



4th Floor
Riverwalk Office Park
Block A, 41 Matroosberg Road
Ashlea Gardens, Extension 6
PRETORIA
SOUTH AFRICA
0181

P.O. Box 580, **MENLYN**, 0063
Tel: 012 346 1738, Fax: 086 693 7472
E-Mail: enquiries@pfa.org.za
Website: www.pfa.org.za

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Dear Madam,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,
24 OF 1956 (“the Act”): L MAHOMED (“complainant”) v ARGUS PROVIDENT
FUND (“respondent”)**

[1] INTRODUCTION

- 1.1 This complaint concerns the distribution of a death benefit by the respondent following the death of its member.

- 1.2 The complaint was received by this Tribunal on 4 February 2015. A letter acknowledging receipt of the complaint was sent to the complainant on 9 February 2015. On the same date, a copy of the complaint was forwarded to the respondent, requesting it to file its response by 9 March 2015. A response was received from the respondent on 11 February 2015. On 11 March 2015, a copy of the respondent’s response was forwarded to the complainant requesting her to file further submissions (if any) on or before 26 March 2015.

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act, 24 of 1956. The service offered by the Pension Funds Adjudicator is free to members of the public.

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Further submissions were received from the complainant on 12 March 2015.

- 1.3 Having considered the written submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

[2] **FACTUAL BACKGROUND**

- 2.1 The complainant is the daughter of the late Ms ZBAH Cassan (“the deceased”), who passed away 14 August 2014. The deceased was a member of the respondent at the time of her demise. The deceased is survived by the following:

- Ms L Mahomed (complainant) - Deceased’s Daughter
- Ms Pearce - Deceased’s Daughter

- 2.2 Subsequent to the deceased’s demise, a death benefit in the amount of R2 429 129.89 became available for distribution in terms of section 37C of the Act. The respondent made an allocation and distributed the death benefit as follows:

- Complainant - R70 839.40
-R446 621.81 to be transferred to an annuity to provide a monthly income
- Ms Pearce - R70 839.41
-
R1 840 829.27 to be transferred to an annuity to provide a monthly income

[3] **COMPLAINT**

- 3.1 The complainant is dissatisfied with the allocation and distribution of the death benefit.

- 3.2 She mentioned that the deceased nominated her as a beneficiary. She states that she is unaware of what she signed at a meeting with the board of the respondent. She submits that she is dissatisfied with the inequitable distribution of the benefit. She states that she is in need of cash and therefore has not agreed to the benefit allocation or the investment of such benefit.
- 3.3 The complainant is requesting this Tribunal to investigate the distribution of the benefit and order the respondent to re-distribute the benefit equitably and not in the form of an annuity but in cash.

[4] RESPONSE

- 4.1 The respondent submitted that the deceased died whilst in service of Independent Newspapers (Pty) Ltd employed at their Durban operation. The deceased indicated on her beneficiary form, her two daughters and that 100% of her benefit needed to be paid to the complainant who is the youngest daughter. It stated that the Principal Officer of the respondent met with the two daughters and the executor of the estate at the Human Resources Department of the Durban operation.
- 4.2 The board's findings on the circumstances of the daughters are as follows:

Circumstances regarding Pearce

She is the older daughter of the deceased. She was unable to work as she suffered from a medical condition and had other medical problems which could not be disclosed. Pearce would stay on in the flat that she occupied with the deceased prior to her death. It was found that Pearce was married but no divorce order could be found and her spouse could not be traced. A life policy covered the outstanding bond on the flat. Pearce needed special security measures as she tended to disappear for lengthy periods and visitors needed to be closely monitored. It was established that she needed to continue on the medical aid the deceased put her on and all living expenses needed to be covered. No cash was

allowed to be paid to her as she needed monthly income for her living expenses and her finances would be managed by the executrix of the deceased's estate.

Circumstance regarding Ms L Mahomed, the complainant

She is the younger daughter of the deceased. She was married and living with her husband and children. She was a housewife and dependent on her husband and not the deceased. She needed a monthly income to enable her to have medical aid as she left her husband from time to time and he would then stop her medical aid contribution. The complainant also insisted that she needed R50 000.00 in cash from the benefit to donate to a charity in honour of the deceased.

4.3 The respondent reflected the benefit as follows;

Accumulated Benefit	R1 675 874.53
Insured Benefit	<u>R 753 255.36</u>
Total	<u>R2 429 129.89</u>

The member's own contribution totalled R141 678.81. The respondent submitted that if the total amount was distributed as cash, the tax deductible would have been R612 162.13 which would have reduced the distributable benefit to R1 816 967.76. The board obtained advice from a financial advisor who calculated the amount required for investment to cover the monthly expenses of Pearce. The advisor calculated the amount as being R1 840 829.27 which is more than the amount that would remain after the tax deduction in a cash payment.

4.4 The respondent submitted that the board agreed to the following distribution. The deceased's own tax free contribution of R141 678.81 to be distributed equally between the two daughters. Therefore, R70 839.41 was paid to the executrix of the estate to take care of the maintenance needed on the deceased's flat and outstanding accounts, and R70 839.40 was paid to the complainant to enable her to make the donation in the deceased's honour and some cash for her to spend. The board agreed that R1 840 829.27 would be transferred to an annuity to provide a monthly income, payable to a trust created by the

executrix to cover the monthly expenses of Pearce. The board further agreed that R446 621.81 would be transferred to an annuity to provide a monthly income for the complainant to cover the cost of her medical aid contributions.

- 4.5 The respondent submitted that considering the current situation the matter will be referred to the board to reconsider the method of payment of the benefit but not necessarily the split thereof as the board cannot be held responsible for decisions made by the beneficiaries/dependants after the fact as opposed to what the situation was at the time of her death.

Complainant's further submissions

- 4.6 The complainant's legal representative submitted a response on her behalf. It submitted that it is unacceptable that a fund makes an apportionment of benefits at its own discretion. It stated that the fund unilaterally makes a decision to benefit in some manner, as investments were done on behalf of the beneficiaries and commissions were involved. It stated that the inequitable apportionment of benefits needs to be revised.

[5] **DETERMINATION AND REASON THEREFOR**

Introduction

- 5.1 The issue for determination is whether or not the respondent allocated the death benefit in terms of section 37C of the Act.

Payment of a death benefit

- 5.2 The payment of a death benefit is regulated in terms of section 37C of the Act, which provides as follows:

“37C. Disposition of pension benefits upon death of member

(1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit (other than a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules) payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section (19)(5)(b)(i) and subject to the provisions of section 37A(3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:

(a) ...

(b) ...

(bA) If a member has a dependant and the member has also designated in writing to the fund a nominee to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the fund shall within twelve months of the death of such member pay the benefit or such portion thereof to such dependant or nominee in such proportions as the board may deem equitable: Provided that this paragraph shall only apply to the designation of a nominee made on or after 30 June 1989: Provided further that, in respect of a designation made on or after the said date, this paragraph shall not prohibit a fund from paying the benefit, either to a dependant or nominee contemplated in this paragraph or, if there is more than one such dependant or nominee, in proportions to any or all of those dependants and nominees.”

5.3 It is the board’s responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the beneficiaries, to thereafter decide on an equitable distribution and finally to decide on the most appropriate mode of payment of the benefit payable. Their duties in this regard were summarised in *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA), at paragraph 24 and 25, as follows:-

“When making an “equitable distribution” amongst dependants the

board of management has to consider the following factors:

- the age of the dependants;
- the relationship with the deceased;
- the extent of dependency;
- the wishes of the deceased placed either in the nomination form and/or his last will; and
- financial affairs of the dependants including their future earning capacity potential.

In making their decision, trustees need to consider all relevant information and ignore irrelevant facts. Further, the trustees must not rigidly adhere to a policy or fetter their discretion in any other way.”

5.4 Section 1 of the Act defines a dependant as follows:

“**Dependant**”, in relation to a member, means –

- (a) a person in respect of whom the member is legally liable for maintenance;
- (b) a person in respect of whom the member is not legally liable for maintenance, if such person –
 - (i) was in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;
 - (ii) is the spouse of the member,
 - (iii) is a child of the member, including a posthumous child, an adopted child and a child born out of wedlock.
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died.”

5.5 The law recognises three categories of dependants based on the deceased member’s liability to maintain such a person, namely, legal dependants, factual dependants and future dependants. In principle, a member is legally liable for the maintenance of a spouse and children as they rely on the member for the necessities of life. In the case of factual dependants, where there is no duty of support, a person might still be a dependant if the deceased in some way contributed to the

maintenance of that person. The person alleging to be a factual dependant will have to prove that he was dependent on the deceased, despite the deceased not having a legal duty to maintain at the time of the member's death.

