



**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR
(HELD IN CAPE TOWN)**

CASE NO: PFA/WE/10350/06/KM

In the complaint between:

I VAN BAALEN

Complainant

and

**MITTAL STEEL SA SELECTOR
PENSION FUND**

First Respondent

**MITTAL STEEL SA SELECTOR
PROVIDENT FUND**

Second Respondent

ALLAN GRAY LIFE LTD

Third Respondent

**DETERMINATION IN TERMS OF SECTION 30M OF THE
PENSION FUNDS ACT 24 OF 1956 (“the Act”)**

1. Introduction

[1.1] The complaint concerns the purchase by the first and second respondents of a living annuity from the third respondent with the proceeds of a death benefit of which the complainant is the sole beneficiary.

[1.2] The complaint was received by this office on 30 August 2006 and a letter acknowledging receipt thereof was sent to the complainant on 26 September 2006. On 27 September 2006 a letter was dispatched to the first and second respondents requesting them to file a response to the complaint by no later than 27 October 2006. A joint response was received on 13 October 2006 and a copy of same was sent to the complainant. On 20 September 2007 this office addressed a letter to the third respondent advising it that it had an interest in the outcome of the complaint, joining it as a respondent to the proceedings in terms of section 30G(d) of the Act, and inviting it to make submissions. A response was received on 8 October 2007, which was also copied to the complainant. No reply has been received.

[1.3] After reviewing the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

2. Background

- [2.1] The first and second respondents are occupational pension and provident funds respectively, and are registered in terms of the Act. The complainant's husband, Mr JM van Baalen ("the deceased"), was a member of first and second respondents at the time of his death in service on 2 June 2006. As a consequence, a benefit became payable in an amount of R1 013 030 (from the first respondent), and R2 562 473 (from the second respondent), providing a total of R3 575 503.
- [2.2] The boards of trustees of both respondents decided to award the benefits in their entirety to the complainant. The intention of the first and second respondents is to pay the lump-sum amount to the complainant, less tax thereon.
- [2.3] The dispute centers around the method of payment, and the tax liability that it will attract. The first and second respondents have agreed to retain the monies in the funds until such time as a ruling from this office has been issued.

3 The complaint

- [3.1] The complaint, in essence, is that payment of the lump-sum amount directly to the complainant will result in a tax liability of R1 125 826 which will be deducted from the benefit. The complainant has therefore asked the trustees of first and second respondents to purchase a living annuity in her name from third

respondent instead of paying the amount directly to her.

[3.2] She contends that this manner of discharge of the first and second respondents' liabilities will result in the avoidance of a substantial tax liability.

[3.3] The first and second respondents have refused to accede to this request, citing their rules and the Income Tax Act 58 of 1962 ("the Tax Act") as imposing restrictions on the manner in which the benefit may be dealt with.

[3.4] The complainant is dissatisfied with this response and has approached this tribunal for a ruling directing the respondents to purchase a living annuity with the third respondent for her benefit instead of paying her the lump-sum.

4. First and second respondents' response

[4.1] The response refers to rule 8.1 in the rules of the first and second respondents which provide that on the death of a member a lump sum equal to the member's equitable share in the funds will be payable. It thereafter refers to the Second Schedule of the Tax Act which deems any lump sum benefit payable as a consequence of the death of a member to be taxable in the hands of that member as if it had accrued to him immediately prior to his death.

[4.2] The response concludes that in view of the above two provisions the benefit must be taxed in the hands of the deceased according to the applicable tax rates. It submits that to do otherwise would be to circumvent the Tax Act.

[4.3] The first and second respondents therefore submit that they are unable to comply with the complainant's request.

5. Third respondent's response

[5.1] The third respondent states that the Allan Gray Living Annuity is one of its products, but that it is a compulsory annuity policy purchased in the name of and on the life of the policy holder. This means that it may only be purchased in circumstances where the originating source of the investment amount is from a retirement fund where the capital amount invested has not accrued to the annuitant.

[5.2] In further explanation it states that it is only available where the member or beneficiary of a death benefit is either compelled to, or has the option in terms of the rules to elect to have such an annuity purchased. If, however, a member or beneficiary of a death benefit is entitled to a lump sum benefit in terms of the rules, such benefit will accrue to that person. The member or beneficiary is then free to elect how to invest the money. This is therefore considered a 'voluntary benefit' and, if invested in an

annuity policy, can only be invested in a voluntary annuity policy. Such “voluntary monies” cannot be applied to purchase a compulsory annuity, according to the third respondent. It comments further that it does not offer a voluntary annuity policy in its product range.

- [5.3] The third respondent concludes that it would only be able to accept an investment in a living annuity if the complainant’s entitlement is to a compulsory annuity and the capital has not accrued to her, in other words if the capital is transferred from the retirement fund(s) directly to the third respondent without any tax liability being incurred.

6. Determination and reasons therefor

- [6.1] I have examined the rules of first and second respondents. The entitlement to a death benefit is contained in rule 8.1 of both funds, and reads as follows:

“A lump sum equal to the MEMBER’S EQUITABLE share in the FUND as at the date of death, shall become payable.”

- [6.2] I have had regard to the other provisions in the rules, and there is nothing that confers on a beneficiary of a death benefit the right to elect that it be transferred into an annuity.

[6.3] Section 13 of the Act states that the rules of a registered fund are binding on the fund's members, shareholders and officers thereof, and any person claiming under the rules, or whose claim is derived from a person so claiming. Furthermore, the trustees' powers are circumscribed by the rules of the fund (see *Tek Corporation Provident Fund and Others v Lorentz* [2002] 3 BPLR 227 (SCA) at 239 D-H). The fund's authority to perform any action, through its board of management, therefore needs to be determined with reference to the fund's rules.

[6.4] For this reason there is no question but that the benefit accrues directly to the beneficiary, in this case the complainant. From this it is apparent that the third respondent would not be in a position to accept a transfer from the first and second respondents in respect of the complainant.

[6.5] Concerning the issue of taxation of the benefit, section 37A of the Act prohibits the reduction of benefits by any means, but is subject to certain exceptions contained in section 37D. In this regard, section 37D(1)(a) provides:

“1) A registered fund may-

(a) deduct any amount due on the benefit in question by the member in accordance with the Income Tax Act, 1962 ([Act 58 of 1962](#)), ...”

[6.6] Paragraph 3 of the Second Schedule of the Tax Act deems a lump sum benefit payable on the death of a member to be taxable in the hands of that member as if it had accrued to him immediately prior to his death. The relevant portion reads as follows:

“Any lump sum benefit which becomes recoverable in consequence of or following upon the death of a member or past member of a pension fund, provident fund or retirement annuity fund shall be deemed to be a lump sum benefit which accrued to such member or past member immediately prior to his death.....”

[6.7] In the present case the benefit allocated to the complainant as the beneficiary of the deceased was payable as a lump sum benefit in terms of the rules of the fund and was accordingly taxable in the hands of the deceased. The fund was therefore not only permitted, but obliged, to effect the tax deduction in favour of the South African Revenue Service.

[6.8] In view of the above there is no basis on which to order the relief sought by the complainant, and the complaint must fail.

7. Relief

[7.1] The complaint is dismissed.

DATED AT CAPE TOWN ON THIS THE DAY 2008.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR