

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/1214/00

In the complaint between:

J Malanga

Complainant

and

Group Five Multi Benefit Retirement Fund

Respondent

**DETERMINATION IN TERMS OF SECTION 30M 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 complaint in essence alleges that the payment of a death benefit by the respondent into a trust is inequitable and contrary to the wishes of the deceased. The complainant seeks an order directing the respondent to dissolve the trust and pay the remaining capital to the beneficiaries.
2. No hearing was held in this matter. An investigation under my supervision was conducted by my investigator, Naleen Jeram. In determining this matter, I have relied on the documentary evidence and written submissions gathered during the course of our investigation.
3. The complainant is Johannes Seuntjie Malanga, an adult male, of Bloemfontein, Free State.
4. The respondent is the Group Five Multi Benefit Retirement Fund, a pension fund duly

registered under the Act (“**the fund**”). The fund is represented by its principal officer, Mr T G Hook and his assistant, Ms T A Michael.

5. Mr Ndengana Dingaan Malanga during his lifetime was a member of the fund. On 14 May 1999 he died as a result of meningitis. A death benefit of R356 218.34 payable by the fund became available for distribution. The fund conducted an investigation to determine the circle of beneficiaries. The result of the investigation disclosed that the deceased had the following dependants:

NAME	RELATIONSHIP	DATE OF BIRTH
1. Manaha Letitia Makoa	Wife	30.09.1945
2. Hlengile Ntombenzima Maria	Daughter	23.06.1981
3. Francina Nomthandazo Malanga	Daughter	28.02.1984
4. Mzikayise Petrus Malanga	Son	26.09.1986
5. Khangelani Oscar Malanga	Son	14.06.1997
6. Johannes Malanga	Son	Major
7. Amos Malanga	Son	Major

6. In 1991 the deceased completed a nomination in which he appointed the above beneficiaries excluding K O Malanga as nominees (even though they qualified as dependants). Ms C J Mchuno is the biological mother of K O Malanga. The fund in its response attached a copy of the maintenance order, in terms of which the deceased was liable to pay maintenance for K O Malanga in the amount of R250.00 per month at the time of his death.
7. In coming to a decision regarding the distribution, the trustees of the fund took into account the relationship between the dependants and the deceased, their respective ages, their financial status, their ability to support themselves and the fact that the complainant and Amos Malanga were self supporting. Based on the above considerations, the fund decided to award R48 453.37 to K O Malanga. The money was paid into a trust, in terms of which a monthly income was to be paid to Ms C J Mchuno (mother and guardian of K O Malanga) until the said K O Malanga turns 25 at

which point the remaining capital will be paid to him. The remainder of the death benefit (R307 764.97) was awarded to Ms M L Makoa (deceased's widow) and her three minor children. This benefit was also placed in a trust, in terms of which the widow was to receive a monthly income to support herself and her dependant children.

When the youngest of the widow's children turns 25, the remaining capital will be paid to the widow. The relevant provisions of the trust regulating the payment of capital and income read as follows:

DISPOSAL OF CAPITAL AND INCOME

- 13.1 The Trustee shall utilize such portion of the income as it in its absolute discretion deems necessary, and/or such portion of the capital as the Settlor (fund) may from time to time direct, for the maintenance, education and general well-being of the beneficiaries.
- 13.2 Any income not utilized for the purposes of Clause 13.1 may be capitalized.
- 13.3 The Trust shall terminate on the youngest surviving beneficiary attaining the age of 25 (twenty-five) years, provided however, that should there at any time be only one beneficiary under the age of 25 (twenty-five) years and such beneficiary dies before attaining that age, then the Trust shall terminate upon such beneficiary's death. On termination, the assets shall be delivered to MANAHA LETITIA MALANGA (born 15 November 1944) the spouse of the Deceased, or failing her to the beneficiaries or the survivor(s) of them, or failing them all, to the estate of MANAHA LETITIA MALANGA.

8. The complainant is dissatisfied with the distribution effected by the fund. He firstly contended that K O Malanga is not entitled to share in the distribution as he and his family were not aware that he was a son of the deceased. For the purposes of this determination I have disregarded this aspect of the complaint as the complainant has not produced any evidence to substantiate this allegation. Furthermore, as stated the fund supplied me with a copy of a maintenance order in terms of which it is clearly evident that the deceased was legally liable to maintain this child. Accordingly, I have disregarded the complainant's allegations that K O Malanga is not the son of the deceased.

9. The complainant further argued that the benefit awarded to the widow and her minor children should not have been placed in a trust. According to him it was the express wishes of the deceased that the benefit upon his death be paid in cash to the respective beneficiaries. He referred to the nomination form in which the deceased requested the benefits to be paid to the dependants. The complainant has repeatedly informed the fund to terminate the trust and pay the remaining capital. After the complaint was lodged with this office, he closed his mother's bank account in which payments were made from the trust in protest of the fund not paying the entire capital. He seeks an order directing the fund to dissolve the trust and pay the remaining capital to Ms Makoa.

10. Mr Hook in his response submitted that the trustees considered it in the best interest of the widow and the minor children to set up a trust as the widow was illiterate and did not have the necessary financial background to manage the investment in a manner that would provide her and the minor children with a regular income for their upkeep, education and medical needs. Furthermore, there are major self-supporting children and there is a potential risk that advantage could be taken by them were a single payment to be made. According to Mr Hook, the conduct of the complainant especially the closing of the widow's bank account, is a further indication of the risk that the capital may be depleted by the major children.

11. The payment of the death benefit is regulated by section 37C of the Act, the relevant provisions of which read:
 - (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:
 - (a) If the fund within twelve months of the death of the member becomes aware of or traces a dependant or dependants of the member, the benefit shall be paid to such dependant or, as

may be deemed equitable by the board, to one of such dependants or in proportions to some of or all such dependants...

- (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.

12. As I have held previously, section 37C establishes a compulsory scheme in terms of which a death benefit payable by a pension fund has to be distributed. This section expressly restricts the deceased member's freedom of testation in respect of the benefit in that the benefit (other than the exceptional circumstances permitted by the section itself) cannot form part of the estate. Therefore, whilst the wishes of the deceased is an important factor to be considered by the trustees in making an equitable distribution amongst the beneficiaries, it is not a decisive one. Furthermore, section 37C(2) specifically allows a trustee contemplated in the Trust Property Control Act of 1988 to receive and administer a death benefit or portion thereof.

13. *In casu* the issue of a determination is whether the establishment and payment into the trust for and on behalf of the widow and the deceased's minor children is an equitable one as required by section 37C(1)(a) of the Act. The trustees' decision to place the benefit in a trust cannot be faulted for the following reasons. The widow of the deceased, also the mother and guardian of the minors is illiterate. She also does not have the financial expertise to manage and administer the benefit in a way that would ensure that the educational, medical and daily living needs of the minor children are provided for until they attain the age of majority. Furthermore, the widow is 55 years of age and also needs to ensure sufficient capital for her own needs. By virtue of these factors, there is a clear danger that were the capital paid to the widow, the benefit may not be correctly utilized and dependants may be left without support. Should this occur, the purpose of section 37C (ensure that no dependants whether factual or legal are left without support) may be defeated. In terms of the trust agreement, the capital shall be paid to the widow upon the last minor attaining 25 years of age. Assuming all minors survive until their 25th birthday, the capital will be paid to the widow on 26 September

2011 when M P Malanga turns 25 years ⁶ of age. Therefore, I am satisfied that the decision of the trustees to place the benefit in a trust is an equitable one, which ensures that no dependants, including the widow, are left without financial support.

14. Accordingly, the complaint is dismissed.

Dated at **CAPE TOWN** this 31st day of January 2001.

John Murphy

Pension Funds Adjudicator