



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

CASE NO: PFA/GA/14151/2007/SM

In the complaint between:

AK KOWA

Complainant

and

CORPORATE SELECTION RETIREMENT FUND

First Respondent

LIBERTY LIFE

Second Respondent

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

INTRODUCTION

- [1] The complaint concerns the failure of the respondents to pay the complainant a portion of the death benefit that is payable to a minor child in the form of a lump sum following the death of her son, Mr E Kowa (“the deceased”).
- [2] The complaint was received by this office on 1 June 2007. Unfortunately there is no record which indicates that a letter acknowledging receipt thereof was sent to the complainant. On 12 June 2007 a letter was dispatched to the respondents giving them until 21 June 2007 to submit their responses to the complaint.
- [3] A joint response on behalf of the respondents was received from Mrs CP Makenete, the legal advisor of the second respondent on 27 June 2007. This response was forwarded to the complainant on 21 August 2007, in the event that she wished to make any further submissions. The complainant omitted to file any further submissions.
- [4] After considering the written submissions before this tribunal, it is considered 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 shall be repeated. The determination and reasons therefore appear below.

FACTUAL BACKGROUND

- [5] The complainant is the mother of the deceased who passed away on 25 November 2005. The deceased was employed by Paul's Muesli CC ("the employer") from 1 November 2000 and was a member of the first respondent from 1 November 2005 until he passed away.
- [6] Upon his death, a total lump sum death benefit of R62 158.47 became available for distribution to his beneficiaries. The deceased completed a nomination form on 21 November 2000 in terms of which he nominated the complainant to receive 100% of his death benefit.
- [7] After completing its investigation regarding the circle of beneficiaries the board of trustees decided to pay the complainant an amount of R3000.00 on the basis that she was nominated as a beneficiary by the deceased. The balance was placed in a trust for the benefit of the deceased's minor child, Kabelo Justice Kowa. A monthly income of R300.00 is being paid to the complainant from the trust for the maintenance of the deceased's minor child.

COMPLAINT

- [8] The complaint is that the trustees of the first respondent erred in deciding to place the minor child's share in a trust. The complainant contends that the deceased nominated her as the sole beneficiary of his death benefit. Therefore, the

complainant requests that the respondents should pay her the whole amount of the death benefit in the form of a lump sum as she is taking care of the deceased's minor child. She submitted that this is because the deceased's wife also passed away. Further, the complainant completed an affidavit in which she stated that she needs a lump sum payment as the amount of R300.00 that is being paid to her is not enough to buy food and to pay for school fees.

RESPONSE

[9] Mrs CP Makenete submitted that the board of trustees was under a duty to ascertain which persons qualify as dependants of the deceased at the time of his death in order to make an equitable distribution of the benefit. She indicated that a dependant can be a spouse, children or persons who were financially dependant on the deceased at the time of his death. She pointed out that a member may nominate a person who is not dependant on him to receive a portion of his benefit but such a person will only be considered after the needs of the dependants have been addressed.

[10] She submitted that the decision of the board was based on the fact that it established that the deceased had one legal dependant (Kabelo Kowa) who was 4 years at the time of his death. Further, the board established that the complainant was nominated to receive 100% of the death benefit prior to the deceased's marriage and the subsequent birth of the minor child. She further pointed out that the deceased neglected to update his beneficiary nomination form even though his

circumstances changed following his marriage. Further, she stated that the board established that the complainant was employed and earning an income at the time of the deceased's death.

[11] She further indicated that legal dependants are considered before nominees in terms of section 37C of the Act. In this matter, she pointed out that the complainant is only a caregiver for the deceased's minor child and she is not a legal guardian.

[12] Therefore, she submitted that the board decided to make a token payment to the complainant in the sum of R3000.00 as she was nominated as a beneficiary. The balance was placed in a trust for the benefit of the deceased's minor child. Further, she indicated that the trust makes provisions for school fees to be paid in addition to the monthly income of R300.00 that is being paid to the complainant. Moreover, she stated that the complainant may contact Fairheads, the administrators of the trust, in order to request a review of the minor child's maintenance requirements.

