

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 Limited Staff Pension Fund

Respondent

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

Background

[1] The complainant's husband, the late Mr. William Baloyi, was a member of the Ellerine Holdings Ltd Staff Pension Fund ("**the fund**") whilst he was in the employ of Ellerine Holdings Ltd ("**the employer**").

[2] Upon his death during July 2001, a lump sum death benefit amounting to R305 000-47 became payable from the fund. Prior to distributing the same, the fund deducted an amount of R51 896-19 in respect of a housing loan for which the employer had provided a guarantee, as well as an amount of R4 610-00 in respect of a loan which had been advanced by the employer to the complainant to cover funeral expenses.

[3] On 3 April 2002 the trustees resolved to distribute the balance of the benefit among the deceased's dependants in the following manner:

Complainant	R113 896-93
PS Baloyi (deceased's mother)	R 25 310-43
PT Baloyi (son)	R 37 965-64 (in trust)
GM Baloyi (son)	R 37 965-64 (in trust)
ET Baloyi (son)	R 37 965-64 (in trust)

[4] The deceased's mother's share was paid out to her in full, while the complainant was paid an amount of R20 000, with the balance being placed in a fixed deposit investment with Nedbank until 13 April 2005. From the minor children's shares, an amount of R5 896-92 was paid out to the complainant, and the balances were also invested with Nedbank until each child attained the age of 21 years. Interest from the investments is paid out to the complainant on a monthly basis. According to the trustees' resolution, the trustees may at their sole discretion authorize the release of the capital in proportions that they deem appropriate.

The issues

[5] The complainant challenges the trustees' decision to allocate 10% of the proceeds of the benefit to her mother-in-law, the decision to invest her portion of the benefit with Nedbank without her consent, written or otherwise, the decision to invest the minor children's shares with Nedbank instead of paying the same directly to her, and the deduction of the amount of R4 610-00 from the benefit.

[6] In response, the fund states as follows:

[6.1] The deceased's mother was a dependant of the deceased, and that was confirmed in writing by the complainant. Furthermore, she had been nominated in writing by the deceased to receive 50% of the proceeds of the

death benefit.

[6.2] The investment of both the complainant's and the minor children's portions of the benefit was done with the complainant's prior knowledge. The fund indicated that the trustees were not willing to release the children's benefits, but the complainant could apply for the release of a maximum amount of R28 169-01 from her own investment as the same is subject to Nedbank's rules.

[6.3] The funeral expenses amount was advanced to the complainant to assist her with the deceased's funeral arrangements as she was financially destitute at the time.

Analysis and ruling

[7] For the sake of convenience, I will deal with the deduction of funeral expenses first. Section 37A(1) prohibits the reduction, transfer of or execution against pension benefits except under certain circumstances, namely in terms of the Income Tax Act, section 37D of the Pension Funds Act, the Maintenance Act, the Divorce Act and section 65 of the Magistrates' Court Act.

[8] The deduction of funeral expenses does not fall within any of the categories of allowable deductions; thus the fund acted unlawfully in effecting the same from the death benefit amount: *Mlungisi v Anglo American Property Services Provident Fund & Others (2)* [2001] 4 BPLR 1882 (PFA) at p1884I-J. Regardless of how noble and humane the employer's intentions were in advancing the amount to the complainant, the fund may not reimburse the employer from the proceeds of the complainant's death benefit. After all, the employer still has the civil remedies available to it to recover the loan amount from the complainant. In the result, the fund must repay that amount to the complainant.

- [9] Section 37C(1) governs the disposition of death benefits. It places a duty on the board of trustees to identify the beneficiaries of a deceased member and also vests the board with discretionary powers on the proportions and manner of distributing the proceeds of a death benefit. As with the exercise of any discretionary power, in effecting an equitable distribution the board is required to give proper consideration to relevant factors and to exclude irrelevant ones from consideration. It may not unduly fetter its discretion by following a rigid policy that takes no account of the personal circumstances of each beneficiary and of the prevailing situation.
- [10] In deciding to allocate 10% of the benefit to the deceased's mother, the trustees took into account the fact that she was to some extent dependent on him for support. The complainant and the deceased's brother also confirmed that fact in writing on 14 March 2002. Her belated objection to the allocation, without advancing any cogent reasons therefor, is quite puzzling. I am satisfied that the fund's decision in this regard satisfies the requirement of effecting an equitable distribution.
- [11] The death benefit due to a major beneficiary must be paid in full directly to him or her unless he or she has consented in writing to payment of the same in more than one payment. In the event that such written consent has been given, Section 37C(4) requires that the amount of the payments, the intervals of payment, interest to be added and other terms and conditions be contained in a written agreement. The agreement may be cancelled by either party on written notice not exceeding ninety days, and upon its cancellation the balance of the benefit shall be paid directly to the beneficiary in full.
- [12] For the purposes of the sub-section, therefore, mere prior knowledge by the major beneficiary that his/her benefit will be invested on his/her behalf, without there being a written agreement setting out the amounts and intervals of payment as well as interest to be added, does not suffice.

The complainant is a major, thus she is entitled to be paid her benefit in full. Since she did not give any written consent to the investment of her benefit, nor enter into any written agreement as envisaged in section 37C(4)(i), the trustees' conduct in paying her only a portion of her benefit and investing the balance is unlawful. As matters stand, the fund has failed to effect full payment of the complainant's benefit to her and must thus do so without further ado.

[13] The fact that the investment can only be released subject to Nedbank's rules should not deprive the complainant of her right to receive payment of her share of the death benefit in full. The fund will just have to find the funds with which to pay the complainant's benefit if it cannot cancel the investment prior to maturity date.

[14] On the issue of the investment of the minor children's benefits, there are three mechanisms for the payment of a minor beneficiary's benefit. The first one is not directly spelt out in the Act, but flows as a natural consequence from the relationship of guardianship of a parent over his/her minor child. 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 his/her minor child. Thus, the payment of a minor's benefit to his/her 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 his/her minor children's financial affairs and the right to decide how the funds due to the minor should be utilized in the best interests of the minor: *Dhlamini v Smith & Another* [2003] 7 BPLR 4894 (PFA) at page 4901C-F.

[15] The second and third mechanisms 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 fund deems appropriate, respectively. Where the board has decided to depart from the ordinary route of paying 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 fulfill his/her duty.

- [16] In the instant case I have not been furnished with any evidence which suggests that the board even considered paying the benefit to the complainant, nor has the fund advanced any reasons for the board's decision to deprive the complainant of her right to decide what is in her children's best interests. There is also no indication on the papers whether or not the trustees considered the cost implications and the financial benefits of investing the benefit with Nedbank as opposed to other viable and available options.
- [17] Since I do not have an insight into the factors that were considered by the board in deciding to deprive the complainant of the right to decide on how to manage her minor children's financial affairs, as well as the cost implications and financial benefits of investing the benefit with Nedbank as opposed to other financial institutions or options, I am unable to determine whether or not the board has exercised its discretionary powers properly as it is required to do by the section. Those factors are highly relevant ones that should influence the trustees' decision. I therefore believe that it would be prudent to issue a preliminary ruling directing the fund to provide the necessary information whereafter I shall hand down a final ruling.
- [18] The order of this Tribunal is therefore as follows:
- [18.1] The fund's decision to allocate a portion of the death benefit to Mrs. PS Baloyi is upheld.
- [18.2] 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.

[18.3] The fund is further 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.

DATED AT CAPE TOWN THIS 19TH DAY OF AUGUST 2004.

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR