

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE

NO.:PFA/WE/301/2003

In the complaint between:

Linda de Kock Complainant

and

EMC Provident Fund First
Respondent

EMC² Computer Systems SA (Pty) Ltd Second
Respondent

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT OF 1956

1. This is a complaint lodged with the Office of the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act, 24 of 1956 (“the Act”), relating to the distribution of the late H C de Kock’s death benefit. No hearings were conducted and therefore in determining this matter, I have relied on written representations and submissions made by the parties, documentary evidence and the investigation conducted under my supervision by my assistant adjudicator, Lisa Shrosbree.
2. The complainant is Linda de Kock, an adult female of Durbanville, Cape Town. The first respondent is the EMC Provident Fund (“the fund”), a fund falling within the definition of a pension fund organisation in section 1 of the Act. The second respondent is EMC² Computer Systems SA (Pty) Ltd a company duly incorporated with limited liability and registered in accordance with the company laws of the Republic of South Africa (“the company”).

3. The late Mr H C de Kock (“the deceased”) had been employed by the company and a member of the fund. He passed away on 10 January 2002 whereupon a death benefit – calculated by the fund to be R2 475 004 - became payable in terms of the rules of the fund.

4. The deceased was survived by the complainant (who is his wife), his major son (Riaan) and his minor daughter (Lianie) of 17 years. Prior to his death and in a beneficiary nomination form dated 2 May 1996, the deceased nominated all three as beneficiaries to receive the death benefit in the following proportions:

Linda de Kock: 50%
Riaan de Kock: 25%
Lianie de Kock: 25%

5. There was a dispute regarding another beneficiary nomination form dated 10 July 1996 in which the complainant alleges the deceased had nominated her as the sole beneficiary. She charges that “preference was given” by the trustees of the fund to the nomination form of 2 May 1996 over that of 10 July 1996, and that the 2 May 1996 form was “kept a secret” (presumably by the trustees).

6. It is clear from the complaint that the complainant places great store on the “preference” shown by the trustees to the earlier nomination form over the later one. I am satisfied, however, that the nomination form of 10 July 1996 relates to a different fund which is not the fund here in issue. It relates to a preservation fund to which the deceased had transferred his benefit when the business of his previous employer was acquired by the company in 1996.

7. After conducting an investigation, the trustees of the fund decided to distribute the benefit in the same proportions as those reflected in the nomination form of 2 May 1996. Since Lianie is still a minor, the trustees decided that the 25% proportion awarded to her should be placed in trust for her benefit until such time as she has completed tertiary education. Further, it was decided that the income from the trust should be paid to the complainant in her capacity as Lianie's mother and guardian.
8. This proposed distribution forms the basis of the complaint. The complainant contends that the entire benefit should have been awarded to her. Her reason is essentially that "the children with no experience whatsoever in money matters might squander the money and place all of us in financial misery".
9. Since the complaint was lodged in March 2003, Riaan has subsequently renounced his 25% share in favour of the complainant. The only amount in dispute is therefore the 25% portion awarded to Lianie. Effectively the complainant is entitled to 75% of the benefit in issue.

Relief sought

10. The complainant seeks wide and varied relief. First, she seeks immediate payment of the entire benefit to her. Second, she seeks a refund of R200 000 from the company and Alexander Forbes which she says she incurred in "preparing my own case as well as . . . for the humiliation I had to suffer". Third, she wants "proof of what happened to" an amount of R144 151,05 she alleges "went astray". Fourth, she wants a full benefit statement of the deceased's benefits from the date of death "up to now". I deal with each of these in turn.

Payment of benefit

11. The payment of any death benefit is regulated by section 37C of the Pension Funds Act which reads:

“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 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:
- (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 a dependant or, as may be deemed equitable by the board, to one of such dependants or in proportion to some of or all such dependants;
- (b) 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.
- (bA) If a member has a dependant and the member 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 member in writing to the fund, the fund shall within twelve months of the death of such member 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 proportion to any or all of those dependants and nominees; and

- (c) 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 if the member has not designated a nominee or if the member has designated a nominee to receive a portion of the benefit in writing to the fund, the benefit or the remaining portion of the benefit after payment to the designated nominee, shall be paid into the estate of the member or, if no inventory in respect of the member has been received by the Master of the Supreme Court in terms of section 9 of the Estates Act, 1965 (Act No. 66 of 1965), into the Guardian's Fund."

