



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 / 748 4000
Fax: 086 693 7472
E-Mail: enquiries@pfa.org.za
Website: www.pfa.org.za

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REGISTERED POST

Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): C DIENER (“complainant”) v PSG WEALTH RETIREMENT ANNUITY FUND (“first respondent”) AND PSG LIFE LIMITED (“second respondent”)

[1] INTRODUCTION

- 1.1 This complaint concerns the distribution of a death benefit by the first respondent following the death of its member, Mr A Naude (“the deceased”).
- 1.2 The complaint was received by this Tribunal on 7 February 2017. On 15 February 2017, an acknowledgement letter was sent to the complainant. On the same date, the complaint was dispatched to the respondents requesting them to file their responses by 15 March 2017. A response was received from the second respondent on 14 March 2017. On 16 March 2017, the second respondent’s response was sent

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to the complainant requesting her to file further submissions by 29 March 2017. No further submissions were received from the parties.

- 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 deceased was a member of the first respondent during his lifetime. The complainant is the life partner of the deceased. The deceased died on 6 April 2015 and is survived by the following:

- | | |
|--------------------------|-----------------------|
| - C Diener (complainant) | Life partner; |
| - D Diener | Biological child; |
| - I Naude | Biological child; |
| - J Naude | Biological child; |
| - T Roos | Biological child; and |
| - SH Naude | Mother |

- 2.2 Following the death of the deceased, a death benefit in the amount of R1 653 640.00 became available for distribution. The first respondent allocated the death benefit to the deceased's beneficiaries as follows:

- | | |
|--------------------------|---------|
| - C Diener (complainant) | 80%; |
| - D Diener | 5%; |
| - I Naude | 0%; |
| - J Naude | 5%; |
| - T Roos | 0%; and |
| - SH Naude | 10% |

- 2.3 The allocation of the death benefit to the deceased's beneficiaries is the subject matter of this complaint.

[3] **COMPLAINT**

- 3.1 The complainant is dissatisfied with the allocation of the death benefit to D Diener, J Naude and SH Naude. She stated that SH Naude was awarded an amount of R625 632.00 from the Discovery Retirement Annuity Fund. She mentioned that 5% of the total amount of R3 083 838.34 being R154 191.91 was allocated to D Diener and J Naude from the Discovery Retirement Annuity Fund. She stated that the first respondent should not be influenced by the decision of the Discovery Retirement Annuity Fund. She submitted that the first respondent must take into consideration that she is 57 years old and is nearing retirement. She mentioned that SH Naude has 6 children who still support her in various ways and the deceased did not provide the majority of the support to her. She stated that D Diener and J Naude are still young and employed.
- 3.2 The complainant requests this Tribunal to allocate the entire death benefit to her.

[4] RESPONSE

- 4.1 The second respondent submitted that the first respondent is entitled to take note of the decisions made by another retirement fund as this directly impacts on the financial circumstances of the dependants. It stated that the first respondent adjusted the allocation to SH Naude down following the determinations in the complaints involving the Discovery Retirement Annuity Fund (**PFA/LP/00025182/2016/UM** and **PFA/LP/00025302/2016/UM**).
- 4.2 The second respondent submitted that in allocating 80% (R1 322 912.00) of the death benefit to the complainant, the first respondent took note of her age and life partnership of many years with the deceased. The first respondent also took into account the allocation of 69% of R3 083 838.34 from the Discovery Retirement Annuity Fund to the complainant. It mentioned that the first respondent noted the fact

that the complainant is employed and has received various other benefits from the estate of the deceased.

- 4.3 The second respondent submitted that the first respondent initially awarded 21% of the death benefit to SH Naude, however because of the substantially increased allocation from the Discovery Retirement Annuity Fund, the allocation was decreased to 10%. It stated that the first respondent decided on this allocation as it will assist SH Naude with additional living expenses and that her children contribute to her support. It submitted that SH Naude is a vulnerable dependant as she is not able to work and the first respondent felt it appropriate to make an allocation to her.
- 4.4 It submitted that D Diener was taken care of by the deceased in that he was not paying rent in a property owned by the deceased and received various other benefits. He was factually dependent on the deceased. It mentioned that J Naude was also partially factually dependent on the deceased as the accommodation he and his family lived in was subsidized by the deceased.
- 4.5 The second respondent submitted that the first respondent disregarded the deceased's wishes of nominating his estate as a beneficiary to his death benefit. It mentioned that the deceased's nomination read together with his will conflicts with the complainant's allegation that the deceased wanted her to have the annuities as they discussed before he passed away.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

- 5.1 The issue for determination is whether or not the first respondent allocated the death benefit fairly and equitably to the deceased's beneficiaries.

