

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/GA/211/98/LS

In the complaint between:

P G Bison Provident Fund

Complainant

and

Liberty Life Association of Africa Ltd

Respondent

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

1. This is a complaint lodged with the Pension Funds Adjudicator relating to the fund's investment of a minor's death benefit in a life insurance policy. The complainant is the fund in this instance and alleges that the insurer, Liberty Life, wrongfully and negligently paid the proceeds of the policy to the minor's grandmother thereby depriving the minor of his property and causing him patrimonial loss. The complainant requests that Liberty Life pay damages to the minor in the amount of the proceeds of the policy which he should have received.
2. No hearings were conducted and therefore I have determined this matter on the documentary evidence and report by my investigator, Lisa Shrosbree.
3. Prior to his death, the deceased, one Johannes Matlaisane, was a member of the P G Bison Provident Fund ("the fund").
4. The deceased died on 17 September 1993 whereupon a death benefit became payable by the fund to his dependants in terms of the fund's rules.
5. The deceased was survived by his mother, wife and minor child.

6. Initially the deceased's mother looked after the child but later the child's mother took over custody.
7. The death benefit payable was an amount of R86 152.18.
8. The trustees in the exercise of their discretion in terms of the rules and section 37C of the Act awarded 30% of the benefit to the grandmother and 70% to the minor child.
9. It was further decided by the trustees to invest the minor's share in a Lifestyle Income and Capital Builder policy with Liberty Life of Africa Limited ("the policy") with the interest to be paid to the grandmother for supporting the child. The policy commenced on 1 February 1994.
10. Initially the policy was taken out in the name of the minor child with the estate named as beneficiary. A trustee of the fund, one Mr Miller, signed the policy on the minor's behalf as the minor's guardian, his mother, could not be located at the time.
11. However on 25 January 1994, Mr Miller sent a letter to Liberty Life requesting that the policy in the name of the minor be changed into the name of the grandmother. Presumably the fund became aware that a minor could not insure his own life and therefore corrected the error which had been made.
12. Liberty Life accordingly changed the policy into the name of the grandmother.
13. Towards the end of 1994, the minor's mother returned and took over custody from the grandmother.
14. The minor's mother approached the fund to inform them that she had resumed custody of the minor child. Liberty Life, on the instructions of the fund,

accordingly started paying over the interest earned on the policy to the mother to assist her in supporting the child.

15. The complainant states that it has pieced together subsequent events on the basis of the available documentary evidence as follows:
 - 15.1 It appears that the grandmother thereafter approached Liberty Life to enquire as to the reason why she was no longer receiving the interest on the policy initially allocated to her.
 - 15.2 According to the complainant, the grandmother then produced a certificate stating that she was the executor of the deceased's estate. She also represented to Liberty Life that the life assured on the policy was the deceased. This implied that if the policy became part of the deceased estate on the deceased's death, she, as executor of the estate would gain control over the policy and its proceeds on surrender.
 - 15.3 According to the complainant, the grandmother was able to mislead Liberty Life on account of the fact that the deceased, the grandmother and minor child all have the same initials and surname. Liberty Life was therefore not alerted by any inconsistencies.
 - 15.4 The grandmother then completed and signed a discharge form dated 21 June 1996 in her supposed capacity as executor. The effect of the discharge was to surrender the policy.
 - 15.5 She also completed and signed a standard form contract of cession dated 2 August 1996 whereby the estate ceded the policy to her in her capacity as executor. It was on this form that she indicated that the life assured in terms of the policy was the deceased and that she was the executor of the estate.

16. On the basis of the cession and surrender aforementioned, Liberty Life paid the proceeds of the policy to the grandmother.
17. Thereafter the fund made enquiries as to the entitlement of the grandmother to surrender the policy.
18. Liberty Life responded in a letter dated 18 November 1996 that since the grandmother was the legal guardian of the minor child, she was entitled to surrender the policy in that capacity.
19. Then on 26 November 1996, Liberty Life's legal department sent a letter to Mr Miller, the fund's trustee, stating that he had had no authority to sign the policy on behalf of the minor in the first place and that the money should have been deposited into the Guardian's Fund. Further, as per Government Notice R200 6/2/1987, the grandmother was appointed executor of the deceased estate and accordingly was entitled to surrender the policy after it had been ceded to her by the estate.
20. Thus it would appear that on the one hand, Liberty justifies its payment of the proceeds to the grandmother on the basis that she was executor of the estate and on the other hand that she was the guardian of the minor child.
21. The complainant asserts that as a reasonable insurer, Liberty Life should not have issued the policy in the first place since by virtue of the trustee's signature and statement on the policy that he was signing on behalf of the owner since the latter was a minor and his guardian could not be located, Liberty Life ought reasonably to have known that the policy owner was under 18 years. A minor under the age of 18 cannot insure his own life.
22. The complainant also asserts that no certificate of appointment of the

