

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/1074/2000/NJ

In the complaint between:

A R Kipling

Complainant

and

Unilever SA Pension Fund

Respondent

INTERIM RULING IN TERMS OF SECTION 30J OF THE PENSION FUNDS ACT OF 1956

1. This is a complaint lodged with the Office of the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act 24 of 1956 (“**the Act**”). The complainant is dissatisfied with the distribution of a death benefit in terms of section 37C(1)(bA) of the Act, in particular, the amounts awarded to his minor children.
2. No hearing was held in this matter. An investigation under my supervision was conducted by my investigator, Naleen Jeram. Accordingly, in handing down this ruling I have relied exclusively on the documentary evidence and written submissions gathered during the course of our investigation. For reasons which appear below, I have chosen to hand down an interim ruling.
3. The complainant is Andrew Robert Kipling in his capacity as father and guardian of Fiona Kipling (3 years of age) and Bronwyn Kipling (8 years old). The complainant together with his children are residing at Benoni, Gauteng.
4. The respondent is Unilever SA Pension Fund, a pension fund duly registered under the Act (“**the fund**”). The fund is represented by its principal officer, Mr E D Erasmus.

5. The complainant and Ms Gaile Kipling were married to each other in community of property on 12 March 1990. Two minor children were born from this union, namely, Fiona and Bronwyn. Ms Kipling was a member of the respondent fund. The marital relationship between the parties had broken down and Ms Gaile Kipling left the common household in 1998 together with the minor children. On 18 February 1999, a divorce summons was issued out of the High Court of South Africa (Witwatersrand Local Division), in terms of which the complainant sought a divorce order against Ms Kipling. However, prior to the divorce being finalized, Ms Kipling passed away on 17 March 1999 as a result of a motor vehicle accident.

6. A death benefit of R563,164.49 became available for distribution payable by the fund. The trustees of the fund in determining the circle of beneficiaries and making an equitable distribution amongst them, considered the following information:
 - 6.1. The deceased was survived by her two minor children, Fiona and Bronwyn. She was also survived by her estranged spouse, the complainant. On 14 January 1999, the deceased nominated her twin sister, Karen Dettmer as her sole beneficiary and requested 100% of her benefit to be awarded to her. Ms Dettmer, after the death of the deceased submitted the following statement under oath:

I would like the board of trustees to make the right decision as to what should happen to the pension fund that my twin sister, Gail Kipling, left benefit (*sic*) to me. My sister knew me very well, as she did Andrew Kipling, and I am sure she was of the right state of mind and knew what was best if anything happen to her that I would look after her two children (9 & 3) as I would my own. The children are my main concern, and I can only go by Andrew Kipling word that he will buy house for the kids. How much his word is worth is a chance I will have to take. I do not feel that the fund should be put in a trust for the kids as that does not help them financially now. There are four people living in a two bedroom flat and as far as I am concerned they deserve better than that. I leave the decision up to the trustees to decide who is capable of handling the funds for the benefit of the children. My sister did not desert A Kipling, she left because he beat her.

6.2. The trustees also considered the divorce summons, in which the complainant requested that custody of the two minor children be awarded to the deceased and a maintenance order be made in terms of which he would have paid R300 per month per child.

6.3. After the death of the deceased, the two minor children commenced residing with the complainant who became responsible in law for their maintenance and upkeep.

7. Based on the above information, the fund decided to award 60% of the benefit (after deductions for a housing loan and funeral expenses (R300,298.28) to Ms Dettmer. The two minor children were awarded 20% each (R112,632.90) of the benefit. The minor children's benefits were placed in a trust administered by Fedsure Trust (Pty) Ltd. The complainant in his capacity as guardian commenced receiving a monthly income of R800.00 per trust and in terms of the trust agreement, the capital is only payable upon the respective minors reaching the age of 25. In summary, the distribution was as follows:

GROSS BENEFIT		563,164.49
LESS:	DEATH BENEFIT LUMP SUM	337,898.69
	- ADVANCE TO FATHER	17,400.00
	- TAX	0.00
	- KAREN DETTMER	300,298.28
	- LOAN STANDARD BANK - HOUSING	<u>20,200.41</u>
AVAILABLE FOR PURCHASE OF ANNUITIES		225,265.80
	C/O KAREN DETTMER	
	- CHILD	112,632.90
	- CHILD	<u>112,632.90</u>
		<u>225,265.80</u>

8. The complainant was dissatisfied with the distribution effected by the fund. He argued that after the death of the deceased, he was the sole guardian of the minor children and therefore responsible for their upkeep and maintenance. Furthermore, he referred to the affidavit of Ms Dettmer in which she indicated that the money should utilized for the minor children. The complainant indicated that he was responsible for the schooling, clothing, medical needs, food and all other needs of the minor children. He is currently unemployed and therefore unable to provide for the children and maintain their previous standard of living (annexures "A" and "I" attached to the complainant's complaint fully sketches the financial and other needs of the minor children). The complainant has also raised concerns about the investment of the moneys by the trust company, for reasons which appear below, it is unnecessary to further expand on these arguments. The complainant essentially seeks an order directing the fund to award a greater portion of the benefit to the minor children.

9. Mr E Erasmus in his response unfortunately did not fully deal with the allegation that a greater portion should have been awarded to the minor children. In respect of this issue, he responded as follows:

...The simple background is that our member had nominated 100% of the death benefits to be paid to her twin sister. She was being sued by her husband for divorce at the time she made out the nomination to her sister, Mrs Karen Dettmer.

...

2. The award of the death benefits at the level of 40% to the children and 60% to her twin sister.

The death benefit was dealt with in terms of section 37C of the Pension Fund Act. Section 37C(bA) states:...

...In my view, the complainant did not qualify for any benefits on the basis of this nomination. He would also not have qualified for any benefits if and when the divorce order was made final.

We believe, we have adequately provided for the child benefits through payments into a trust for their benefit.

10. *In casu* the payment of the death benefit was regulated by section 37C(1) which reads:

- (1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit 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:

...

- (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.

Dependant is defined in section 1 in the Act 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, including a party to a customary union according to Black law and custom or to a union recognized as a marriage under the tenets of any Asiatic religion;

(iii) is a child of the member, including a posthumous child, an adopted child and an illegitimate child;

(c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died;

11. In terms of section 37C, the only persons who may benefit from a death benefit are dependants as defined in section 1 of the Act, nominees designated by the deceased member and where there are no nominees and dependants the estate shall be the recipient of the benefit. Mr J Quinn, who received R17,400 in respect of funeral expenses clearly does not fall within any of the above categories.

12. However, section 37C as an exception to the general rule does permit three types of deductions, namely, a pledge in accordance with section 19(5)(b)(i), the provisions of section 37A(3) and section 37D of the Act. It is plainly evident that the payment for funeral expenses does not fall within the ambit of section 19(5)(b)(i) and 37A(3). Section 37D in turn, only permits eight kinds of deductions, which a fund may make. These are:

12.1. Amounts due to the fund in respect of housing loans granted to the member by the fund (section 37D(a)(i)).

12.2. Amounts due to the fund in respect of amounts for which the fund is liable under a guarantee furnished in respect of a housing loan to the member made usually by a bank or a building society (section 37D(a)(ii)).