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, non-legal 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 non-legal 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, a death benefit in the amount of R1 653 640.00 became available for distribution. The board of the first respondent allocated the death benefit to the deceased’s beneficiaries as stated in paragraph 2.2 above. The complainant is dissatisfied with the allocation of a portion of the death benefit to D Diener, J Naude and SH Naude as they were paid the death benefit from the deceased’s Discovery Retirement Annuity Fund. It is common cause that the deceased and the complainant were living together as partners and shared the same household at the date of death. In *casu*, the complainant qualifies as a legal dependant of the deceased in terms of section 1(b)(ii) of the Act in that they shared the same residence and were mutually dependent on each other. The deceased had a duty to maintain her. The deceased’s mother on the other hand, qualifies as a dependant in terms of section 1(b)(i) of the Act as the deceased was supporting her financially.
- 5.7 D Diener and J Naude above qualify as dependants in terms of section 1(b)(iii) of the Act. Sub-section 1(b)(iii) was introduced to include *inter alia* major children of the deceased who at the date of death were not

dependent on the deceased for maintenance. Therefore, D Diener and J Naude fall within the ambit of paragraph 1(b)(iii) and consequently qualify for allocation of the death benefit (see *Bruce v Lifestyle Retirement Annuity Fund* [2001] 7 BPLR 2198 (PFA)). Therefore, any decision which favours the complainant's needs more than the needs of D Diener and J Naude in the distribution of the death benefit would be unreasonable and unjustifiable.

5.8 Even though the complainant did not mention her allocation of the death benefit from the Discovery Retirement Annuity Fund, the submissions before this Tribunal indicate that she was allocated 69% of the R3 083 838.34 from the Discovery Retirement Annuity Fund and she received other benefits from the deceased's estate. Thus, it is clear that in respect of the current and future earning capacity, the complainant is in a far better position than D Diener, J Naude and SH Naude. This Tribunal would like to highlight that the object behind section 37C of the Act is to ensure that those persons who were dependent on the deceased are not left destitute by the death of the member. It is clear in this instance that the complainant was not left destitute as a result of the death of the deceased. This Tribunal is wary of the complainants who lodge their complaints with the aim of defeating the entire purpose of section 37C of the Act, which is the case in this complaint and cannot be seen to be condoning such. This Tribunal strongly condemns the conduct of the complainant as it demonstrates the greed of some dependants.

5.9 The board of the first respondent took into account the financial circumstances of the deceased's beneficiaries when allocating the death benefit as stated in paragraph 2.2 above. In *casu*, the maintenance needs of the complainant would be duly catered for by the benefits she received from the deceased's estate and a portion of the death benefit allocated to her from the Discovery Retirement Annuity Fund, based on the first respondent's investigations.

5.10 The second respondent mentioned that the deceased nominated his estate as a beneficiary. This Tribunal would like to highlight that a death benefit does not form part of the deceased's estate. The first respondent can only pay the death benefit into the deceased's estate if there are no dependants and/or nominees as well as where a nominee has been allocated a portion of the death benefit and the remaining balance to be paid into the deceased's estate (see *Jacobs NO v Central Retirement Annuity Fund and Another* [2001] 1 BPLR 1488 (PFA)). In this instance, the deceased has dependants and therefore the nomination failed to act as a guiding tool in assisting the board in the exercise of its discretion.

5.11 In light of the above, this Tribunal is satisfied that the board of the first respondent took into account relevant factors and ignored irrelevant factors and did not fetter its discretion in the allocation of the death benefit to the deceased's beneficiaries as identified. This Tribunal is satisfied that the death benefit was allocated properly to the dependants of the deceased and there is no reason to set aside the board's decision.

[6] ORDER

1. In the result, the complaint cannot succeed and is dismissed.

DATED AT PRETORIA ON THIS 19TH DAY OF MAY 2017

MA LUKHAIMANE

PENSION FUNDS ADJUDICATOR