurhuleni Metropolitan Municipality ("the employer") until his demise. He was a member of the first respondent by virtue of his employment.
- 2.2 Following the deceased's death, a death benefit amounting to R235 735.33 became available for distribution to his dependants and beneficiaries.

[3] COMPLAINT

- 3.1 The complainant submits that at the time of the deceased's death, he was dependent on him as evidenced by a maintenance order effective at the time of the deceased's death in which the deceased's maintenance obligations are confirmed. He states that following the deceased's demise, his mother, Ms Eunice Thoko Maphoyisa, submitted a declaration of dependency to the first respondent informing

it that she was his guardian and that he was dependent on the deceased.

3.2 The complainant states that in distributing death benefits, section 37C of the Act requires the board of a fund:

- to determine the circle of potential beneficiaries to be considered, that is, those who fall within scope of the definition of dependant in relation to the deceased member and whether the member had nominated any persons (nominees) as his or her preferred recipients of the death benefit;
- to determine what it would regard as an equitable basis for the division of the benefit amongst one or more of the beneficiaries or, if there are only nominees, to determine the amounts required to be paid to them in terms of the beneficiary nomination form; and
- to determine the appropriate mode of payment of the benefit, or a portion of it, to each beneficiary to whom it has decided to pay it.

3.3 It submits that a dependant is defined in the Act 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;"*

- 3.4 The definition of dependant creates 3 categories of dependants; those known as legal dependants, those known as non-legal dependants which include factual dependants, spouse dependants and child dependants, and the third category is referred to as future dependants.
- 3.5 He avers that at the time of the deceased's death, he was a legal dependant on the basis of the maintenance order in terms of which the deceased had a legal obligation to maintain him. He further states that in addition, he was also a child dependant as well as a factual dependant.
- 3.6 He indicates that when distributing a death benefit, the board is required to exercise the discretionary power bestowed upon it properly and is not to fetter its discretion. The Act does not prescribe the factors that must be taken into account in exercising that discretion but it is trite that the board must always exercise its discretion properly by considering relevant factors and ignoring irrelevant ones.
- 3.7 The complainant contends that at the time of distributing the death benefit, the board was aware of his existence as well as the fact that he was dependant on the deceased. In any event, even if it was not aware of this fact, it had a duty to investigate and collate all information on all possible dependants of the deceased. He mentions that in the matter of *University of Pretoria Provident Fund and another vs Johanna Susanna Petronella Du Preeze and another*, (unreported judgment under case number 49755/14), the High Court in Pretoria stated the following regarding the board's duty:

"Section 37C of the Act, in terms of which the Funds made the payment, was enacted and inserted into the Act in 1976 to regulate the distribution of death benefits, requiring such distribution to be in accordance with a legislated scheme which gives preference to factual needs and dependency. The section confers on a fund a discretionary power (exercised by the board) to

determine need and dependency and a duty to effect an equitable distribution amongst the deceased's dependants and nominees in a reasonable manner and in accordance with the possibilities provided in the section."

3.8 He submits that the allocation of the benefit payable must therefore be one that is 'deemed equitable' by the board. Again, the Act does not prescribe what factors the board should consider when determining an equitable distribution. He states that this Tribunal has held that some of the important factors to consider are the following:

- the extent of the beneficiary's dependence on the deceased member before his or her death;
- the beneficiary's financial requirements and the extent to which they can be, or in future will be capable of being, met from other resources;
- the ages of the beneficiaries;
- the wishes of the deceased;
- the beneficiary's relationship with the deceased; and
- the amount available for distribution.

3.9 He further submits that in determining the extent of dependency, two factors are relevant:

- The first is the nature and extent of the material support which the member had been providing to the beneficiary at the time of the member's death.
- The second is the financial need of the beneficiaries, taking into account their personal conditions, namely:
 - their financial needs, including those derived from special circumstances such as special medical or educational requirements, and other sources of income and other financial support;
 - their ages in relation to each other because these may provide an indication of the likely periods during which they

will require financial support before they become self-supporting; and

- their future income-earning capacity, that is, whether they will have any physical or other impediment to becoming qualified to perform income-earning functions sufficiently lucrative to enable them to support themselves.

3.10 The complainant states that it is important to distinguish between the financial support actually provided by the deceased before death and the beneficiary's actual financial needs at the time of the death and thereafter. While section 37C is intended to allow funds to seek to mitigate the loss of actual support that beneficiaries received before a member's death, it is also intended to allow them to provide better support to those beneficiaries if that is possible, taking into account the amount of the lump-sum benefit. In this regard, he refers to the matter of *Brummelkamp v Babcock Africa (1997) Pension Fund & Another* [2001] 4 BPLR 1811 (PFA) where this Tribunal found that: '*in order to comply with the spirit of the statute it is necessary for the trustees carefully to assess the financial predicament, degree of dependence and future prospects of all relevant dependants*', in effecting an equitable distribution.

3.11 He submits that he was only 6 years old when the deceased passed away and as such, has only recently attained legal capacity to challenge the decision of the board of the first respondent not to award him a portion of the death benefit payable pursuant to the deceased's death. Further, even though the deceased's maintenance obligations in terms of the maintenance order were negligible, the board of the first respondent had a duty to consider his actual financial needs at that time. He contends that in that regard, his actual financial need was great with his mother working as a domestic worker and not having much income to support him.

3.12 He asserts that considering the above, it is clear that the board did not comply with its duties as set out in section 37C of the Act in that he

was not considered by the board in distributing the death benefit. He mentions that section 7C of the Act confirms that it is the object of the board of the fund to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund. Section 7C(2)(b) confirms that in pursuing this object, the board is to act with due care, diligence and good faith. He submits that the board of the first respondent can indeed be seen to have breached the aforementioned duties in that it failed to act diligently and with due care in neglecting him in the death benefit distribution.

- 3.13 He further asserts that on the basis of the above, he challenges the legality of the decision of the board in that it did not exercise its discretionary power lawfully, rationally or in good faith in that it did not properly consider certain factors regarding his dependency on the deceased. He states that regarding the relief he seeks, the decision of *Stacey Koevort v Old Mutual Protektor Pension Fund & Another* [2005] 1 BPLR 73 (PFA) must be noted which states as follows:

“the effecting of an equitable distribution requires of the board of trustees to take into consideration all the relevant factors and discard irrelevant ones. The board may also not unduly fetter its discretion, nor should its discretion reveal an improper purpose. If it has acted as aforesaid, no reviewing tribunal will lightly interfere with its decision. It should be noted that even if I may not necessarily agree with the decision of the board that it itself is not a ground for setting aside the board’s decision. This is because it is not my role as a reviewing tribunal to decide on what is the fairest and most generous distribution. The test in law is whether the board has acted rationally and arrived at a proper and lawful decision.”

- 3.14 The complainant requests that this Tribunal finds that the board failed to act rationally and lawfully by failing to take into account relevant factors regarding his dependency when distributing the deceased’s death benefit. He further requests this Tribunal to direct the board to re-exercise its discretion having regard to his actual dependency on the

deceased at the date of his death, as well as his actual financial needs at that time.

Further submissions

3.15 In his further submissions, the complainant states that the first respondent concedes that the complaint was submitted 12 calendar days following the “*prescription*” of the complaint, which is 7 court days. The complainant indicates that he is indigent and had to approach the Law Society prior to obtaining the legal assistance that he required. Further, his mother, on many occasions attended the High Court prior to being directed to the Law Society.