grandmother as executor has been produced and that Liberty Life was negligent in failing to require proof of the grandmother's guardianship at the time she applied for surrender of the policy. In any event the complainant argues that Liberty Life should have been suspicious of the fact that at that time interest on the policy was being paid to the minor's mother as guardian of the child.

23. The complainant argues that Liberty Life was also negligent with respect to the cession:

23.1 Firstly Liberty Life had a duty to confirm the capacity of the grandmother entering into the cession as well as check the identity of the person whose life had been assured. It failed to do both.

23.2 If Liberty Life had done the above checks, it would have realized firstly that it was not the deceased's life that had been insured in terms of the policy. Thus ceding the policy on the basis of the deceased's death was contrary to the terms of the policy. The policy was in fact taken out on the grandmother's life and therefore it was only the grandmother's death which could lawfully set the cession in motion. Secondly, it would have come to light that the grandmother had not in fact been appointed executor of the deceased estate and therefore was not entitled to receive the proceeds of the policy in that capacity.

23.3 The complainant argues that due to Liberty Life's negligence, the grandmother fraudulently gained access to the proceeds of the policy.

23.4 The complainant also points out that in terms of section 26 of the Administration of Estates Act of 1965, an insurance policy does not fall within the assets of the deceased estate and therefore an executor does not have the power to deal therewith in any event.

- 23.5 Finally, the complainant states that the discharge form whereby the policy was surrendered specifically required the full names of the policy owner to be filled out whereas only the initials appear. Had Liberty Life exercised greater caution and required the full names on the discharge form, the confusion could possibly have been avoided.
24. The complainant states that on account of Liberty Life's negligence, the minor child has suffered loss, that is, he has been deprived of his benefit.
25. The relief sought by the complainant is stated in the following terms:
- We submit that the proceeds of the policy should never have been paid to the grandmother and our client would like to see the proceeds of the policy paid to its rightful owner.
26. Liberty Life's response is wholly inadequate in that it fails to deal with all the allegations contained in the complaint. The response reads in part:
- From the trustees' instruction to us the apparent guardian was the grandmother of the minor child.
- With effect from February 1994, monthly instalments were made in accordance with the said policy to the grandmother of the minor child, to provide for the living expenses of the child.
- During 1994 the policy was surrendered and the proceeds paid to Mrs Matlaisane, the owner, and grandmother of the child. There was nothing sinister in our actions in surrendering the policy to the owner as it is normal practice in the pension funds industry to pay cash benefits to the guardians of minor children for their benefit.
27. Thus in the final analysis, Liberty Life states that it paid the proceeds to the grandmother on the basis that she was the guardian of the minor child and in that capacity would receive the cash for the minor's benefit.

28. It is clear from the above that either negligence, a breach of statutory duty or maladministration has resulted in severe prejudice to a minor child who has been deprived of his benefit.

29. However on account of the fact that I lack jurisdiction in this matter, it is unnecessary for me to go into the merits of the dispute.

30. Section 30D of the Act reads

The main object of the Adjudicator shall be to dispose of complaints lodged in terms of section 30A(3) of this Act in a procedurally fair, economical and expeditious manner.

and a complaint is defined in the Act to mean a complaint by a complainant.

31. Thus my power to grant relief depends on the existence of a *complaint* by a *complainant*. The former goes to my jurisdiction in respect of subject matter and the latter to my jurisdiction over parties. I will deal with the latter first.

32. A complainant is defined in the Act as

(1) any person who is, or claims to be -

(1) a member or former member of a fund;

(ii) a beneficiary or former beneficiary of a fund;

(ii) an employer who participates in a fund;

(2) any group of persons referred to in paragraph (a)(i),(ii) or (iii);

(3) a board of a fund or member thereof; or

(4) any person who has an interest in a complaint

33. In the present case, the complainant is the P G Bison Provident Fund and hence falls under either (c) or (d) above.

34. Section 30G governs who the parties to a complaint shall be and reads:

The parties to a complaint shall be

- (a) the complainant;
- (b) the fund or person against whom the complaint is directed;
- (c) any person who has applied to the Adjudicator to be made a party and who has a sufficient interest in the matter to be made a party to the complaint;
- (d) any other person whom the Adjudicator believes has a sufficient interest in the matter to be made a party to the complaint.

35. The complaint in this instance is against Liberty Life.

36. Thus I have jurisdiction over Liberty Life in terms of (b) above being the *person against whom the complaint is directed*.

37. The second leg of the jurisdiction enquiry relates to the subject matter of the complaint.

38. In terms of section 30D, my jurisdiction extends to complaints lodged in terms of section 30A(3) of the Act. Thus the enquiry is whether the complaint lodged by the P G Bison Provident Fund constitutes a complaint as defined.

39. Complaint is defined in the Act to mean

a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging

- (a) that a decision of the fund or any person purportedly taken in terms of

the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;

- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;
- (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
- (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant;

40. Paragraph (a) to (d) of the definition outline the causes of action over which I have jurisdiction:

40.1 The complaint does not fall under (a) since it is unrelated to a decision taken in terms of the fund's rules.

40.2 The complaint does not fall under (b) since it does not allege maladministration of the fund by the fund but rather maladministration of an insurance policy by Liberty Life, the insurer.

40.3 The complaint does not fall under (d) since it does not involve a participating employer in the fund.

41. In respect of (c), the complaint does raise a dispute of law in so far as the complainant claims that Liberty Life had no right to pay the proceeds of the policy to the grandmother in terms of the policy whereas Liberty Life states the contrary.

41.1 However (c) also requires that the dispute of law be *in relation to the fund*. On a generous interpretation all that this means is that the dispute be in some way connected to the fund. In so far as the dispute concerns

a policy which was bought with the minor's death benefit by the fund on the minor's behalf, this connection is present.

- 41.2 Finally (c) requires that the dispute be between *the fund or any person and the complainant*. In this instance, the complainant is the fund and Liberty Life would fall into the category of *any person*. Thus this requirement of (c) is also met.
42. However the fact that the complaint may fall within the scope of (c) in the definition of a complaint is not the end of the enquiry concerning my jurisdiction in respect of subject matter.
43. The first part of the definition in addition requires the complaint to relate to the administration of a fund, the investment of its funds or the interpretation and application of its rules.
44. Clearly, the complaint does not relate to the interpretation and application of the fund's rules since no rules are at issue in the complaint.
45. The complaint also does not relate to the administration of the fund. If anything, it relates to the administration of the insurer, Liberty Life.
46. The fund's administration of the benefit may very well leave something to be desired and arguably could form the basis of a complaint by the minor of maladministration of the fund. But that is not the complaint which has been lodged with this office.
47. The complaint does however relate to the investment of funds in the sense that the death benefit paid out by the fund was invested in a policy with Liberty Life.
48. However the definition refers to a complaint of a complainant relating to the

investment of *its* funds. Therefore what is required is the investment of the fund's funds.

49. Whilst the fund purchased the policy, it did so as a means of paying a benefit and acted as agent for the beneficiary (in this instance the minor) for that purpose. It was not an investment of the fund's capital as a means of securing its ongoing liabilities. A benefit became payable to a minor and as a means of paying that benefit and discharging its liability the fund purchased a policy.
50. It is clear from the policy documentation that the "owner" was initially the minor child. However a minor cannot own an insurance policy in law and on that account the fund instructed Liberty Life to transfer ownership in the policy from the minor to the grandmother.
51. Accordingly it cannot be said that the dispute of law related to the investment of the fund's funds. Rather it related to investment of the *minor's* funds.
52. Thus this complaint does not constitute a complaint as defined in the Act and I accordingly do not have jurisdiction to investigate and determine it.
53. The appropriate solution in this instance would be for the fund to take the matter up with the Ombudsman for Long Term Assurance. My determination in this matter shall be handed to him and the fund is advised to direct its complaint to him.
54. The complaint is accordingly dismissed.

DATED at CAPE TOWN this 1st day of NOVEMBER 1999.

.....

JOHN MURPHY
PENSION FUNDS ADJUDICATOR