- 12.3. Amounts due by a member to his employer owing on the date of his retirement or exit from the fund in respect of a housing loan granted by the employer to the member (section 37D(b)(i)(aa)).
 - 12.4. Amounts due by the member to his employer on the date of his retirement or exit from the fund in respect of amounts for which the employer is liable under a guarantee in respect of a housing loan made by some other person, usually a bank or building society (section 37D(b)(i)(bb)).
 - 12.5. Amounts due by a member to his employer on the date of his termination of membership in respect of compensation in respect of any damage caused to the employer by reason of any theft, dishonesty fraud or misconduct by the member (section 37D(b)(ii)).
 - 12.6. Amounts which the fund has paid or will pay by arrangement, and on behalf of, a member or beneficiary in respect of subscriptions to a medical aid scheme (section 37D(c)(i)).
 - 12.7. Amounts which the fund had paid or will pay by arrangement, or on behalf of, a member or beneficiary in respect of insurance premiums (section 37D(c)(ii)).
 - 12.8. Amounts which the fund has paid or will pay by arrangement, or on behalf of a member or beneficiary in respect of any purpose approved by the Registrar on the conditions determined by the Registrar upon a request in writing from the fund (section 37D(c)(iii)).
13. On a proper interpretation of section 37D, I am satisfied that it does not permit the fund to deduct funeral expenses from the death benefit. Such a claim would lie against the deceased's estate. Therefore, the R17,400 paid to Mr J Quinn is contrary to section 37C and thus unlawful. Such amount should form part of the distribution to dependants

and nominees as will appear below.

14. Before dealing with the merits of the distribution, an important issue ignored by the parties is whether the complainant in his personal capacity qualified as a dependant. In terms of the definition of dependant, the complainant clearly falls within paragraph (a), as at the time of the deceased's death the divorce proceedings had not as yet been finalized. Therefore, in terms of the applicable laws at the time, his marriage to the deceased on 12 March 1990 was still in existence (even though they were separated) and accordingly he qualified as the spouse of the deceased. However, the complainant in his personal capacity seeks no relief for himself. Rather, he seeks an order directing the fund to award a greater portion of the benefit to the minor children.
15. As I have held previously, section 37C of the Act establishes a compulsory scheme, in terms of which a death benefit has to be distributed. Other than the exceptional circumstances permitted by this section itself, the benefit may not form part of the estate of the deceased member and therefore the member's freedom of testation or the provisions of the Intestate Succession Act of 1987 where the member dies intestate is overridden in all its forms (see *Moir v Reef Group Pension Plan and Others* [2000] 6 BPLR 629 (PFA) and *Williams and Others v FFE Minerals SA Pension Fund and One Other* [2001] 2 BPLR 1685 (PFA)).
16. As stated, the distribution was regulated by section 37C(1)(bA), in terms of which the fund was required to effect an equitable distribution amongst the dependants and the nominee, Ms Dettmer. In making an equitable distribution, the fund needs to consider the following factors in respect of the beneficiaries:
 - the age of the beneficiaries;
 - the relationship with the deceased;
 - the extent of dependency;
 - the wishes of the deceased, which may be expressed in his nomination form,

last will, etc; and

- financial affairs of the beneficiaries, including their future earning capacity/potential.

17. From the response of Mr Erasmus, it is more than evident that the fund was largely influenced by the fact that the deceased member nominated her sister to receive 100% of the benefit. As I have held previously, the wishes of the deceased is only one of the factors to be taken into account when making an equitable distribution amongst the beneficiaries. Otherwise, the entire purpose of section 37C (ensure that no dependants are left without support) would be defeated. As stated, the section specifically restricts the member's freedom of testation in respect of his pension benefit. Therefore, I am of the view that trustees have fettered their discretion by rigidly adhering to the member's nomination form.

18. The deceased's request for a maintenance order against him in respect of the minor children in the amount of R600.00 does not *ipso facto* reflect the minor children's current reasonable maintenance needs or the extent to which they were dependent on the deceased at the time of her death. Such an assessment would require an investigation into the minors' current financial status. In my view, the maintenance order requested in the divorce summons is an irrelevant consideration for the following reasons. Firstly, the deceased member did not have an opportunity to respond to the summons. Secondly, the court did not issue a final divorce order confirming any maintenance order. Thirdly, the changing circumstances of the minor children makes this factor even more arbitrary. That is, prior to the deceased's death, they were living with the deceased who was responsible for their upkeep. After their mother's death, they were and are living with the complainant who is now their sole guardian and responsible for their welfare. Therefore, the fact that the complainant was prepared to pay R300.00 per month per child prior to the deceased's death doe not in any way assist us in the enquiry in determining to what extent they were dependent on their mother.

19. Therefore, based on the irrelevant consideration taken into account by the trustees and their rigid adherence to the nomination form, the distribution decision is materially flawed and I have no option but to set it aside.

20. It is trite law that where a discretion has been improperly exercised, our courts are reluctant to substitute their own decision for another functionary. As a general rule, our courts tend to refer the decision back to the functionary unless there are exceptional circumstances. This matter has dragged on for a considerable period of time. The deceased died on 17 March 1999. Section 30D of the Act requires me to dispose of complaints in a procedurally fair, economical and expeditious manner. Furthermore, it appears as if the minor children are financially suffering as a result of the decision of the fund. In light of sufficient evidence placed before me to make a decision in respect of an equitable distribution amongst the beneficiaries, the lapsing of almost two years from the date of death of the deceased, the ongoing correspondence between the parties and bearing in mind the purpose of section 30D, I propose to substitute my decision for that of the fund.

21. For the purposes of the distribution, I have included the R17,400 unlawfully paid to Mr Quinn in the lump sum available for the beneficiaries. Ms Dettmer is approximately 30 years of age and gainfully employed at Niche Designs (Pty) Ltd. On the other hand, the minor children's ages are respectively 3 and 8. The complainant, the guardian of the minor children is currently experiencing grave financial difficulties to maintain the minor children. The deceased prior to her death other than being the mother of her children had a close relationship with the children, which is borne out by the fact that when she left the common household the minor children went with her. In light of the above, one would ideally like to award the entire benefit to the children. However, the wishes of the deceased are clear in that she requested the benefit be paid to her twin sister and some recognition must be given thereto. Therefore, taking into account the wishes of the deceased, the financial status of the beneficiaries, the close relationship of the deceased with her children and their current financial difficulties, I am of the view

that 90% (R488,667.67) of the benefit should be awarded to the minors and 10% (R54,296.41) to Ms Dettmer. However, I am in agreement with the trustees that the minors' benefits be held in trust until they attain the age of 25. Therefore, Fiona Kipling and Bronwyn Kipling are each entitled to R244,333.83 less R112,632.90 (already paid into the trust) plus interest thereon.

22. However, it would be unwise to make a final order in this matter for the following reasons. Ms Dettmer, who has a substantial interest in this matter has not been joined as a party to these proceedings. No hearing was held and the fund has not dealt with all the allegations in the complaint. In the interest of procedural fairness, it would be prudent to join Ms Dettmer as a second respondent to the complaint in terms of section 30G(d) of the Act and issue a preliminary order.

23. Accordingly, the preliminary order of this tribunal is as follows:

23.1. Ms Karen Dettmer is joined as a second respondent to the complaint in terms of section 30G(d) of the Act.

23.2. The fund is directed to serve a copy of the complaint, its response, subsequent submissions and a copy of this ruling on Ms Dettmer within 7 days of the date of this ruling.

23.3. A rule *nisi* is hereby issued in terms of which the parties are called upon to show cause, if any, within 21 days of this ruling why the following order should not be granted:

23.3.1. The decision of the respondent fund to award 40% of the benefit to the minor children and 60% to Ms Karen Dettmer is hereby set aside.

23.3.2. The fund is directed to pay R131,700.93 each to Fiona Kipling and

Bronwyn Kipling, together with interest thereon at a rate prescribed in the Prescribed Rate of Interest Act for a judgement debt from 28 May 1999 to the date of payment, within 6 weeks of the date of this ruling.

23.3.3. The amounts mentioned in paragraph 23.3.2 shall be paid into the respective trusts established for Fiona Kipling and Bronwyn Kipling.

Dated at **CAPE TOWN** this 28th day of February 2000.

John Murphy

Pension Funds Adjudicator