



**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR
(HELD IN JOHANNESBURG)**

CASE NO: PFA/NP/5947/2005/RM

In the complaint between:

M.H. LEBEPE

Complainant

and

PREMIER FOODS PROVIDENT FUND

First Respondent

NBC HOLDINGS (PTY) LTD.

Second Respondent

NBC UMBRELLA TRUST

Third Respondent

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

[1.0] Introduction

[1.1] The complaint concerns the mode of payment chosen by the first respondent when it paid a death benefit to the complainant's three minor children. It was received by this office on 11 October 2005.

[1.2] A letter acknowledging receipt thereof was sent to the complainant's legal representative on 24 October 2005. On the same date a letter was dispatched to the second respondent, the first respondent's administrator, giving the respondents until 14 November 2005 to submit a response to the complaint. A joint response from the first and second respondents, which was also forwarded to the complainant's legal representative, was received on 21 November 2005. On 30 May 2006 this office received the complainant's reply. The third respondent was joined as a party to these proceedings on 4 July 2007 and was given until 17 July 2007 to submit a response. Their response, which was also copied to the other parties, was received on 17 July 2007.

[1.3] After considering the submissions before this tribunal, it is unnecessary to hold a hearing in this matter. As the background facts are well known to all the parties, only those facts that are pertinent to the issues raised herein will be repeated. The determination and reasons therefor appear below.

[2.0] Factual Background

[2.1] The complainant is the widow of the late Mr. M.J. Lebepe (“the deceased”). Prior to his passing away he was employed by Anchor Yeast (Pty) Ltd. and by virtue of his employment he was a member of the first respondent. The deceased passed away on 1 April 2004, whereafter the first respondent became liable to pay a death benefit to his dependants and/or nominees, which had to be distributed in terms of section 37C of the Act.

[2.2] The complainant and her three minor children were identified as dependants of the deceased. The first respondent decided to allocate R33 000 to the complainant, which was paid as a cash lump sum. The three children received the remaining benefit of approximately R200 000, which was split in three equal portions and placed into trust with the third respondent (to be more precise, each child received R66 558.59). The complainant, as guardian of the three children, receives a total of R675 per month from the third respondent in respect of maintenance for the children.

[3.0] Complaint

[3.1] The complainant is dissatisfied with the trustees’ decision to place the benefit payable to the three children into a trust. The complainant states that she was never consulted by the first respondent before this decision was made and that the trustees acted arbitrarily in setting up the trust because they deprived her of her right to administer the benefit on behalf of her children.

- [3.2] The complainant states that she receives R675 per month from the trust, but this amount is too little to cover the daily needs of her children. Therefore, it is not financially viable to place their benefit in the trust.
- [3.3] Further, the complainant avers that the first respondent was unjustified in setting up the trust considering that she can administer the monies herself, she passed grade 11 and has attended several financial management courses at educational and business institutions.
- [3.4] The complainant also submits that she approached an insurance company for a quotation on interest payments she would receive on an endowment policy to the value of R200 000. The insurer quoted a monthly interest payment of R1 200. The complainant also alleges that the insurer's initial advisory fee was far less than the monthly administrative costs deducted in respect of the childrens' trust.
- [3.5] Lastly, the complainant avers that the trustees of the first respondent ought to have consulted with her before setting up the trust and they should only have opted for the trust after obtaining her consent. The complainant requests that this tribunal order the trustees to terminate the trust and that the childrens' benefit is paid to her so that she can invest it on their behalf.

[4.0] Responses

- [4.1] The second respondent responded on behalf of the first and second respondents. It advises that the trustees' decision to place the childrens' benefit in trust was made

in terms of section 37C(2) of the Act and the trusts were set up in terms of the provisions of the Trust Property Control Act, 57 of 1988. The benefits accruing to the three children were placed in trusts with the third respondent, which were created for the sole purpose of preserving the capital until termination of the trusts in terms of the trust deeds.

[4.2] The second respondent then goes on to contrast trusts with endowment policies, which it says motivated the trustees to opt for placing the benefits in trust. This tribunal presumes that the distinction with endowment policies was made because the complainant referred to it in her complaint. Thus, the first and second respondents submit that:

[4.2.1] The sole purpose of the trust is to preserve the capital amounts until the beneficiaries reach a stipulated age, whereafter the remaining lump sum is paid out. The trust is not really an investment vehicle, so strictly speaking it is incomparable to an endowment policy, which is a pure investment vehicle. Therefore, the investment returns from a trust should not be compared to that generated through an endowment policy.

[4.2.2] Trusts are legal entities in terms of the Trust Property Control Act, 57 of 1988, so they afford greater security and protection of capital against “market erosions.” Trusts are managed by a board of expert trustees, but the same cannot be said in respect of endowment policies.

[4.2.3] The trusts were set up in the individual names of the minor children. On the other hand the endowment policy would be taken out in the complainant's name. This has the effect of changing the "ownership nature" of the childrens' benefit, which would conflict with the trustees' original intended allocation. Therefore, to the extent that the beneficiaries would be divested of the ownership of the benefits, the trustees express their "serious reservations and concerns."

[4.2.4] The trusts offer superior levels of flexibility since the capital amounts, while invested in the financial markets, can still be accessed on an individual needs basis. This means that the trusts allow for the payment of the childrens' schooling and medical needs when they arise. So, the capital is not locked up in the trust, which would be the case if it was invested in an endowment policy.

[4.2.5] An added advantage of trusts is that capital withdrawals are not deemed as capital gains in the hands of the drawee, whereas withdrawals from endowment policies would be regarded as capital gains.

[4.2.6] There is no predetermined minimum amount that can be drawn from trusts, so withdrawals and monthly incomes can be adjusted to suit changing circumstances. Endowment policies guarantee a fixed monthly income, meaning that it cannot cater for the changing circumstances of the beneficiaries. Therefore, while the endowment policy promises superior

immediate returns, the complainant would find that these returns will not be sustainable or sufficient in the longer term.

[4.2.7] Trusts are generally managed on a cost-effective basis, both from the administrative and income tax perspectives. The trustees were of the opinion that the charges for the trusts were much more cost-effective when compared to the immediate and ongoing charges to be levied on the endowment policy. The fee structure for the trusts is as follows:

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| - Upfront introduction fee: 1% of capital amount | R1 996.76 |
| - Income collection fee: 6% of generated interest
(i.e. currently R675) | R 40.50 per month |
| - Distribution fee charges
on any capital distribution: 1.5% | (varies depending on the
capital amount distributed) |
| - Annual administration fee: 1.2% on market value
of the assets | (varies depending on the
capital amount distributed) |

[4.2.8] The assets of each sub-trust are pooled together for investment purposes.

The effect of this pooling together means that each sub-trust benefits from the investment returns generated by the whole of the assets, which are then added to each sub-trust *pro rata*. This arrangement might not be applicable to endowments, where the capital is invested separately and is therefore “not immune” to the dangers of market fluctuations.

[4.2.9] The capital amounts in the trust are invested immediately upon receipt and

generate immediate monthly incomes. They are not subject to possible waiting periods.

[4.3] The trustees of the first respondent and the trustees of the trusts controlled by the third respondent re-considered the circumstances of the complainant and they are willing to increase the monthly interest income to a sum of R1 000, payable to the complainant with effect from 1 December 2005. They decided on this after considering that the complainant has stable and permanent employment and that her complaint is primarily about the investment of the capital and the subsequent inadequate monthly interest income she was receiving.

[4.4] The first and second respondents submit that the trustees “do not doubt” the complainant’s capability to handle the monies on behalf of the minor children, but she does not require the monies on the basis of an immediate and/or existing cash crisis. The trustees believe that the complainant identified an alternative investment vehicle that yields a much improved monthly income. Thus, for the benefit of the children, they have resolved to pay an increased monthly income from the trusts, i.e. R1 000. The trustees suggest that the complainant weigh the above implications, especially the income tax and ownership consequences, which would prejudice the minor children if the trusts were terminated and the capital paid out to the complainant.

[4.5] Lastly, the trustees of the first respondent pray that this tribunal confirm its decision to place the minor childrens’ benefits in trusts.

