

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/354/98/NJ

In the complaint between:

P Maimela

Complainant

and

Simba Provident Fund

First Respondent

Simba (Pty) Ltd

Second 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.
2. No hearing was held. An investigation under my supervision was conducted by my assistant, Mr Naleen Jeram. For reasons, which appear below, I have decided to hand down an interim ruling.
3. The complainant is Mangobeni Patricia Maimela, an adult female, currently employed as a professional teacher, residing in Witbank, Mphumelanga. The complainant is represented by Mr Mphela of Mphela, Mokabane & Partners attorneys.

4. The first respondent is Simba Provident Fund, a pension fund falling within the definition of pension fund organisation contained in section 1 of the Act (“**the fund**”).
5. The second respondent is Simba (Pty) Ltd, a company duly incorporated with limited liability according to the company laws of South Africa (“**the employer**”). The fund and the employer are represented by Mr Patrick Bracher of Deneys Reitz attorneys.
6. Mr Mbalati Jacob Maimela was employed by the employer during which time he was a member of the fund. On a date not apparent from the papers, the complainant was married to Mr Maimela. Five children were born from this union, namely, Prudence Mpho Maimela (born on 9 February 1978), Kholofelo Brian Maimela (born on 18 July 1982), Vivian Renkie Maimela (born on 22 May 1986), Mahlatse Jacob Maimela (born on 30 June 1994) and Sipho Nicholas Maimela (born on 3 March 1997). On 25 November 1997 Mr Maimela passed away.
7. A death benefit of R111,722.91 (after tax) payable by the fund became available for distribution. The fund conducted an investigation to determine the circle of beneficiaries and thereafter effect an equitable distribution amongst them. During the investigation it emerged that the deceased was survived by his spouse (the complainant) and his five children. However, it also emerged that the deceased worked in Middleburg and only came home on certain weekends and during this time he had a relationship with a certain Ms Ethel Happy Shabangu. Furthermore, the deceased appeared to have bought several gifts for Ethel. A child by the name of Bonginkasi Gugu was conceived from this relationship and born after the death of the deceased on 30 December 1997 (this is denied by the complainant). The fund obtained information from the deceased’s blood relatives, which confirmed that they were aware of the relationship between the deceased and Ms Shabangu and also confirmed that Bonginkasi was born of that relationship.

8. Based on the above information, the fund effected the following distribution:

Beneficiaries	Amounts	%
Simba (Pty) Ltd	R 11,127.51	9.9
MP Maimela	R 60,357.24	54.01
S Maimela	R 5,029.77	4.5
PM Maimela	R 5,029.77	4.5
KBMaimela	R 5,029.77	4.5
VR Maimela	R 8,047.63	7.2
M Maimela	R 12,071.45	10.8
BG Shabangu	<u>R 5,029.77</u>	<u>4.5</u>
	R111,722.91	100

As appears from the distribution, the fund awarded R11,127.51 to the employer. These deductions were in respect of an acknowledgement of debt between the complainant and the employer for monies lent and advanced in the sum of R4,000.00. There was a further deduction of R7,127.51 for amounts owing by the deceased to the employer. As will appear below in the determination, these deductions were contrary to sections 37A and 37D of the Act and therefore unlawful. The monies awarded to the minor children were placed in separate trusts and a monthly income is paid to the respective guardians. However, on 22 May 1999, Bonginkasi died. From the papers it is not apparent what transpired with the remaining capital in the trust.

9. The complainant was dissatisfied with the distribution effected by the fund. In essence, Mr Mphela on behalf of the complainant submitted that BG Shabangu was not the son of the deceased and therefore not entitled to share in the distribution. Mr Mphela attached several affidavits by various family members of the deceased wherein it was submitted that the deceased was living with the complainant immediately prior to his death and therefore could not have

conceived a child with another women. Furthermore, references were also made to the fact that the deceased immediately prior to his death was bedridden and not in a position to father a child. Thus, the complainant requested that the benefit paid to BG Shabangu be awarded to herself.

10. Mr Bracher on behalf of the fund submitted that the fund conducted a thorough investigation, which revealed that the deceased had another child by the name of BG Shabangu. He contended that the complainant has produced no evidence other than bare denials by members of his family to show that Bonginkasi was not his son. Accordingly, he requested that the complaint be dismissed.
11. The payment of the death benefit is regulated by section 37C(1)(a), which reads:

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 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.

12. In terms of section 37C(1) of the Act, there are two duties on a board of management of any pension fund organisation. Firstly, it needs to identify the dependants (and nominees) of the deceased as defined in section 1 of the Act. Thereafter, it needs to make an equitable distribution amongst the said beneficiaries.

13. In *casu* it is common cause that the deceased was survived by his spouse (the complainant) and the five children born of this union. However, a dispute of fact exists regarding BG Shabangu and whether he was a child of the deceased. As stated, the fund conducted an investigation, which revealed the deceased was employed in Middleburg and only returned home on certain weekends. A relationship existed between him and a certain Ms Ethel Shabangu. From the various interviews conducted by the fund and other evidence obtained, the fund concluded that BG Shabangu was the son of the deceased.
14. The complainant is unhappy with this conclusion and essentially contends that BG Shabangu was not a son of the deceased. However, she has not produced any evidence to prove her cause of action (on a balance of probabilities). That is, she has merely submitted several affidavits, wherein various members of the family have denied that Bonginkasi was the son of the deceased. It was also argued that the deceased could not have fathered the child as he was living with the complainant immediately prior to his death. I have difficulty in following this argument. Firstly, no medical evidence was adduced to show that the deceased was incapable of fathering a child. Furthermore, the mere fact that the deceased was living with the complainant does not *ipso facto* mean that he could not have fathered the child. Therefore, from the evidence before me, there are no grounds permitting me to interfere with the fund's decision that BG Shabangu was the child of the deceased and therefore entitled to share in the distribution.
15. However, during our investigation it emerged that the fund in addition to the deduction of tax made two further deductions from the death benefit. In terms of section 37C of the Act, the benefit has to be distributed in terms of the scheme outlined in the section subject to three exceptions. The first being a pledge in accordance with section 19(5)(b)(i) and the second deduction is regulated by section 37A(3) of the Act, which are both inapplicable in this matter. The section is furthermore subject to section 37D of the Act, which in turn must be read

together with section 37A of the Act. In terms of section 37A, the right to a pension benefit may not be reduced, transferred, ceded, pledged, hypothecated, or be liable to be attached or subject to any form of execution under a judgement or order of a court of law. But, it does allow as an exception, a reduction of the benefit permitted by the Income Tax Act of 1962 and the Maintenance Act of 1963. In addition to these Act the only other deductions permitted are those regulated by section 37D.

16. Section 37D, in turn, only permits eight kinds of deductions:

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

16.2 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)).

16.3 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)).

16.4 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 of building society (section 37D(b)(i)(bb)).

16.5 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)).

- 16.6 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)).
- 16.7 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)).
- 16.8 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)).
17. From the evidence before me, it is plainly evident that the deductions made from the death benefit to pay certain debts owing to the employer do not fall within the aforesaid exception of sections and are therefore unlawful. Thus, the R11,127.51 awarded to the employer should have formed part of a death benefit and distributed in accordance with the decision of the board of management. It is prudent to distribute this amount in the same proportion as determined by the board of management in respect of the death benefit distribution, with Bonginkasi being excluded from this subsequent distribution. However, I believe it is unwise to make a final order in this matter for the following reasons. As stated, no hearing was held and the fund and the employer have not had a proper opportunity to address the claims in respect of the deductions due to it only emerging during our investigation. Hence, it is wise to issue a rule *nisi*, affording the parties an opportunity to submit additional submissions.

18. Accordingly, in the interest of procedural fairness, a rule *nisi* is hereby issued, in terms of which, the parties are called upon to show cause, if any, within 14 days of this preliminary ruling why the following order should not be granted:

18.1 The deduction of R11,127.51 from the death benefit payable by the first respondent is declared to be unlawful in terms of section 37C read together with sections 19(5)(b)(i), 37A and 37D of the Pension Funds Act of 1956 and is hereby set aside.

18.2 The first respondent is directed to pay R11,127.51 to the various beneficiaries of the deceased, excluding BC Shabangu, in the same proportion (in relation to each other) to which they initially benefited from the death benefit distribution, together with interest thereon at a rate prescribed in the Prescribed Rate of Interest Act from 25 November 1998 to date of payment, within 6 weeks of the date of this determination.

DATED at Cape Town this 5th day of December 2001.

John Murphy

Pension Funds Adjudicator