

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/WE/882/2000

In the complaint between:

CALA Dairies CC

Complainant

and

Orion Money Purchase Provident Fund

First respondent

Old Mutual Life Assurance Company Limited

Second respondent

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

1. This is a complaint lodged with the Pension Funds Adjudicator, relating to the fund's distribution of a death benefit. No hearings were conducted and therefore in making this preliminary determining, I have relied on the documentary evidence and the investigation conducted, under my supervision, by my investigator, Lisa Shrosbree.
2. The complaint is lodged by CALA Dairies CC on behalf of Mrs Veronica Makaula, the widow of the late AW Makaula, a former employee of the company, against the Orion Money Purchase Provident Fund of which the company is a participating employer. The complainant is represented by Schneider, Shargey & Klitzner Attorneys.
3. The first respondent is the Orion Money Purchase Provident Fund administered by Old Mutual, the second respondent in this matter.
4. As an employee of CALA Dairies CC, the late A W Makaula ("the deceased") automatically became a member of the Orion Money Purchase Provident Fund ("the fund"). The deceased died on 18 April 1999 and a

death benefit of R160 011.10 accordingly became payable by the fund in terms its rules.

5. Old Mutual, the administrators of the fund distributed the death benefit on 22 July 1999 as follows: R100 011.10 to Cynthia Makaula, the customary law wife of the deceased and R30 000.00 each to their two children, Nandipha Makaula and Linda Makaula. The benefit awarded to the two children was paid into a trust for their benefit.
6. The complainant's complaint is that Veronica Makaula, who was legally married to the deceased, and her three children born of that union, were entitled to share in the death benefit as they were dependent on the deceased at the time of his death. The failure of the trustees to award any portion of the death benefit to Veronica Makaula's family was, according to the complainant, a breach of their fiduciary duties.
7. According to the complainant, the fund ought reasonably to have known of the existence of Veronica Makaula's family. On 19 July 1999 Veronica Makaula met with one Mr Samsodien of Unity Assurance & Insurance Brokers ("Unity Brokers"), who according to the respondents are the complainant's appointed intermediary.
8. At the meeting which was held at the complainant's premises, Veronica Makaula was requested to obtain the necessary forms relating to her husband's death. Mr Samsodien was informed at that meeting that Veronica Makaula was the lawful wife of the deceased and that three children, namely, Sitembele Makaula, Sipokazi Makaula and Avela Makaula had been born of the marriage.
9. The complainant further states that Veronica Makaula obtained the requested forms at great inconvenience and cost and handed them to Mr

Samsodien at a second meeting held on 23 July 1999 at the complainant's premises. However neither the complainant nor Veronica Makaula heard anything further from the fund or Old Mutual regarding the distribution of the death benefit.

10. The complainant later discovered that the death benefit had already been distributed to Cynthia Makaula and her family. This forms the basis of its complaint.
11. The respondents in their response have set out the sequence of events leading up to the decision to distribute the death benefit to Cynthia Makaula and her children.
12. On 29 April 1999, the respondents received a benefit claim form from the complainant, a copy of which is attached to the response. Significantly the form states that Veronica Vyiswa Makaula was the wife of the deceased and should be awarded 100% of the death benefit. In addition, the following documents were attached to the benefit claim form:
 - a tax form containing the past five years' salary of the deceased as required by the fund to obtain the required tax directive in respect of the death benefit due
 - the deceased's member benefit statement
 - one page of an identity document (totally illegible)
 - two birth certificates, one of which totally illegible
 - abridged death certificate in which it was recorded that the deceased was married
 - death register form
 - one page of the deceased's identity document

13. Since the birth certificates and identity document copy were illegible as well as the fact that no marriage certificate or affidavit as to a customary law union accompanied the above documents, the second respondent sent a fax dated 16 June 1999 to Unity Brokers, requesting clearer copies of the documentation submitted and further information regarding the relationship of the claimant to the deceased.
14. On 30 June 1999, in response to this request, the fund received a clearer copy of the page of the identity document, that of one Nofezile Cynthia Makaula (hereinafter referred to as "Cynthia Makaula"), clearer copies of the birth certificates of Nandipha Makaula and Linda Makaula respectively, the children born of the union between the deceased and Cynthia Makaula, a sworn affidavit by her confirming that she was married to the deceased by customary law and her bank statement.
15. On receipt of the above, the fund distributed the benefit to Cynthia Makaula and her two children. It states in its response:

Given that no further respondents were brought to the attention of the Respondent Fund by the Complainant via its agent, the Respondent Fund distributed the death benefit, as required by s37C of the Pension Funds Act, amongst the dependants it had traced via correspondence between it and the Complainant and its agent. Thus, the customary law wife, NC Makaula, received a net cash benefit of R100,011.10 and her two children received an amount of R30,000.00 each via payment into trust.

16. The fund goes on to say that

[it] was satisfied on reasonable grounds and acting in good faith that it has taken reasonable steps to trace the dependents of the deceased. It is submitted that, given such reasonable steps, the Respondent Fund had no reason to doubt that the dependants brought to its attention were the only dependents of the deceased.

17. The fund accordingly contends that it fulfilled its duties in terms of section 37C and that the complainant therefore has no grounds for its complaint.
18. The deceased did not nominate any beneficiaries and was survived by dependents. Therefore the distribution of the death benefit was governed by section 37C(1)(a) of the Pension Funds Act. To determine whether or not the fund complied with its duties in terms of section 37C(1)(a), the question is whether it took all reasonable steps to trace dependents and thereafter took all relevant considerations into account in determining an equitable distribution of the benefit to those identified dependents.
19. The fund has provided me with several points of argument to support its contention that it did indeed comply with its duties in terms of section 37C(1)(a). I shall deal with each in turn.

20. Firstly it states:

No beneficiary form was completed by the deceased wherein he would have had the opportunity to indicate the identities of his dependents or nominate such dependents for receipt of his death benefit from the Respondent fund.

21. The implication here is that since the deceased failed to provide the fund with any information regarding his dependents, that somehow reduces the obligation on the fund to trace dependents.
22. However the reverse is true. The fact that the deceased did not provide information regarding his dependents by nominating beneficiaries placed a greater duty on the trustees to proceed cautiously and to undertake a comprehensive investigation.
23. Secondly, the fund states that:

The Respondent Fund, given its status as an umbrella fund and therefore being removed from the immediate work place of its fund members and participating complainants, must necessarily rely upon such participating complainants to provide it with information concerning dependants of a deceased member who was employed by it immediately prior to his/her death.

24. The fund is saying that, as an umbrella fund, it is entitled to rely exclusively on the information provided by the participating employer and since no information regarding Veronica Makaula's family was provided in this instance, the fund could not reasonably have been expected to know of her existence.
25. However I do not agree. It may be, as the fund asserts, that the fund had no reason to doubt the complainant's knowledge of the deceased's dependents. However that does not mean that it can delegate its duty to trace dependents to the complainant. The duty is on the Board is to satisfy itself that all dependents have been traced.
26. Furthermore it is significant that on the initial benefit claim form submitted by the complainant, it clearly stated that Veronica Makaula was the wife of the deceased and should receive 100% of the benefit. (The fund's statement that at no stage prior to the allocation and payment of the death benefit did it receive any documentation from the complainant relating to other dependents of the deceased is therefore puzzling). However no further information regarding Veronica Makaula was received. This ought to have alerted the fund to the existence of other dependents and prompted it to take further steps to confirm the accuracy of the information provided by the complainant before distributing the benefit.
27. As stated in my determination in *Dobie v National Technikon Retirement Fund Pension Fund* PFA/KZN/207/99/AS, where a reasonable investigation reveals that there may be some doubt as to the circle of dependents, the

Board will be well advised to postpone the distribution until it has taken all reasonable steps to remove that doubt.

28. In the present case, the fact that Veronica Makaula's name appeared on the benefit claim and yet the complainant only sent information regarding Cynthia Makaula and her children thereafter, should have raised doubt in the minds of the trustees as to the circle of dependents and prompted them to postpone the distribution of the benefit. However the deceased died on 18 April 1999 and the benefit was distributed some three months later on 22 July 1999.
29. The next point made by the fund is that the complainant has shown in the past that it understands the meaning of the word "dependency" in the Act as evidenced by documentation submitted by the complainant in respect of a previous death benefit claim, namely, the late T Ntiyane. The complainant in that claim stated that the deceased's only dependent was his mother and that she should receive the entire proceeds of the death benefit. Included in the documentation was an affidavit taken under oath by the mother wherein she confirmed that she was the only dependent of the deceased.
30. According to the fund, this shows that the complainant was aware of the requirements concerning dependency and the requisite notification to be submitted to the fund and that it therefore reasonably relied on the information regarding the late Mr Makaula's dependents submitted by the complainant.
31. However I do not agree. The fund is suggesting that if the complainant has demonstrated that it understands the requirements of section 37C, it is entitled to rely wholly on the information provided by it. Whilst I can accept that, to a certain extent, an umbrella fund must rely on its participating employers to provide it with personal information regarding its employees,

that does not relieve it of its duty to conduct its own investigation and to satisfy itself that all dependents have indeed been traced. Had it done so in this instance, it would have discovered the existence of Veronica Makaula's family.

32. In its response the fund also refers me to a Flexidowment Policy on the life of the deceased, the proceeds of which were paid to Veronica Makaula who had been named sole beneficiary. It states that simultaneously to Old Mutual processing the late Mr Makaula's death claim, the life side of Old Mutual was processing the deceased's Flexidowment Policy. The fund contends that the complainant was fully aware of the endowment policy but failed to reveal this information to the fund and that this failure was due to an undisclosed decision taken by the complainant that it would be equitable for Veronica Makaula to receive the proceeds of the policy and for Cynthia Makaula to receive the death benefit. According to the fund, the complainant deliberately withheld information regarding Veronica's family and thereby frustrated the fund's attempt to locate dependents.
33. Again, I fail to see the relevance of this. At the end of the day, it is the fund's responsibility to investigate the personal circumstances of the deceased member, not only for the purposes of tracing dependents of the deceased but also to determine the deceased's overall financial position since this is a highly relevant consideration in the equitable distribution of a death benefit. In this instance, a proper investigation by the fund of the deceased's financial situation would have revealed the deceased's Flexidowment Policy and in turn the existence of Veronica Makaula's family.
34. As seen above, the various arguments raised by the fund in support of its contention that it complied with its duty in terms of section 37C(1)(a) are not convincing. In fact, the fund would appear to have misconstrued the nature of its duty by adopting the attitude that it is entitled to sit back and rely

exclusively on the information provided by the participating employer when in fact an active role in tracing dependents and positive intervention in the investigative process is what is required.

35. I am satisfied that the fund breached its duty in terms of section 37C(1)(a) and that its decision to distribute the entire benefit to Cynthia Makaula and her children is therefore unlawful and should be set aside on that basis.
36. The question is then what is the appropriate relief in this instance. In determining an equitable distribution of the benefit to the deceased's dependents pursuant to section 37C(1)(a), factors such as the extent of dependency on the deceased and the financial circumstances of each dependent must be taken into account. The parties have not provided me with any evidence in this regard and I am therefore unable to determine an equitable distribution of the benefit at this stage.
37. The appropriate remedy is therefore to postpone the matter to give the parties an opportunity to adduce evidence and provide additional submissions in this regard.
38. It should be noted that the respondents have also raised various other issues in their response such as the agency relationship between Unity Brokers and the complainant. However, since I consider these issues irrelevant to the question of whether or not the fund complied with its duties in terms of section 37C(1)(a), I find it unnecessary to deal with them.
39. The order of this tribunal is accordingly as follows:
 - 39.1 The first respondent's decision to distribute the death benefit of the late Mr A W Makaula to Cynthia Makaula and her family is hereby set aside.

39.2 The parties are invited to adduce evidence and to provide additional submissions as to an equitable of the death benefit of the late A W Makaula.

39.3 The matter is postponed until 15 June 2001 whereupon I shall make my final order.

DATED at CAPE TOWN this 17th day of APRIL 2001.

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JOHN MURPHY
PENSION FUNDS ADJUDICATOR