

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/NP/258/00/NJ

In the complaint between:

J E Zikhali

First Complainant

N A Zikhali

Second Complainant

and

Metal Industries Provident 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 complaint relates to the payment of a death benefit in terms of section 37C of the Act, in particular, the exclusion of the complainants from the distribution, by virtue of the fund deeming them to fall outside of the definition of a dependant as defined in the Act.
2. No hearing was held. An investigation under my supervision was conducted by my assistant, Naleen Jeram. For reasons, which appear below, I have chosen to hand down an interim ruling.
3. The first complainant is Jabulani Elias Zikhali, a retired pensioner, 65 years of age, currently residing at Witbank, Northern Province. The second complainant is the wife of Mr Zikhali, namely, Ms Ntombizodwa Aletta Zikhali, who is 64 years of age and also retired. The complainants are unrepresented in this matter.

4. The respondent is the Metal Industries Provident Fund, a fund falling within the ambit of the pension fund organization defined in section 1 of the Act (“**the fund**”). The fund is represented by Ms C P Kirk of its pensions department.
5. Mr Zweli Freddy Zikhali (“**the deceased**”) was employed by Highveld Steel and Vanadium Corporation Limited and was a member of the fund. The deceased was married to Ms CC Zikhali and a minor child was born from this union, namely Sphiwe Prudence Zikhali (currently 12 years of age). On 9 March 1998 the parties were divorced and custody of the minor child was awarded to Ms CC Zikhale. Shortly thereafter and on 15 April 1998, Mr ZF Zikhali passed away. Upon his death, a lump sum of R105,187.07 (after tax) payable by the fund became available for distribution.
6. It is common cause that the deceased’s minor daughter, Sphiwe, qualified as a dependant. During the fund’s investigation it emerged that even though custody of the child was awarded to Ms CC Zikhali, she was living with her father and her grandparents (complainants). Subsequent to the death of the deceased, Sphiwe commenced living with her mother at a different residence.
7. The payment of the death benefit is regulated by section 37C(1)(a) of the Act, 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:
 - (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. ...

Dependant is defined in section 1 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;

8. The issue for determination is whether the complainants qualified as dependants. In this regard, the fund received five affidavits material to this issue. The first was deposed by Mr J E Zikhali, the material provisions thereof read:

...Zweli Freddy Zikhali born 06-11-1964 (*sic*) is my biological son. He was married with one child daughter (*sic*), I am the one who will be responsible for her, his wife left him is now staying with another man as wife.

The said wife has now two children from that man. They are living together as man and wife. My late son was not married again to any other woman. At the time of his death he was single and

was also staying in my property together with her daughter Sphiwe. The deceased had only one child and no one else. I am now maintaining the child as he stays with me....

9. Ms NA Zikhali submitted four affidavits to the fund. For the purposes of this determination, I only quote the relevant portions of each affidavit:

...My son ZF Zikhali made me beneficiary because I riseup (*sic*) his only child since birth. He died knowing I will look after his child. Only his mother took her away to claim monies after 12 years not (*sic*) staying with child. We sent relevant information for our grievance (*sic*) our son died been divorced and supported us with his child, we have stated clearly that we dependant on our son support. All our grievance (*sic*) were fax and posted registered on affidavit to our surprise not a single reply received so far. On papers we are entitled of claim (*sic*) as stated on papers of 1996. We also dependant (*sic*) on our son until his death. Divorce mother (*sic*) took child away only to claim monies as grandmother I rise (*sic*) the child for 12 years and dependant on son for support. See information on paper (star) was divorce wife (*sic*) nominated on which papers to claim for death fund...

...I was very much surprise (*sic*) about the claim she secretly made after 12 years staying away from child she did nothing for child.

I kindly request claim (*sic*) as I have no one to support me with daily needs, paying doctor's bills, transport to clinic and buying my madicine. My son was a very supportive person he stayed with me till his death, please consider my claim as mother of the late who cared for me with all my needs as my life is no more perfect.

Christina took child away for one reason to (*sic*) claim monies but did not tell me any thing about claim...

...My son started to work at Highveld (*sic*) 1994. He started to support me paying (*sic*) my Doctor's bills as I am sick cannot walk long distance through paining legs, he gave me money for transport to clinic bought clothing, he bought food he cared for me with daily needs till his death. I can no more (*sic*) work as I am sick.

For 12 years I devoted my whole life rising (*sic*) and caring for the child now I have no one to by medicine (*sic*) as my husband is not working Christina took child away after 12 years for only

reasons to claim money she did not care for her.

As grandmother I sacrifice my whole life caring for the child when (*sic*) she took child she said she wants the child to stay with her just to forget the death of his father....

...I Grandmother to the only child born in the marriage cared for Sphiwe since birth (*sic*) 24-02-1987.

Started to attend daily care school crèche from 1992, I paid school fees, attended to his daily needs doing her washing her (*sic*) mother was not present. My son during that time was also staying with us from 1988- 1993 was (*sic*) not working. Child went to High Primary (*sic*) School I attended to all school needs school meetings etc, child stayed under my care for 12 years till 28-04-1998 after his father's death, she secretly went to claim monies 12 years not caring for the child divorced staying with new man at present as man and wife....

10. On 28 June 2000 the fund informed the complainants that the entire death benefit was awarded to Sphiwe Zikhali. The monies were retained in the fund and became payable to Ms CC Zikhali, in her capacity as guardian of the child on an installment basis of R1,390.00 per month, in terms of section 37C(3) of the Act. Furthermore, a condition was imposed on the benefit that monies may only be used for the specific care and maintenance of Sphiwe.
11. The complainants were dissatisfied with the decision of the fund. They argued that they were both retired and living on a state pension with no monthly income from other sources and they were essentially financially dependant on their son from 1994. Furthermore, the deceased was living with them at the time of his death and made regular financial contributions to the household for their specific maintenance. Accordingly, they concluded that they were in fact dependants of the deceased and were entitled to share in the distribution.
12. In the initial response of the respondent fund, no reasons were provided as to why the complainants were excluded from the distribution. My assistant specifically

requested the fund to address this issue. In her subsequent response, Ms Kirk stated that the complainants fell outside the definition of a dependant for the following reasons:

Several affidavits was received from the parents of the deceased.

These affidavits does not state that they were dependent on the deceased but that they were looking after the minor child and that the mother of the child took her away and that she claimed the pension monies.

On the application form the parents never listed themselves a dependents.

An installment benefit is paid to the ex-wife (according to section 37) as she was awarded custody of the minor child.

13. As stated, the payment of the death benefit is regulated by section 37C(1)(a) of the Act. The section imposes two onerous duties on the board of management of the fund. Firstly, it has to establish the class of beneficiaries, who may share in the distribution. Section 37C limits this class to dependants as defined in section 1 of the Act and nominated beneficiaries. Once the board has established the class of beneficiaries, it is then required to effect an equitable distribution amongst them.
14. There is a common misconception amongst the parties in this matter and the pensions industry at large, that there is a duty on a dependant to come forward and inform the board of his status and potential entitlement to a death benefit. In terms of section 37C of the Act, the onus is squarely on the board of management of a pension fund to conduct an investigation to trace the dependants of a deceased. Thus, in any death benefit claim arising out of a pension fund organization, it is imperative for the board to take all reasonable steps to ascertain and locate the dependants of the deceased.
15. The definition of dependent as contained in section of the Act, consists of three

categories. The first category defined in paragraph (a) requires the beneficiary to be dependant on the member for maintenance, where such dependency stems from a legal duty arising out of a statute or a common law. Paragraph (b) regulates the position of beneficiaries dependent on a member where there is no duty of support in terms of the law, for example, an independent adult child. The section hereafter outlines three factual and legal scenarios, which sets out different criteria for qualification as a dependant. The third category outlined in paragraph (c) refers to persons who are currently not dependent on the member for maintenance, but in respect of whom the deceased member would potentially have become liable for maintenance at some future date had he (notionally) survived his death.

16. It is trite law that there is a duty on parents to pay maintenance in respect of their minor children. There is also a duty on a child to pay maintenance in respect of his parents under certain circumstances. The existence and scope of this duty has been fully canvassed by this tribunal in previous determinations (see *Fourie v Central Retirement Annuity Fund* [2001] 2 BPLR 1580 (PFA) and *Wasserman v Central Retirement Annuity Fund* [2001] 6 BPLR 2160 (PFA)). It is unnecessary to again fully examine the legal development of this duty other than to state that there are two requirements that need to be met before the duty comes into existence. Firstly, there must be a need or necessity for support on the part of the parent and secondly, the child must have the necessary means to provide the financial support.
17. *In casu* the issue for determination is whether the complainants fell within the definition of a dependant, in particular, paragraph (a) of the definition. On a reading of the various affidavits submitted by the complainants (which were in the possession of the fund) it is plainly evident that the complainants were dependent on the deceased and the need or necessity for support existed. Furthermore, it is also apparent that the deceased made regular financial contributions for the maintenance of his parents. These allegations have not been denied by the fund or any other party and therefore one can safely conclude that there was a duty on the deceased to maintain his parents. Accordingly, they both fall within the definition of dependant

and were entitled to be considered in the death benefit distribution. The failure to consider the complainants in the distribution materially flaws the decision of the fund and I have no option but to set aside the distribution. In the instant matter, the interest of justice is best served by remitting the matter to the board of management for a fresh investigation and a distribution in terms of section 37C(1)(a) of the Act.

18. However, it would be imprudent to make a final ruling at this stage as no hearing was held and the fund has not properly addressed the material issues in this matter. Furthermore, it would be wise to join Ms CC Zikhali in her capacity as guardian of Sphiwe Zikhali as a second respondent to the complaint, in terms of section 30G(d) of the Act. Therefore, in the interest of procedural fairness, it would be prudent to issue a rule *nisi* and afford all the parties a further opportunity to submit arguments or settle the matter on the basis of this preliminary ruling.

19. Therefore, the interim order of this tribunal is as follows:

19.1 Ms CC Zikhali is joined as a second respondent to the complaint in terms of section 30G(d) of the Act.

19.2 The respondent fund is directed to serve a copy of all submissions to date and this interim ruling upon the second respondent, within 7 days of the date of this ruling.

19.3 A rule *nisi* is hereby issued, in terms of which, the parties are called upon to show cause, if any, before the close of business on 17 August 2001, why the following order should not be granted:

19.3.1 The decision of the first respondent to award the entire death benefit of R105,187.07 to Sphiwe Zikhali is contrary to section 37C of the Act and therefore unlawful and is hereby set aside.

19.3.2 It is declared that the complainants qualify as dependants as defined in section 1 of the Act.

19.3.3 The board of management of the first respondent is directed to effect an equitable distribution amongst the complainants and Sphiwe Zikhali, in accordance with section 37C(1)(a) of the Act, within 6 weeks of the date of this ruling.

DATED at Cape Town this 19th day of July 2001.

John Murphy

Pension Funds Adjudicator