DETERMINATION AND REASONS THEREFOR

[13] Section 37C of the Act 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.

[14] *In casu*, the issue that falls for determination is whether the board of trustees exercised its discretion properly and reasonably in deciding to place the minor child's share in a trust. The complainant submitted that the whole amount that is payable to the deceased's minor child should be paid to her in a lump sum as she is taking care of the minor child. Further, she argued that the amount should be paid to her as the deceased nominated her as the sole beneficiary of his death benefit.

[15] It is important to point out that although the deceased may have nominated a certain beneficiary in his nomination form to receive his death benefit, it does not necessarily imply that a benefit will in fact be awarded to her because the deceased's intention as contained in his nomination form is only one of the factors taken into consideration when allocating a death benefit (see *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 3705J-3706C).

[16] Thus, the mere fact that the complainant was nominated by the deceased to receive 100% of the death benefit does not necessarily imply that the whole amount of the death benefit will be awarded to her. In any event, the complainant was nominated to receive the whole amount of the death benefit before the birth of the deceased's minor child, who qualifies as a dependant in terms of section 37C of the Act.

Therefore, the complainant cannot claim that she is entitled to receive the whole amount of the death benefit merely on the grounds that the deceased nominated her to receive 100% of his benefit.

[17] With regards to the placement of the minor child's share in a trust, section 37C(2)(3) of the Act regulate the mode of payment of a death benefit to a minor dependant or minor nominee. It 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, 1998, (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. ...”

[18] When paying a benefit to a minor, the benefit is normally paid to the guardian of the minor. As a legal guardian of a minor child, in 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 child's benefit to her/his legal guardian should be done in the ordinary cause of events unless there are cogent reasons for depriving the guardian of the duty to take charge of her/his minor child's financial affairs and the right to decide how the benefit due to the minor should be utilised in the best interests of

the minor child (see *Malatjie v Idwala Provident Fund* [2005] 1 BPLR 45 (PFA) at paragraph 12 and *Dhlamini v Smith and Another* [2003] 7 BPLR 4894 (PFA) at 4901C-F).

[19] It is trite law that the common law grants a legal guardian, as against a custodian or a care giver, a greater responsibility and authority to make decisions regarding the welfare of a minor child under his/her guardianship, subject to those decisions being in the best interests of the minor. (see *Robinson v Boehringer-Ingelheim Pension Scheme and Another* [2003] 10 BPLR 5234 (PFA) at 5237I-J). *In casu*, it is common cause that the minor child was not survived by any legal guardian as both of his parents passed away. The deceased's minor child is being cared for by the complainant who is his grandmother.

[20] It is clear that the complainant is acting as the minor child's guardian as she is taking care of his daily needs. The respondents submitted that the amount of the death benefit that is payable to the deceased's minor child cannot be paid to the complainant in a lump sum as she is a caregiver and not a legal guardian of the minor child.

[21] However, guardianship is used in two senses. In the first sense, the broader definition of guardianship is equated with parental authority and includes all other responsibilities. This is typically used to describe the legal status of the parents of a marital child in their capacity as natural guardians. In the second sense, the narrower definition, guardianship means that portion of parental authority which

relates to the control and administration of the child's estate (see *Family Law* issue 47-May 2007 *Young Persons* at page 27). Further, section 18(1)(2) of the Children's Act No 38 of 2005 sets out the parental responsibilities and rights in the following terms:

"(1) A person may have either full or specific parental responsibilities and rights in respect of a child.

(2) The parental responsibilities and rights that a person may have in respect of a child, include the responsibility and the right-

(a) to care for the child;

(b) to maintain contact with the child;

(c) to act as guardian of the child; and

(d) to contribute to the maintenance of the child."

(3) Subject to subsections(4) and (5), a parent or other person who acts as guardian of a child must-

(a) administer and safeguard the child's property and property interests

(b) ..."