[4.6] The third respondent also responded to the complaint. They confirmed that the three minor childrens' benefits were placed in trust with them following the decision to do by the trustees of the first respondent. The third respondent had no input regarding the distribution of the death benefit or the trustees' decision to place the childrens' benefit in trust. The third respondent avers that the primary purpose of placing the funds into trusts is to provide for the beneficiaries' educational needs until they reach 21 years of age. The complainant, as the childrens' guardian, is able to request capital from the childrens' trust accounts to pay for their educational and other expenses, but she has not exercised this option despite being advised to do so in correspondence dated 10 May 2005.

[4.7] The complainant has received a total of R18 225.00 in monthly income distributions from September 2005 until June 2007. Subsequently, the board of trustees of the third respondent reconsidered the complainant's circumstances and have increased monthly income distributions to R1 000 per month effective from December 2005. The complainant will receive the arrear amounts owing to her soon.

[5.0] Determination and reasons therefor

[5.1] The crisp issue for determination in this complaint is whether the first respondent's trustees were justified in placing the minor childrens' benefit in trusts rather than paying it directly to the complainant, who is the childrens' mother and legal guardian. The third respondent's submission merely confirms that it had no say in the first respondent's decision to place the minor childrens' benefit in trust, so it

does not take this complaint any further and there is no need to deal with it any further here. Further, it is not the role of this tribunal to enter the realm of speculation regarding the advantages and disadvantages of trusts as compared to endowment policies, so despite the invitation by the first and second respondents for this tribunal to do so, it is not intended to venture there in this determination particularly since it is irrelevant given the facts of this complaint.

[5.2] This tribunal does however caution the trustees of the first respondent and the second respondent that they need to proceed with utmost care and diligence when considering any investment vehicle, even when assessing the perceived security offered by trusts. One needs only consider the tremendous financial loss incurred by the beneficiaries of the Living Hands Trust, whose monies were recklessly entrusted to the now defunct Fidentia Asset Management company, to realise that the decision regarding the investment of monies belonging to needy beneficiaries is a duty that requires the exercise of sober minds, utmost care and diligence by fund trustees.

[5.3] Section 37C of the Act imposes three important duties on the board of management of pension funds. First, it needs to identify the dependants and nominees of the deceased. Secondly, it needs to effect an equitable distribution of the benefit to the identified beneficiaries. Lastly, the board must determine an appropriate mode of payment of the benefit. In the present matter there is no complaint about the manner in which the board carried out its first two duties, so there is no need for this tribunal to address these aspects. The complaint concerns the final function, i.e. the

mode of payment of the childrens' portion of the death benefit.

[5.4] In terms of the fund's rules, rule 6.4 stipulates that payment of any death benefit will be made in terms of section 37C of the Act. In turn, sub-sections 37C(2), (3) and (4) of the Act regulate the different modes of payment of death benefits and reads as follows:

“(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.”

[5.5] Section 37C provides for four modes of payment. Sub-section 37C(1) contemplates direct payment of the benefit to the beneficiary. Sub-sections 37C(2), (3) and (4)

provide alternatives to direct payment to the beneficiary.

[5.6] When paying a benefit to a minor it is normally paid to the minor's guardian (see *Ramanyelo v Mineworkers Provident Fund* [2005] 1 BPLR 67 (PFA) at paragraph [12] ("the Ramanyelo case") and *Malatje v Idwala Provident Fund* [2005] 1 BPLR 45 (PFA) at paragraph 12). However, section 37C(2) provides that such a benefit may be paid into a trust and payment to such a trust shall constitute payment to a dependant or nominee. Section 37C(3) provides a further alternative to the board, in terms of which a benefit payable to a minor dependant or nominee may be paid in installments by the fund together with interest as determined by the board from time to time. Such an installment payment is further subject to the condition that upon the death of the beneficiary, or when the beneficiary reaches the age of majority, the remaining capital will be paid in full. Section 37C(4) permits installment payments in respect of major beneficiaries.

[5.7] Therefore, when paying a benefit to a minor child the board has three options. It may effect payment to the minor's guardian, or it may establish a trust from which a monthly income is paid to the guardian (section 37C(2)), or it may hold the benefit in the fund's portfolio and effect installment payments to the guardian (section 37C(3)). On a plain reading of the relevant sub-sections in the Act it is apparent that, before the board considers an alternative mode of payment, there must be good reason in law and fact as to why the option of direct payment should not be followed. Our courts have decided that only in instances where it is found that the guardian was not competent or qualified to administer a minor's benefit would the interests of

justice best be served by placing the benefit in a trust (see the authorities quoted in the *Ramanyelo* case, at paragraphs 14 and 15).

[5.8] it is evident from the decided court cases that the following factors need to be considered by the board when determining whether a guardian should administer monies on behalf of his or her minor child:

[5.8.1] The amount of the benefit;

[5.8.2] The ability of the guardian to administer the monies;

[5.8.3] The qualifications (or lack thereof) of the guardian to administer the monies;
and

[5.8.4] The benefit should be utilised in such a manner that it can provide for the minor until he or she attains the age of majority.

[5.9] Thus, there is a duty on the board to carefully consider the facts of each case before depriving the guardian of the right to administer a benefit on behalf of his or her minor child. In the present matter the trustees appear to have only considered the advantages of trusts contrasted with the allegedly more risky investment of monies in endowment policies. However, they failed to even consult with the complainant regarding her ability to manage the minor childrens' benefit. In fact, it would appear that they totally ignored the complainant when they decided on the mode of payment of the childrens' benefit. The complainant has stated that she is competent in managing money and that she attended at least three financial administration courses. It is also evident from the fact that the complainant, of her

own accord, investigated the returns she would receive from an endowment policy investment contrasted with the monthly interest she presently receives from the trusts that she is aware of the various investment options available to her. The first and second respondents actually admitted the complainant's competency to manage the childrens' benefit when they stated in their response, *inter alia*, that:

“...[the] Trustees do not doubt the capability of the complainant to handle the monies on behalf of the minor children...”

[5.10] Given that the trustees themselves admit that the complainant is capable of handling the childrens' benefit, it is astonishing that the board eventually decided to place the benefit in trust rather than pay it to the complainant for the benefit of the children. It is clear from the foregoing that the board failed to take into account relevant factors, considered irrelevant ones, and unduly fettered its discretion when making its decision on the mode of payment of the benefit. Thus, the board's decision regarding the mode of payment of the childrens' benefit must be set aside.

[5.11] Regarding the appropriate relief in this matter, this tribunal could send the matter back to the trustees to exercise their discretion afresh. This is in accordance with the general principle of administrative law that a court will be reluctant to substitute its own decision for that of another administrative authority, where the administrative action is found to be unreasonable or *ultra vires*. The norm is to refer the decision back to the administrative authority. However, exceptional or unique circumstances permit a judicial officer to substitute his or her decision for the administrative body. Baxter, *Administrative Law* (682–684) delineates four such circumstances, namely,

where:

- [5.11.1] Further delay would cause unjustifiable prejudice to the applicant;
 - [5.11.2] The tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again;
 - [5.11.3] The Court is in as good a position to make the decision itself; and
 - [5.11.4] The end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter.
- [5.12] On the facts of this matter the complainant has already been deprived of the right to manage and control the lump-sum childrens' benefit since June 2005. A further delay will cause unjustifiable prejudice to the complainant and it would be a waste of time. Further, section 30D of the Act enjoins this tribunal to dispose of complaints in an expeditious manner. As is evident from this determination, there is sufficient evidence before this tribunal to finally dispose of this matter. The evidence clearly shows that the end result is a foregone conclusion, given the admission by the trustees that the complainant is competent to manage the childrens' benefit, so it is clear that it would be a waste of time to ask the board to reconsider the matter.
- [5.13] In the circumstances, this tribunal will substitute its decision for that of the trustees of the first respondent. It is this tribunal's finding having considered all the arguments that the complainant is entitled to receive payment of the childrens' benefit (less amounts already paid and deductions permitted by the Act), so that

she can administer it on their behalf. The first respondent may further recover such monies from the third respondent.

[5.14] In the result, the following order is made:

[5.14.1] The first respondent's decision to place the three minor childrens' benefit into trust with the third respondent is hereby set aside.

[5.14.2] The first respondent is directed to pay to the complainant the remaining amount of the share of the childrens' death benefit in full, less any amounts already paid and further less any deductions permitted by the Act, together with interest thereon at the rate of 15.5% *per annum* from the date of this determination until the date of payment, within 4 weeks of this determination.

Dated at Johannesburg on this the day of 2007

Yours faithfully

Mamodupi Mohlala
Pension Funds Adjudicator