

## IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/821/03/FM/ch

In the complaint between:

**Meisie Njipulane Malatjie**

**Complainant**

and

**Idwala Provident Fund**

**Respondent**

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### DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956

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[1] This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act (“the Act”). The complaint relates to the payment of a death benefit in terms of section 37C of the Act. The complainant is dissatisfied with her exclusion from the distribution and mode of payment selected by the respondent.

[2] As I have considered it unnecessary to do so on the facts of this case, no formal hearing has been held. Thus in coming to a decision, reliance was placed exclusively on documentary evidence and respective submissions filed by the parties.

#### Background

[3] The complainant is Meisie Njipulane Malatjie, the wife of the late Phineos Bonana Malatjie (“the deceased”). The complainant is lodging the complaint both in her personal capacity and in her representative capacity as the legal

guardian of her minor children, namely, Folosang Malatjie (born on 23 December 1982 who is now, as at 23 December 2003, a major), Malau Malatjie (born on 17 May 1987), Pulane Malatjie (born on 19 July 1995) and Kutollo Malatjie (born on 8 October 2001).

- [4] The deceased was a member of Idwala Provident Fund (“the fund”) during the tenure of his employment with Idwala Industrial Minerals Company Limited (“the employer”).
- [5] Upon the deceased’s death on 16 November 2001, a benefit of R231 744.00 after deduction of income tax became available for distribution.
- [6] On 24 January 2002 the management board of the respondent resolved to pay the entire death benefit into a trust for the benefit of all the minor dependants of the deceased to the exclusion of the complainant. No individual allocations were made in respect of each of the deceased’s respective dependants. The board’s resolution provides thus:

“The benefit for distribution is to be placed in a Trust with the wife... and the children... being the income beneficiaries. The capital sum is only to be paid out to the wife once all the present dependent children attain majority or predecease the wife”.

### The Issues

- [7] The complainant’s challenge is two-pronged. Firstly, she is dissatisfied by the failure of the board to allocate a specific portion of the benefit to her and she is also aggrieved by the board’s decision to place the minor children’s’ benefit in a trust arrangement. The complainant contends that by virtue of the benefit being placed in a trust arrangement, which does not generate sufficient monthly income to cover the daily needs of the minor children, it is not financially viable

to place the benefit in a trust. It is contended further that the placing of the benefit into a trust was done without the complainant's prior knowledge and therefore without her consent. The complainant accordingly seeks an order directing the fund to effect direct payment to her of her portion of the benefit and that the minor children's respective portions be paid to her in her capacity as the guardian.

[8] The fund, in justification of its decision states as follows:

"The Idwala Trustees use the above approach as it is almost impossible to determine the variable support requirements per individual dependents (sic). The family trust provides the flexibility to allocate funds to the greatest need over time and ensures the maintenance of the family as long as possible".

The board further makes sweeping generalisations to the effect that placing the benefit into a trust would obviate the attachment of the benefit by the complainant's creditors.

### Analysis

[9] Section 37C governs the disposition of death benefits. It places a duty on the management board to first conduct an investigation into the circle of the deceased member's beneficiaries, and having identified them, to allocate the proceeds of the death benefit to the member's beneficiaries in such a manner as they deem equitable. The board is thus vested with a discretionary power to effect an equitable distribution of the benefit. As with the exercise of any discretionary power, in effecting an equitable distribution, the board is required to exercise that power properly, to act within its powers and not to unduly fetter its discretionary powers by following a rigid policy that takes no account of the personal circumstances of each beneficiary and of the prevailing situation. After

identification of beneficiaries and a decision on an equitable distribution, the board would need to determine an appropriate mode of payment.

[10] In the instant case, the fund failed to effect payment of a portion of the benefit to the complainant. It is patently clear that the board never considered paying a portion of the benefit to the complainant (see definition of “dependant” in section 1 of the Act) nor has the board advanced any valid reasons for such an omission. The complainant, who is unemployed and is 35 years of age, was solely dependent on the deceased. Her exclusion defies belief. Thus, the board failed miserably to fulfil the obligation imposed on it by section 37C(1)(a) of the Act, that is to effect an equal distribution amongst the dependants. The decision can be set aside on this ground alone.

[11] Subsection 37C(2), (3) and (4) regulates the different modes of payment and reads:

“(2) For the purpose of this section, a payment by a registered fund to a trustee contemplated in the Trust Property Control Act, 1988, (Act No 57 of 1988), for the benefit of a dependant or nominee contemplated in this section shall be deemed to be a payment to such dependant or nominee.

(3) Any benefit dealt with in terms of this section, payable to a minor dependant or minor nominee, may be paid in more than one payment in such amounts as the board may from time to time consider appropriate and in the best interests of such dependant or nominee: Provided that interest at a reasonable rate, having regard to the investment return earned by the fund, shall be added to the outstanding balance at such times as the board may determine. Provided further that any balance owing to such a dependant or nominee at the date on which he or she attains majority or dies, whichever occurs first, shall be paid in full.

(4) (a) Any benefit dealt with in terms of this section, payable to a major dependant or major nominee, may be paid in more than one payment if the dependant or nominee has consented thereto in writing: Provided that:-

- (i) the amount of the payments, intervals of payment, interest to be added and other terms and conditions are disclosed in a written agreement; and
- (ii) the agreement may be cancelled by either party on written notice not exceeding 90 days.