(My Emphasis)

[22] Thus, any person who administers and safeguards a minor's property and property interests should be regarded as a guardian. However, this should depend on the nature of the relationship between the person concerned and the minor child. In this instance, the complainant is the grandmother of the deceased's minor child. It is

clear that the complainant is the one who attends to all the daily needs of the deceased's minor child. It is also clear the relationship between the complainant and the minor child is not temporary as in the case of a temporary care-giver. Therefore, I find that the complainant is in the same position as that of a natural guardian.

[23] Moreover, the approach of the board of trustees in this matter leaves much to be desired. There is a very onerous duty on the board to carefully consider the facts of each case before depriving any person who is acting as a guardian of a minor child to administer the financial affairs of the minor child. The board fettered its discretion by automatically placing the minor child's share in a trust without investigating the ability of the complainant to administer the affairs of the deceased's minor child. It has been held that the board has to consider certain factors when determining whether a guardian should administer moneys on behalf of his minor child. Although these principles were enunciated in a situation where the complainant was a legal guardian, I believe that they apply with equal force in the present matter. It was held in *Ramanyelo v Mine Workers Provident Fund* [2005] 1 BPLR 67 (PFA) at paragraph 16, that the board has to take into account the following factors:

- The amount of the benefit;
- The ability of the guardian to administer the moneys;
- The qualification (or lack thereof) of the guardian to administer the moneys; and
- 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.

[24] *In casu*, the only reason advanced by the board for its decision to place the minor's share in a trust was because the complainant is not a legal guardian of the minor. There is nothing which suggests that the board made an attempt to investigate her ability to administer the financial affairs of her grandchild, her qualification and the nature of her relationship with the minor child. Further, the amount involved and the cost implications of placing the minor child's share in a trust, vis-à-vis those other suitable options, are highly relevant considerations that the board of trustees should take into account (see *Dhlamini v Smith and Another* [2003] 7 BPLR 4894 (PFA) at paragraph 23).

[25] Moreover, the best interests of the minor child are paramount, and prevail over all other considerations as it has been held in a number of decisions (see *Fletcher v Fletcher* 1948 (1) SA 130 (A) at 135 and *Hahlo Husband and Wife* 391). What is actually in the best interests of a child is obviously a question of fact in each case. It has been held that a child's vital need for a sense of stability, security and continuity, which finds expression in the court's awareness of the importance of not subjecting the child to unnecessary and disruptive moves is one of the most important considerations in this regard (see FS Steyn J in *French v French* 1971 (4) SA 298 (W) and *Fletcher-supra* at 135-137). It should be pointed out that it might be in the best interests of a minor child for the board to place his/her share in a trust, but this decision should be taken after all relevant factors have been carefully considered.

[26] Section 7(1) of the Children's Act sets out some of the factors that the board must

take into account when considering what is in the best interests of a minor child who is being cared for by his natural parents or any other person. The apposite portion of section 7(1) reads as follows:

“(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-

- (a) The nature of the relationship between-
 - (i) the child and the parents, or any specific parent; and
 - (ii) the child and any other care-giver or person relevant in those circumstances;
- (b) the attitude of the parents, or any specific parent, towards-
 - (i) the child; and
 - (ii) the exercise of parental responsibilities and rights in respect of the child;
- (c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
- (d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-
 - (i) both or either of the parents; or
 - (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
 - (iii) ...”

[27] Thus, in the light of the fact that the board fettered its discretion by failing to consider all relevant factors set out in this determination, I set aside the decision of the board. The interests of justice are best served by remitting the matter to the

board of trustees for a fresh exercise of its discretion in respect of its failure to conduct a diligent investigation regarding the mode of payment in respect of the deceased's minor child.

RELIEF

[28] The order of this tribunal is as follows:

[28.1] The decision of the board of the first respondent to place the minor child's share in a trust is hereby set aside.

[28.2] The first respondent is directed to re-exercise its discretion in respect of the mode of payment to the deceased's minor child having regard to the factors mentioned in this determination.

[28.3] The first respondent is further directed to determine whether the complainant should be deprived of the right to administer monies on behalf of the deceased's minor child having regard to the factors stated in this determination within six weeks of the date of this determination.

Dated at Johannesburg on this the day of 2008

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR