

**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR**

CASE NO: PFA/MP/601/04/Z/CN

In the complaint between:

**Mmapula Joyce Baloyi**

**Complainant**

and

**Ellerine Holdings Ltd Staff Pension Fund**

**Respondent**

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**INTERIM RULING IN TERMS OF SECTION 30J OF THE PENSION FUNDS ACT 24  
OF 1956**

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[1] On 19 August 2004, I issued a preliminary ruling in which I handed down an order in the following terms:

- 1.1. The fund's decision to allocate a portion of the death benefit to Mrs. PS Baloyi is upheld.
- 1.2. The fund is directed to pay to the complainant, by no later than 1 September 2004, the amounts of R93 896-93 and R4 610-00, together with interest thereon calculated at the prescribed rate of interest, from 12 April 2002 until the date of payment.
- 1.3. The fund is directed to inform this Tribunal and the complainant in writing, by no later than 1 September 2004, of the factors that it took into account in deciding to invest the minor children's benefit with Nedbank,

as well as the cost implications and financial benefits of investing the benefit in the manner that it did, as opposed to any other options, especially the payment of those benefits to the children's legal guardian, the complainant.

[2] In response to paragraph 18.2 of my ruling, the fund stated that it was prepared to abide by the ruling by paying out the amount of R93 896-93 with interest on 31 August 2004. However, it stated that interest on the amount will be calculated over the period 14 August to 30 August 2004, as the fund had already paid the interest on the amount to the complainant from the date the amount was invested until 13 August 2004.

[3] No submissions were made regarding the second part of the ruling in that paragraph, namely the order to the effect that the fund should refund to the complainant the amount of R4 610-00, together with interest at the prescribed rate, calculated from 12 April 2002 up to the date of payment thereof.

[4] With regard to paragraph 18.3 of the ruling, the fund listed the factors that it took into account in deciding to invest the minor children's benefits with Nedbank as being the following:

[4.1] It would not be in the children's best interests to pay the children's shares directly to the complainant as she, by virtue of her relative youth, could enter into an intimate relationship with a third party and be pressurized into utilizing the children's benefits for purposes other than the children's well-being.

[4.2] The funds are invested in bank accounts in the minor children's names, which are controlled by the trustees of the fund. If the funds are paid over to the complainant she is likely to invest them in her own name, and in the event of her predeceasing the children, the funds would then form part of her estate.

[4.3] Setting up a separate trust for each child when each one's share amounts to only R36 000 would not be financially feasible as the interest earned on each share would be less than R3000 per annum.

[4.4] The cost of setting up and administering separate trusts would take up the major portion of the children's capital.

[4.5] The fund has not raised any fees or charges for administering the minor children's benefits, and the interest earned on their funds is paid to the complainant on a monthly basis in order to assist her with their maintenance.

### **Analysis & ruling**

[5] Insofar as paragraph 18.2 of the preliminary ruling is concerned, I accept the fund's submission to the effect that since it has already paid the complainant interest on the R93 896-93 for the period up to 13 August 2004, it should only be ordered to pay interest thereon from 14 August 2004 to the date of payment. At the time of the issuing of the preliminary ruling this Tribunal had not been apprised of that fact.

[6] As the fund has duly shown cause why it should not be ordered to pay interest for the whole period, my preliminary ruling will be set aside to the extent that it orders the fund to pay interest to the complainant over that whole period, instead of from 14 August 2004 to the date of payment thereof.

[7] With regard to the payment of the amount of R4 610-00, together with interest, my preliminary ruling is hereby confirmed.

[8] It remains to be considered whether the trustees have properly exercised their discretion with regard to their decision to invest the minor children's benefits with Nedbank, instead of adopting other available options like paying them into a trust or directly to the complainant who is their legal guardian.

When exercising a discretionary power, the functionary which is vested therewith is required to take into account all relevant factors and to discard irrelevant ones from consideration. The functionary must also not unduly fetter its discretion by adhering to principles that take no account of the personal circumstances of the person who will be affected by the decision. If the functionary has acted as aforesaid, no reviewing tribunal will readily interfere with its decision.

[9] I am satisfied that the trustees exercised their discretion properly when they decided against placing the children's benefits into a trust.

[10] Regarding the decision to deprive a guardian of her right to administer her minor child's assets on the child's behalf, the following have been accepted as being relevant considerations: the amount of the award, the ability of the guardian to administer the amount for the minor, the qualifications of the guardian to administer the amount and the need to preserve the capital until the minor attains the age of majority.

[11] No factual or legal basis has been laid for the fund's assertion that if the funds were to be paid directly to the complainant she would invest the same in her name instead of the minor children's names. Thus, such an assertion amounts to a mere assumption.

[12] The fund's argument to the effect that because of her youth the complainant "is expected to form a relationship with a third party" which may cause her to bow to social pressures and misuse her children's monies is evidence of the patronizing attitude which the trustees have adopted towards the complainant. How a 39-year-old person can be regarded as "a relatively young person" is totally beyond my comprehension. For the trustees to assume that just because the complainant is a woman, she is financially irresponsible and immature, is not only anachronistic thinking, but also borders on chauvinism and gender discrimination.

In the circumstances, it is appropriate to quote the dictum of Lord Halsbury in the English case of *Sharp v Wakefield (1891) AC 173 at 179*, a case dealing with the exercise of a discretion, wherein it is stated:

“Discretion” means when it is said that something must be done within the discretion of the authorities, that something is to be done according to the rules of reason and justice, not according to private opinion: according to law and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular.”

- [13] Inasmuch as there is no factual basis for all of the trustees’ aforesaid views, all they amount to is fanciful, arbitrary and vague private opinion. Thus, their argument falls to be rejected as an irrelevant assumption.
- [14] By reason of the foregoing, I have no doubt in my mind that the trustees failed to properly exercise their discretion in deciding to deprive the complainant of her right to administer her minor children’s benefits. As a general principle, the courts are wary of assuming a discretion which has been entrusted to another tribunal or functionary and will refer the matter back to that tribunal or functionary for a fresh decision unless there are exceptional circumstances for departing from that principle.
- [15] The complainant has been trying to access the death benefit since her husband passed away in July 2001. Granted, she has during April 2002 received payment of part of the death benefit that was due to her, but she has been dissatisfied with the trustees’ decision throughout. Although the fund has exhibited chauvinism of a disturbing degree in dealing with this matter, and the complainant has been subjected to unacceptable inconvenience, I do not believe that there are exceptional circumstances which compel this Tribunal to usurp the fund’s exercise of its discretion. I will therefore refer this matter back to the trustees for them to reconsider it with due regard to my remarks as set out in paragraphs [11] to [14]

above.

[16] In the result therefore, the interim order of this Tribunal is as follows:

[16.1] The fund is directed to show cause in writing by no later than Friday 22 October 2004 why the following order should not be made:

[16.1.1] The fund's decision to invest R93 896-93 of the complainant's death benefit, and R108 000 representing the minor children's shares of the death benefit, with Nedbank, is hereby set aside.

[16.1.2] The fund is directed to pay to the complainant, by no later than 12 November 2004, the amounts of R93 896-93 and R108 000, together with interest thereon calculated at the prescribed rate, from 14 August 2004 to the date of payment.

[16.1.3] The fund is further ordered to pay to the complainant, by no later than 12 November 2004, the amount of R4 610-00, together with interest thereon at the prescribed rate, from 12 April 2002 until the date of payment.

[16.2] Upon receipt of the fund's submissions, the complainant shall be afforded an opportunity, until Friday 29 October 2004, to file answering submissions thereto, whereafter this Tribunal shall hand down its final ruling.

DATED AT CAPE TOWN THIS 11<sup>th</sup> DAY OF OCTOBER 2004.

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**VUYANI NGALWANA**  
**PENSION FUNDS ADJUDICATOR**