(b) If the agreement contemplated in paragraph (a) is cancelled the balance of the benefit shall be paid to the dependant or nominee in full.”

[12] On the issue of payment of the minor childrens’ benefits, the benefit is normally paid to the guardian of the minor children. As a legal guardian of a minor child, at common law, a parent has a duty, *inter alia*, to administer the property and assets of her/his minor child. Thus, the payment of the minor childrens’ benefit to her/his legal guardian should be done in the ordinary course of events unless there are cogent reasons for depriving the parent of the duty to take charge of her/his minor children’s financial affairs and the right to decide how the funds due to the minor should be utilised in the best interests of the minor child (*Dhlamini v Smith & Another* [2003] 7 BPLR 4894 at page 4901C-F). This presupposes that there must be an investigation into the competence or otherwise of the legal guardian to administer the minor children’s financial affairs. Expressed differently, there must be an individualised assessment to ensure that unfounded generalisations such as those in the present case are not made.

[13] Other mechanisms for effecting payment of a minor’s benefit are spelt out in section 37C(2) and (3), and are payment to a trust and payment from the fund in more than one instalment and at such times as the board deems appropriate, respectively. Where the board has decided to depart from the ordinary route of effecting payment of the benefit directly to the minor’s legal guardian, it will have to show the existence of good grounds giving rise to an apprehension that the

guardian will fail to fulfil her/his duty (see *Ramanyelo v Mineworkers Provident Fund* – as yet unreported, PFA/GA/228/2002/NJ, 11 October 2004).

- [14] There have been very few reported cases dealing with the circumstances under which a guardian should be deprived of the right to administer monies on behalf of her/his minor children. However in *van Rij NO v Employers' Liability Assurance Corporation Ltd* 1964 (4) SA 737 (W), the mother of the minor child had been appointed as his *curator-ad-litem* as the whereabouts of the father were unknown. The then Supreme Court made a damages award in favour of the minor child but the Court was not satisfied that the guardian was competent to handle monies on behalf of the minor child, Accordingly, it appointed a trust company to handle the proceeds on behalf of the minor child, until he attained the age of majority. Trollip J (as he then was) court made the following remarks (at 738H):

“As Clark is still a minor the proceeds of the award presumably would ordinarily be paid to his guardian for administration on his behalf, but the whereabouts of his father are unknown, and apparently his mother, who was appointed and acted as his *curator-ad-litem* in these proceedings, has not been appointed his guardian. In any event, it is quite clear that for various reasons neither she nor Clark is qualified or competent to administer the proceeds of this litigation, and that if legally possible the Court should make some other order for the proper care and administration thereof, at least during his minority.”

- [15] Thus the approach of the Court was that since the guardian was not competent or qualified to administer the proceeds of the award, the benefit was placed with a trust company. This approach of determining when to deprive a guardian of the right to administer monies on behalf of a minor child was approved by the Appellate Division in *Woji v Santam Insurance Co. Ltd* 1981 (1) SA 1020(A) where Diemont JA on behalf of this full bench commented as follows (at 1031A):

“It is probable that the mother (guardian) is neither competent nor qualified to administer the proceeds of this litigation and, as the sum awarded is considerable, it is desirable that an order be made for the proper care and administration of this money, at least during the minority of the child (see *van Rij NO v Employers Liability Assurance Corporation Ltd* 1964 (4) SA 737 (W)”.

See also *Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98(A) at p120.

[16] From the above cases it is clear that the factors to be considered by the board in determining whether a guardian should administer monies on behalf of her/his minor children may be summarised as follows:

- the amount of the benefit
- the ability of the guardian to administer the monies
- the qualifications (or lack thereof) of the guardian to administer the monies.
- the benefit should be utilised in such a manner that it can provide for the minor until he/she attains the age of majority.

(See also Rule 57 of the Uniform Rules of Court (High Court), which regulates the appointment of a curator bonis on the grounds of the patient/person suffering from a physical or mental disability which prevents him/her from managing his/her own affairs.)

[17] In the instant case, the board has failed to advance any valid reasons for its decision to deprive the complainant of her right to administer monies on behalf of her children. The board has fettered its discretion by following a rigid policy that takes no account of the personal circumstances of each beneficiary and of the prevailing situation. Thus, in the light of the board fettering its discretion by failing to consider the relevant factors set out above, I should set aside the decision of the board. The interests of justice are best served by remitting the matter to the board of management for a fresh exercise of its discretion in

respect of its failure to conduct a diligent investigation into the status of the complainant as a dependant and an appropriate mode of payment in respect of the minor children.

[19] Accordingly the order of this Tribunal is as follows:

[19.1] The decision of the respondent to award the entire benefit to the minor children of the deceased to the exclusion of the complainant is hereby set aside

[19.2] The decision of the respondent to place the proceeds of the death benefit in a trust arrangement is hereby set aside.

[19.3] The respondent is directed to re-exercise its discretion in respect of the distribution of the benefit among all qualifying dependants on or before 24 December 2004.

[19.4] The respondent is further directed to determine (with due regard to the factors referred to in this determination) whether the complainant should be deprived of the right to administer monies on behalf of her minor children on or before 24 December 2004.

DATED at Cape Town this 3<sup>rd</sup> day of December 2004.

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**Vuyani Ngalwana**

Pension Funds Adjudicator

Complainant - unrepresented

Respondent - unrepresented