5.6 Following the death of the deceased, the board of the respondent conducted an investigation in terms of section 37C of the Act. The investigation revealed that the deceased was survived by the complainant and her sister, Pearce. Pearce was financially dependent on the deceased as she was unable to work due to medical reasons. She was also living with the deceased at the time of her death. The investigation also revealed that at the time of death, the complainant was not financially dependent on the deceased but rather on her spouse. Further, the complainant has not adduced any evidence relating to her financial dependency on the deceased. However, in her submission, the complainant stated she is an unemployed mother of three. She is also currently in the process of divorcing her husband. Further, the complainant was also nominated as a 100% beneficiary in the deceased's nomination of beneficiary form.

5.7 The complainant is aggrieved by the first respondent's decision to purchase an annuity on her behalf. She contends that she is in need of cash and not an investment. In the present matter this Tribunal is seized with deciding whether or not the intended payment of a major dependant's benefit by deciding to purchase an annuity on her behalf was lawful and equitable. Section 37C(2) of the Act regulates the modes of payment of benefits to dependants and provides that:

“(a) For the purposes of this section, a payment by a registered fund for the benefit of a dependant or nominee contemplated in this section shall be deemed to be a payment to such dependant or nominee, if payment is made to-

(i) a trustee contemplated in the Trust Property Control Act, 1988, nominated by-

- (aa) the member;
 - (bb) a major dependant or nominee, subject to subparagraph (cc);
or
 - (cc) a person recognised in law or appointed by a Court as the person responsible for managing the affairs or meeting the daily care needs of a minor dependant or nominee, or a major dependant or nominee not able to manage his or her affairs or meet his or her daily care needs;
 - (ii) a person recognised in law or appointed by a Court as the person responsible for managing the affairs or meeting the daily care needs of a dependant or nominee; or
 - (iii) a beneficiary fund.
- (b) No payments may be made in terms of this section on or after 1 January 2009 to a beneficiary fund which is not registered under this Act.” (Own underlining)

5.8 In distributing death benefits, the board of a fund may pay benefits allocated to a minor dependant to such a dependant’s legal guardian, trust fund or a beneficiary fund. Its preference to pay such a benefit in any one of the methods set out above must be informed by reason and such a dependant’s best interests. In the same manner, a major dependant’s benefits may be paid to him/her in cash or into a beneficiary or trust fund. The preferred method of payment must be duly cognisant of such beneficiary’s best interests. There must also be a link between the preferred method of payment and the rationale behind such preferred payment, more so in instances where payment into a beneficiary or trust fund is elected by the trustees over cash payment to such a dependant’s legal guardian (in a minor dependant’s case) or the dependant him/herself (in a major dependant’s case).

5.9 Section 37C(4) regulates the payment of a major dependant’s benefit into a trust or beneficiary fund and provides that:

- “(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.”

5.10 Therefore, as a general principle in instances where a major dependant’s benefit allocation will not be paid to her in a lump sum, she must give written prior consent thereto. Prior consent of the beneficiaries should be obtained before the first respondent purchases annuities on their behalf. The fund must investigate the concerned major dependant’s circumstances and his/her ability to manage his financial affairs. Where its investigations reveal a dire inability to manage financial affairs by the major dependant concerned, it may consider other options rather than to pay the benefit in cash to the beneficiary. However, in this instance the principles mentioned above must be applied before the funds are invested in an annuity on behalf of the beneficiaries.

5.11 In light of the above, this Tribunal is not satisfied that the board of the first respondent took into account relevant factors and ignored irrelevant factors in the allocation of the deceased’s death benefit. This Tribunal concludes that the death benefit was not properly allocated to the dependants of the deceased and finds it appropriate to set aside

the board's decision in allocating the death benefit and the mode of intended payment.

[6] ORDER

6.1 In the result, the order of this Tribunal is as follows:

6.1.1 The decision of the board of the first respondent in its allocation of the death benefit and mode of intended payment is hereby set aside;

6.1.2 The first respondent is ordered to reconsider its decision and to investigate the complainant's financial affairs and dependency on the deceased based on the reasons mentioned above within eight weeks of this determination;

6.1.3 The board of the first respondent is ordered to conduct an investigation into the beneficiaries' competence to manage their benefits and to determine the appropriate mode of payment in terms of section 37C(2) of the Act, within eight weeks of this determination; and

6.1.4 The first respondent is ordered to pay the death benefit to the deceased's beneficiaries, within two weeks of completion of the exercises in paragraphs 6.1.2 and 6.1.3 above.

DATED AT PRETORIA ON THIS 23RD DAY OF APRIL 2015

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M Filing: High Court

Complainant represented by Juthika Hariram and Associates

Respondent unrepresented