12. Section 37C(1)(bA) of the Act (which I consider to be the applicable provision on the facts of this matter) clearly confers a discretion on the trustees of the fund in the allocation of death benefits. The question that then arises in my view is whether such discretion has been properly exercised. This involves a consideration of whether the trustees have taken into account all relevant considerations, excluded irrelevant considerations and have not fettered their discretion.
13. In its response to the complaint the fund states that it gave due consideration to the distribution of the deceased's death benefit. It considered that both children were financially dependent on the deceased at the time of his death. It considered also that Lianie, the minor child, is still attending school and will need financial assistance for tertiary

education. Further, it considered that the complainant had inherited the bulk of the deceased estate including more than one property and some endowments. The complainant has not disputed this consideration but questioned the manner by which the trustees came upon that information. Given that she is still employable and capable of working should she wish to supplement her income, the trustees were of the opinion that the 50% portion amounting to the sum of R1 237 502 which was awarded to her would be more than adequate for her support and maintenance. Finally the trustees considered that it was important to ensure the wellbeing and education of the children and the 25% share awarded to Lianie was also justifiable on this basis.

14. I am satisfied that there is no evidence that the trustees did not exercise their discretion properly. The fact that Lianie's portion will be paid into a trust means that the complainant's fear that her children might squander the money may never be realised. Lianie will only have access to the funds on completion of any tertiary education whilst the complainant will immediately receive the income from the trust for Lianie's upkeep. She therefore benefits directly from the portion awarded to Lianie in any event.
15. Furthermore with the renunciation by Riaan of his 25% share, the complainant stands to receive a large portion of the benefit. It could hardly be said that the decision to award 25% of the benefit to Lianie who was the deceased's daughter and wholly dependent on him at the time of his death works an injustice against the complainant. It certainly does not constitute an improper exercise of discretion by the board.
16. For these reasons, I am satisfied that there are no reasonable grounds upon which to set aside the fund's decision.

Refund of R200 000

17. The complainant demands payment of R200 000 which she says she incurred in preparing her case. She also wants the company and Alexander Forbes to compensate her for the humiliation she alleges she has suffered. I am satisfied that no case has been made out for such refund or compensation. In their response to the complaint, the company and the fund submit that the complainant has been the cause of her own misfortune in that she refused to accept payment not only of her 50% apportionment but also that of the 75% apportionment (after Riaan's renunciation of his 25% share in favour of the complainant). Her reason was that acceptance of anything less than 100% of the benefit would prejudice her rights to claim the balance. This she persisted in notwithstanding advices from the fund in a letter dated 15 July 2003 that:

“[t]he Trustees have agreed to pay 75% of the benefit (R1 861 917 plus interest) to you. . . . We once again invite you to furnish us with account details so that we can make payment of the benefit to you. We further reiterate our previous advices that payment of this benefit to you will be without prejudice to your claim for the balance of the death benefit.”

18. In any event, the complainant offers nothing by way of quantification of the damages claim for “humiliation”.

Proof of what happened to the R144 151,05

19. The complainant also wants to know what became of the amount of R144 151,05 which she alleges “went astray”. It appears this amount was the total transfer amount of the deceased as at 30 June 1996 which was

transferred from the deceased's previous retirement fund, Datakor, to a preservation fund in July 1996. In their combined response, the fund and the company contend that this sum was withdrawn from the preservation fund by the deceased. However, since the preservation fund is an entity that is separate from the fund in this matter and was administered by another company, the fund and the company refer the complainant to that other company.

20. This submission is borne out by a letter dated 28 June 1996 from Wynne-Jones and Company to the deceased advising of a transfer of an amount of R144 151,05 to the Pentrust preservation fund. There is also a transfer form apparently signed by the deceased on 10 July 1996 for the transfer of that amount. The complainant offers nothing of substance to gainsay the fund's response and I find no fault with it.

Deceased's full benefit statements

21. The complainant wants the deceased's full benefit statements from the date of death. In my view this is a reasonable request to which the fund should be able to accede without much difficulty.

22. I thus make the following determination:

- 23.1 The complaint relating to payment of a 100% death benefit is dismissed;

- 23.2 The claim akin to a damages claim for the payment of R200 000 is dismissed;

- 23.3 The complaint relating to the R144 151,05 is dismissed;

- 23.4 The fund is ordered to furnish the complainant with copies of the deceased's full benefit statements from date of death.

DATED at CAPE TOWN this 30th day of MARCH 2004.

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR