

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/NP/109/00/CN

In the complaint between:

Doctor Baloyi

Complainant

and

Denel Retirement Fund

Respondent

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT OF 1956

1. This is a complaint in terms of section 30A (3) of the Pension Funds Act of 1956 (“the Act”), which concerns the non-payment by a fund of a death benefit to a nominated beneficiary, in disregard of the deceased member’s nomination.
2. No hearing has been held; thus in coming to my decision, I have had regard to the documentary evidence compiled in the course of the investigation conducted by my Assistant Adjudicator, Cikizwa Nkuhlu, as well as to the submissions of the parties to the complaint.
3. The complainant is Doctor Baloyi, an adult male residing at Runnymede Village, Mamitwa in the Northern Province. He is unrepresented in these proceedings.
4. The respondent is the Denel Retirement Fund, (“the fund”), a pension fund duly registered in terms of the Act. The fund is represented by Messrs Rooth & Wessels, a firm of attorneys from Menlyn, Pretoria.

5. The complainant is the elder brother of the late Steven Brunare Baloyi (“the deceased member”), who was employed by Denel (Pty) Ltd. The deceased was a contributing member to the fund from 1 October 1995 until his death on 8 August 1998. He was unmarried, but was cohabiting with a girlfriend, Elsie Motseko. A minor child, Lerato Motseko, born on 27 March 1997, was born out of the relationship.
6. On the deceased member’s death, a lump sum death benefit in the sum of R119 002-00, together with a monthly spouse’s pension amounting to R2 479-21, became payable in terms of the rules of the fund. The complainant is laying claim to the benefit, on the strength of a will deposited to by the deceased member on 25 July 1996, wherein the deceased member bequeathed the residue of his estate to the complainant.
7. Apparently, unbeknown to the complainant, the deceased member had, on 12 February 1997, also completed a Pension Nomination Form wherein he had nominated the complainant as the sole beneficiary of his lump sum pension benefit.
8. The board of trustees of the fund, after considering all the relevant facts, decided to allocate the entire death benefit to the minor child on the basis that she was the qualifying child of the deceased member in terms of the fund’s rules.
9. The applicable rule of the fund regulating the allocation of death benefits is rule 5, which reads as follows:

5.1 Death in service prior to normal retirement date

- (1) On the death of a member while in service prior to his normal retirement date, there shall be payable, subject to the provisions of Rules 9.2 and 9.3:
- (a) a lump sum equal to twice the member’s pensionable emoluments and, if a qualifying spouse’s pension or a qualifying child’s pension is not payable after the death of a member in terms of this rule, his member’s share at the date of death shall also be payable;
 - (b) a pension to his qualifying spouse equal to 50% of the member’s pensionable emoluments immediately before his death, or a pension secured by the member’s share less the sum payable in (a) above if greater, provided that the trustees manage to locate the qualifying spouse within twelve months of the member’s death;
 - (c) If there is no qualifying spouse but there are qualifying children, such children will be entitled to a pension in accordance with the following scale:

Children	Percentage of spouse’s pension
1	33 1/3%
2 or more	66 2/3%

- (2) The benefits in terms of this rule will be paid in terms of the provisions of Section 37C of the Act, quoted in Annexure A to the rules.
- (3) Notwithstanding the provisions of subparagraph 5.1(1) (b) above, the trustees may in their absolute discretion pay the qualifying spouse’s pension to the qualifying children.

10. The definition section of the rules defines “qualifying child” to mean:

- (a) a child of the member or pensioner, under the age of 18 years and unmarried, including an illegitimate or a legally adopted child, or
- (b) a step-child, under the age of 18 years and unmarried, who, in the opinion of the trustees, was substantially dependent on the member or pensioner at the time of his death, and shall include.....

11. “Qualifying spouse” is defined as “the surviving partner of the member or pensioner in a recognized marital union existing at the time of death of the member or pensioner; provided that in the event of the death of a pensioner such recognized marital union must have already existed at the member’s date of retirement”. Among the forms of recognized marital unions are legal (civil) marriages, customary unions according to Black Law and custom, unions recognized as marriages under any Asiatic religion, cohabitation and dependence by virtue of financial or other maintenance. At the trustees’ discretion, even dissolved marriages or unions, where the other person is still to some degree financially dependent on the member or pensioner, can be included in the definition of a “recognized marital union”.
12. Rules 9.2 and 9.3, subject to which the death benefit payable in terms of Rule 5.1 can be paid, provide for the payment thereof to a trustee as contemplated in the Trust Property Control Act, a curator or guardian of a minor or other contractually-incapacitated person, and for reinsurance thereof with an insurer.
13. After the Pension Committee of the deceased member’s employer had investigated the circumstances relating to the deceased’s dependants, it made recommendations to the board of trustees, which in turn concluded that the complainant’s nomination as a sole beneficiary should be disregarded, and that the entire death benefit should be paid to the minor child. It was also decided that the benefit be administered by the board of trustees of the fund in terms of section 37C (3) of the Act.
14. According to the fund, the trustees’ decision to disregard the complainant’s nomination, as well as the will dated 25 July 1996, was based on the following factors:
 - 14.1 The dependent daughter’s age, and the possible devaluation of the rand currency;
 - 14.2 The fact that the child is the qualifying child of the deceased member;

- 14.3 Rule 5.1(2) of the rules of the fund, which provides that the benefits in terms of that rule shall be paid in terms of section 37C of the Act;
 - 14.4 Section 37C of the Act, which provides that death benefits shall not form part of the assets of the estate of the deceased member, and can thus not devolve in terms of the deceased member's will;
 - 14.5 The recommendation of the Pension Committee to the effect that the entire benefit should be allocated to the minor child, and placed in trust until she attains the age of majority.
15. The complainant does not allege that the deceased was legally liable to maintain him, nor that, even though no such duty of support exists, he was in fact dependent on the deceased for maintenance. His claim to the death benefit is based mainly on the will in terms of which the residue of the deceased's estate was bequeathed to him.
 16. As was correctly argued on behalf of the fund, Section 37C excludes death benefits from forming part of the assets of the estate of a deceased fund member. Accordingly, the death benefit does not fall within "the residue of my estate" as referred to in the will. The bequest in terms of the will is valid and binding only with regard to the assets of the deceased member's estate.
 17. Although the complainant has not placed any reliance upon the nomination made during February 1997, it is incumbent upon me to consider whether the same should be binding on the trustees.

18. Section 37C(bA) is pertinent in this regard, and it provides as follows:

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.

19. The section, therefore, vests the trustees with a discretion to distribute the benefit as they deem it equitable. Thus, they may distribute it in equitable proportions among both the nominee and the dependant, or allocate it to either one of them to the exclusion of the other.
20. As is the case with any other form of exercise of discretion, I may only interfere therewith if it is unreasonable, or where there has been no exercise of a discretion at all, or where the trustees have unreasonably fettered their discretion. An unreasonable exercise of discretion would for instance exist where the trustees have taken into account irrelevant factors, or have failed to take relevant factors into account.
21. In previous determinations, I have set out the following factors, which are by no means a *numerus clausus*, as being relevant factors to be taken into account in the exercise of the trustees' discretion: the age of the dependants, relationship to the deceased, extent of dependency, financial affairs, as well as the earning potential and prospects of the dependants. Although the wishes of the deceased, as evidenced by his nomination of the complainant *in casu*, are a relevant consideration to be weighed together with all the other relevant factors, Section 37C prefers

dependency over freedom of testation.

22. Since the complainant has not proved any dependency on his part, nor shown that a manifest injustice will result if the trustees' decision is not set aside, I will not lightly interfere with the trustees' decision.
23. On the evidence before me, I am satisfied that the trustees applied their minds and took into account all the relevant factors in coming to their decision. Accordingly, I am not justified to interfere therewith.
24. The complaint is accordingly dismissed.

DATED AT CAPE TOWN ON THIS 25TH DAY OF OCTOBER 2001.

JOHN MURPHY
PENSION FUNDS ADJUDICATOR