3.16 The complainant avers that his mother on multiple occasions attempted to communicate with the first respondent to raise concern as to the distribution of the death benefit, however, she was sent from pillar to post with no relief. The complainant was in contact with a Mr Piet Ntuli and a Mr Stanley Muvemi, who are both officials of the first respondent. He contends that the prescription period would have been interrupted long prior to him having lodged the complaint on the basis that his mother had attempted to raise her concerns with the first respondent regarding the manner of distribution. He concludes that the first respondent has provided no substantive justification for excluding him in the distribution and as such, the substance of his complaint stands to that effect.

[4] RESPONSE

First and second respondents

4.1 The first respondent submitted that section 30I of the Act provides as follows:

1. *The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.*
2. *The provisions of the Prescriptions Act, 1969 (Act No. 68 of 1969), relating to a debt apply in respect of the calculation of the three year period referred to in subsection (1).*

- 4.2 The first respondent states that the relevant provisions of the Prescription Act, 68 of 1969 relating to a debt applying in respect of the calculation of the three year period are captured in sections 12 and 13 thereof. Section 12(1) provides that prescription shall commence to run as soon as the debt is due. Section 13(1) provides that if the creditor is a minor, the period of prescription shall not be completed before a year has lapsed after the day he ceased to be a minor.
- 4.3 It submits that in this matter the 3 year period has already lapsed since the distribution of the death benefit in terms of section 37C was done twelve years ago during December 2004, following the death of the member on 25 December 2003. It states that the complainant was born on 10 November 1997 and turned 18 years of age on 10 November 2015. Consequently, the extended one year period lapsed on 10 November 2016. It further states that the complaint was submitted to this Tribunal on 22 November 2016. It contends that in terms of section 30I of the Act, this Tribunal has no jurisdiction to investigate this complaint and it follows that it should be dismissed.
- 4.4 It submits that although it is practise to also submit a response to the merits of the complaint in the event that the point *in limine* would not be upheld, it is not done in this matter firstly because the law is clear on the time limit. Secondly, due to the time lapse since 2004, the case file is stored off site and the time allowed to the return date of 23 December 2016 is insufficient to obtain and study the relevant file. It contends that since the position in law is clear about the time limit, it

would serve no purpose to delay the adjudication of this matter by requesting an extension of time to submit a response to the merits of the complaint. However, since it and the second respondent are responsible institutions, in the event that this matter is dismissed on the preliminary point raised, the matter will be investigated in depth in the new year and if there is a *prima facie* case to make that the complainant was prejudiced, a report will be submitted to its board and the second respondent for consideration of an *ad hoc ex gratia* payment.

- 4.5 At the time, it mentioned that its board was in recess and therefore, it is not feasible to obtain any fixed commitment in this regard at this stage, however, it and the second respondent have a reputation in the industry of doing the right thing and will not compromise that reputation. It states that it will keep in touch with the attorneys for the complainant in this respect once the determination has been finalised.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

- 5.1 What falls to be determined is whether or not the board of the first respondent exercised its discretion properly in the distribution of the death benefit. However, before delving into the merits of the matter, it is imperative to deal with the technical issue raised by the first respondent. The first respondent submits that the complaint is time-barred and therefore this Tribunal has no jurisdiction to investigate the matter.

Time-barring

- 5.2 Section 30I of the Act imposes certain time limits with regards to lodgement of complaints before this Tribunal and states that:

- “(1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.
- (2) The provisions of the Prescription Act, 1969 (Act No. 68 of 1969), relating to a debt apply in respect of the calculation of the three year period referred to in subsection (1).”

5.3 The provisions of section 30I preclude this Tribunal from investigating and adjudicating any complaint if the act or omission to which it relates, occurred more than three years prior to receipt of a written complaint in that regard.

5.4 However, section 30(1)(2) of the Act states that the provisions of the Prescription Act, 68 of 1969 (“Prescription Act”) are applicable in relation to the computation of the three year time limit. This means that the question of prescription of a claim which is the subject matter of a complaint before this Tribunal must be determined according to the way the Prescription Act envisages the three year time limit in relation to a debt, to be calculated. In other words, in determining whether or not a complaint has become time-barred, this Tribunal must consider the existence of any circumstances impeding, interrupting or suspending the running of prescription as set out in Chapter III of the Prescription Act.

5.5 Section 12 of the Prescription Act determines the running of prescription and the relevant portion provides as follows:

“12. When prescription begins to run-

- (1) ...
- (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) ...

- 5.6 It is, however, imperative to note that the first respondent relies on the provisions of section 13(1) of the Prescription which provide, in a nutshell, that if a creditor is a minor, the period of prescription shall not be completed before a year has lapsed after the day he ceased to be a minor. The first respondent submits that the complainant was born on 10 November 1997 and turned 18 years of age on 10 November 2015. Consequently, the extended one year period lapsed on 10 November 2016, however, the complaint was lodged with this Tribunal on 22 November 2016. It contends that in terms of section 30I of the Act, this Tribunal has no jurisdiction to investigate this matter and must dismiss it.
- 5.7 In the premise, it is important to state that section 12(2) of the Prescription Act acts as a monitoring provision in instances where debtors engage in acts which have the effect of misleading the creditor with respect to the existence of the debt.
- 5.8 In the instant matter, the first respondent submits that the matter has prescribed as the complainant failed to adhere to the provisions of 13(1) which required the complainant to lodge his complaint within a year of attaining the age of majority (which is 18 years) in terms of the Children's Act, 38 of 2005, which came into effect on 1 July 2007. It is imperative to note prior to 1 July 2007, the age of majority was regulated in terms of the Age of Majority Act, 57 of 1972. In terms of the Age of Majority Act, the age of majority was 21 years. If the Age of Majority Act, 57 of 1972 were to be applied in the present matter, the complainant would only have had until 10 November 2018 when he turns 21 years to lodge his claim before it prescribes. The complainant was a minor when the deceased passed away and at the time, the applicable provision with respect to the age of majority was the Age of Majority Act, 57 of 1972. This Tribunal has to determine the validity of

the submission by the first respondent that the matter has prescribed in terms of the Prescription Act.

- 5.9 Faced with the similar situation in the matter of *Malcolm v Premier Western Cape* (207/2013) [2014] ZASCA 9, the Supreme Court of Appeal (SCA) referred to the matter of *National Iranian Tanker Co v Pericles* GC 1995 (1) SA 475 (A) at 483H-I where Corbett CJ stated the following:

“There is at common law a prima facie rule of construction that a statute (including a particular provision in a statute) should not be interpreted as having retrospective effect unless there is an express provision to that effect or that result is unavoidable on the language used. A statute is retrospective in its effect if it takes away or impairs a vested right acquired under existing laws or creates a new obligation or imposes a new duty or attaches a new disability in regard to events already past.”

- 5.10 In the *Malcom* case, the SCA adopted the position that the Children's Act, 38 of 2005 is silent with respect to the retrospective application of its provisions and therefore, it was proper to infer that the change did not operate retrospectively. Therefore, having regard to the fact that the complainant was a minor when the deceased passed away and his rights as a minor were governed in terms of the Age of Majority Act, 57 of 1972 when the deceased passed away, the Children's Act is not applicable to him as it seeks to impair his vested right to lodge a complaint before he turned 21 years of age. Therefore, the first respondent's contention that the complaint is time-barred is rejected.
- 5.11 Furthermore, it is important to scrutinise the conduct of the first respondent. The complainant stated that he is an indigent person, who together with his mother, had made several attempts to enquire about the distribution of the death benefit, however, the first respondent sent them from pillar to post. The complainant avers that he went to the extent of approaching the Law Society which led to him receiving legal

assistance and lodging this complaint. In light of the foregoing, the inescapable conclusion that this Tribunal arrives at is that had the first respondent acted fairly and provided the complainant and his mother with adequate information with respect to the distribution of the death benefit and explained to them that if they were unhappy with the distribution they had a recourse by approaching this Tribunal, the complaint would not have been time-barred against the complainant. Therefore, the conduct of the first respondent interrupted the running of prescription and thus, the matter is not time-barred against the complainant. It follows that the first respondent's submission to the contrary is rejected.

Merits

- 5.12 The payment of death benefits is regulated by section 37C of the Act, read in conjunction with the definition of a "dependant" in section 1. The primary purpose of this section is to protect those who were financially dependent on the deceased during his lifetime. In effect, section 37C overrides the freedom of testation of the deceased. It is the board's responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the beneficiaries, to decide on an equitable distribution and finally to decide on the most appropriate mode of payment of the benefit (see *Ramanyelo v Mine Workers Provident Fund* [2005] 1 BPLR 67 (PFA)).
- 5.13 The board must then decide on a distribution of the death benefit after the deceased's dependants have been identified. The duties of the board in this regard were cogently summarised in *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA) at paragraphs 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;
- the relationship with the deceased;
- the extent of dependency;
- The wishes of the deceased placed either in the nomination and/or his last will; and
- Financial affairs of the dependants including their future earning capacity potential.

In making their decision, trustees need to consider all relevant information and ignore irrelevant facts. Further, the trustees must not rigidly adhere to a policy or fetter their discretion in any other way."

5.14 "Dependant" is defined in section 1 of the Act as follows:

- "(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."
- (Underlining added)

5.15 The law recognises three categories of dependants based on the deceased member's liability to maintain such a person, namely, legal dependants, non-legal 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. The person alleging to be a factual dependant will have to prove that he was dependent on the deceased

(despite the deceased not having a legal duty to maintain) at the time of the member's death.

- 5.16 In the present matter, the complainant qualified as the dependant of the deceased in terms of section 1(b)(ii) of the Act by virtue of being the child of the deceased.
- 5.17 The complainant's discontent with the board's decision to exclude him in the distribution of the death benefit stems from that he was financially dependent on the deceased. In support of his contention, the complainant attached a copy of the maintenance order issued against the deceased. On the other hand, there is no indication from the first respondent as to why such an important aspect of the distribution of the death benefit was not considered. In the circumstance, this Tribunal is not satisfied that the board thoroughly examined the personal circumstances of the complainant as it is not clear as to what factors it placed its reliance on in deciding to exclude him in the allocation and distribution of the death benefit. As has been indicated before, section 37C of the Act aims to ensure that all beneficiaries who were dependent on the deceased member during his lifetime are not left destitute when he dies. Therefore, when a board fails to do a thorough investigation with respect to the personal circumstances of each beneficiary, as evident in this matter, there is a greater likelihood of the objectives of section 37C being subverted.
- 5.18 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 the circumstance, this Tribunal is of the considered view that the board did not conduct a proper investigation and failed to apply its

mind when it resolved to exclude the complainant in the allocation of the death benefit.

[6] ORDER

6.1 In the result, the order of this Tribunal is the following:-

- 6.1.1 The decision of the board of the first respondent to exclude the complainant in the distribution of the death benefit without considering the relevant facts is set aside;
- 6.1.2 The matter is remitted to the board of the first respondent to re-exercise its discretion in terms of section 37C of the Act, considering the issues raised in this determination, within six weeks of the date of this determination; and
- 6.1.3 The first respondent is ordered to inform the complainant and this Tribunal of its decision in terms of paragraph 6.1.2 above, within two weeks of its decision.

DATED AT PRETORIA ON THIS 22ND DAY OF FEBRUARY 2017


A handwritten signature in black ink, appearing to read 'Ma Lukhaimane', is written over a horizontal line.

MA LUKHAIMANE

PENSION FUNDS ADJUDICATOR

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Section 30M Filing: High Court

Complainant represented by Shepstone & Wylie Attorneys

Respondents: Unrepresented