



HEAD OFFICE

Johannesburg

2nd Floor, Sandown House
Sandton Close 2, Sandton, 2196
PO Box 651826, Benmore, 2010
Tel (011) 884-8454 □ Fax (011) 884-1144
E-Mail: enquiries-jhb@pfa.org.za

Cape Town

2nd Floor, Oakdale House, The Oval
Oakdale Road, Newlands, 7700
P O Box 23005, Claremont, 7735
Tel (021) 674-0209 □ Fax (021) 674-0185
E-mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Please quote our ref: PFA/KZN/6204/05/NS

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): GP McLEAN (“the first complainant”) & H & G NIEMIEC (“the second complainants”) v AUNDE SOUTH AFRICA SALARIED PROVIDENT FUND (“the respondent”)

1. Introduction

- 1.1 This complaint relates to the distribution of the proceeds of the death benefit that became payable upon the death of a member of the fund.
- 1.2 The complaints were received by this office on 15 November 2005, and letters acknowledging receipt thereof were sent to the first and second complainants on 24 November 2005. On the same date a letter was dispatched to the respondent requesting it to submit a response to the complaint by no later than 15 December 2005. The response, dated 8 December 2005, was received on 14 December 2005, and a copy thereof was subsequently forwarded to the complainants on 13 January 2006 for a reply. A reply was received from the first complainant on 26 January 2006. No reply was received from the second complainant.
- 1.3 After considering all the written submissions, it is considered unnecessary to hold a hearing in this matter. My determination and the reasons therefor are set out below.

M Mohlala (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrosbree (Snr Assistant Adjudicator), Z Camroodien (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Nekile (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator), S Mothupi (Assistant Adjudicator)

Office Manager: L Manuel

2. **Factual background**

- 2.1 The late Lesley Fourie (“the deceased”) was a member of the fund until she died on 2 August 2005. Upon her death an after tax lump sum benefit of R1 643 478.42 became available for distribution by the respondent. The respondent determined the circle of beneficiaries and dependants of the deceased and decided to effect an equitable distribution as follows:

Name	Extent of Dependency	Amount
Pat McLean (mother)	+R2000 p.m	R117 919.06
Marc Fourie (son)	None	R371 241.72
Shaun Fourie (son)	100%	R783 075.91
Jackie Fourie (daughter)	100%	R 20 975.00
&		
Jordan Stack (grandson)	100%	R350 266.57

- 2.2 The complaint stems from the quantum of the benefits allocated to the first complainant and Shaun Fourie. Shaun is represented by the second complainant in their capacity as the prospective legal guardians. In this regard, this office has assumed that second complainant has the necessary legal standing to bring this complaint, without deciding the issue, in view of the decision that this office has reached on the merits which will appear hereunder.

3. **The complaint**

- 3.1 The first complainant is aggrieved by the distribution of the proceeds of the death benefit decided on by the trustees of the fund. The first complainant contends that the benefit that was allocated to her is too little as it does not take into account her total income and her actual expenses. The second complainant contends that the benefit that was allocated to Shaun is too small considering his age and the type of lifestyle to which he is accustomed. The first complainant states that the trustees erred in distributing the benefit amongst the deceased’s major children, Marc and Jackie, since they were not financially dependent on the deceased during her lifetime. The first complainant disputes that the trustees have done an “extensive investigation” as alleged by them in their letter dated 13 October

2005 on which they based their decision, since neither the first complainant nor the second complainant were contacted by the trustees. The first complainant requests this tribunal to set aside the distribution and to order the board to award a greater benefit to herself. The second complainant asks that a greater portion of the benefit be awarded to Shaun.

4. The response

- 4.1 The respondent states that the board in arriving at its decision took the following considerations into account:
- 4.1.1 The first complainant (Pat McLean) has recently received a share of approximately R250 000.00 in the profit of the sale of the house. In terms of the Will drawn by the deceased the first complainant will receive a quarter of the estate, which will be held in trust and generate a monthly income for her, and a cash lump sum of R75 000.00. In addition she has three surviving children, who can assist with her financial support.
 - 4.1.2 Marc is employed at Aunde South Africa (its full citation does not appear from the papers filed of record) on a relatively low salary. He is currently looking after Jackie and her son, Jordan. He is required to buy the house which they currently occupy. In terms of the deceased's Will he will receive a quarter of the deceased estate, which will be held in trust and generate a monthly income, and a cash lump sum of R159 000.00.
 - 4.1.3 Shaun is 12 years old. He is an adopted son of the deceased and is currently under the care of the second complainant, who are in the process of adopting him. He is currently enrolled in Westville Senior Primary School and the trustees assumed that his future education would continue at a similar model C school. In terms of the deceased's Will he will receive a quarter of the estate, which will be held in trust and generate a monthly income for his benefit.
 - 4.1.4 Jackie was dependent on the deceased due to the fact that she had recently given birth to her son Jordan. She is currently unemployed. In terms of the deceased's Will she will receive a quarter of the deceased's estate, which will be held in trust and generate a monthly income for her benefit. Her child, Jordan, was not included in the Will.
- 4.2 The respondent submits that the trustees have duly considered all relevant information placed before them or collected by them and have exercised their discretion in a manner which gave rise to an equitable result. The

respondent concludes that the trustees are satisfied from their investigation that, as at the date of the deceased's death, all the beneficiaries that were identified by them were dependent on the deceased, and the extent of their dependency warranted that they receive the proportional distribution made by the trustees.

5. Determination and reasons therefor

- 5.1 Section 37C(1) confers a discretion on the board of trustees to distribute the proceeds of a death benefit among the dependants and/or nominated beneficiaries of a deceased member in such proportions as the board may deem equitable. The section does not specify the criteria to be used other than to require the board to act equitably. Equity requires that the needs of all the dependants be considered with reference to all the relevant considerations that have to be taken into account.
- 5.2 Factors that ought to be considered include respective ages of the dependants, the extent of their dependency, their relationship with the deceased, the financial circumstances of the dependants, their future earning capacity or potential, the wishes of the deceased and the amount that is available for distribution. For instance, because a younger dependant is likely to be dependent for a much longer time than an older one, he is likely to require more financial assistance than the older one. A dependant who is employed and thus earning an income is dependent to a lesser extent than one who is unemployed. The amount that is available for distribution is always a critical factor especially where there is more than one dependant. The present case is a good example of a situation where the actual financial needs of the dependants far exceed the amount available for distribution. This may force the board to award a dependant an amount less than his reasonable maintenance needs or even to exclude certain dependants from the distribution. I disagree with your contention that the trustees have not conducted extensive investigation before allocating the death benefit to respective dependants. It is clear that in the exercise of their discretion the trustees have had due regard to the relevant factors that are referred to above.
- 5.3 As long as the board has properly considered all the relevant factors, ignored irrelevant ones from consideration, and not unduly fettered its discretion, no court or reviewing tribunal will lightly interfere with their decision.
- 5.4 This office's duty as a reviewing tribunal is not to decide what is the fairest or most generous distribution, but rather to determine whether the board has acted rationally and arrived at a proper and lawful decision (See *Ditshabe v Sanlam Marketers Retirement Fund & Another (2)* [2001] 10

BPLR 2579 (PFA) at 2582F-G). This tribunal is satisfied that the factors that were considered by the board are relevant, and it has not taken any irrelevant factors into consideration nor unduly fettered its discretion. In the result, no grounds exist for this tribunal to interfere with the board's decision.

6. Relief

6.1 The complaints cannot succeed.

DATED AT CAPE TOWN ON THIS DAY OF 2007

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR