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Trustees ordered to rethink allocation of death benefits

By **Webmaster** on May 3, 2013 in **Employee Benefits**, **Financial Planning**

The board of trustees of a retirement fund has been ordered by the Office of the Pension Funds Adjudicator to reapply its mind in the allocation and distribution of a member's death benefit.

The deputy Pension Funds Adjudicator Ms Muvhango Lukhaimane found that the board of trustees had failed to establish the level of dependency of dependants and thereby effect an equitable distribution.

In a rare move, the board of trustees was also ordered to report to Ms Lukhaimane within eight weeks of the date of the determination, the revised allocation and distribution and the reasons therefor.

Ms T Sixaxeni passed away on 16 March 2011 while she was still employed. A death benefit comprising of the deceased's fund credit in the amount of R706 330.49 became due and payable to the deceased's beneficiaries.

The deceased's mother, Ms NM Sixaxeni of Mossel Bay (complainant) was dissatisfied with the decision by the board of trustees of Cape Retirement Fund (first respondent) to disregard the nomination form that was completed by the deceased prior to her death wherein she indicated that her minor son (Yanga Sixaxeni) should receive 50% of the death benefit.

The complainant was aggrieved that instead of Yanga receiving the percentage that his mother had nominated, the deceased's nieces and nephew received a higher percentage of death benefit.

The board of trustees of the first respondent identified the complainant, the deceased's minor child, the deceased's three nieces and the deceased's nephew as the beneficiaries.

The board of trustees distributed the proceeds of the death benefit as follows: Ms NM Sixaxeni, 50 years old (mother) – R159 791.33; Yanga Sixaxeni, 10 years, (son) – R49 715.84; Lulutho Sixaxeni, four years, (niece) – R92 788.86; Abukwe Sixaxeni, two years, (niece) – R104 332.42; Khanyulutho Sixaxeni, four months (nephew) – R125 620.07; and Lukhanyile Sixaxeni, two years, (niece) -R106 916.81.

Before her death, the deceased had completed a nomination form wherein she nominated her minor child to receive 50% of the death benefit, her sister Fatima to receive 5% of the death benefit, her sister Phindi to receive 5% of the death benefit, her brother Yandisa to receive 5% and her mother (complainant) to receive 30% of the death benefit.

The complainant requested the Office of the Pension Funds Adjudicator to compel the board of trustees to adhere to the nomination form that was completed by the deceased prior to her death.

The first respondent submitted that following the death of the member, the board of trustees conducted an investigation in terms of section 37C of the Pension Funds Act. The investigation revealed that all the identified dependants fell within the definition of a dependent in section 1 of the Act and that they were financially dependent on the deceased.

• The deceased was single at the time of her death and had one child (Yanga) from a previous relationship. Yanga's caregiver was the deceased's mother (complainant). Yanga's father was paying monthly maintenance of R1 100 for him. The board of trustees resolved to allocate R49 715.84 to Yanga, cognisant of the fact that his father paid monthly maintenance for him.

• The complainant was unemployed and financially dependent on the deceased, although she receives a monthly state grant of R1 100. The board of trustees resolved to pay a death benefit of R159 791.33 to the complainant.

• The deceased had a sister, Fatima Sixaxeni, age 28 who was employed as a volunteer at a community centre and earned R700 over three months. Fatima receives a child grant of R280 per month for her minor child, Abukwe, aged two years. While Fatima was dependant on the deceased, the board of trustees resolved not to award a portion of the death benefit to her. Abukwe's biological father is not employed and only contributes towards maintenance when he has a casual job. Abukwe lives with the complainant. The board of trustees resolved to allocate R104 332.42 to Abukwe cognisant of the fact that no regular maintenance were being made by Abukwe's father.

• The deceased had another sister, Phindi, aged 24. Phindi was unemployed and financially dependent on the deceased. She receives a monthly child grant of R810 in respect of her three children, Lulutho, four years, Lukhanyile, two years, and Khanyulutho, four months. The father of Phindi's three children only pays maintenance when he gets a casual job. All three of Phindi's children were financially dependent on the deceased and lived with the complainant. The board of trustees resolved not to award any portion of the death benefit to Phindi. However, they allocated a portion of the death benefit to her three children as follows: Lulutho R92788.86; Lukhanyile R106 916.81; and Khanyulutho R125 620.07.

• Further, the first respondent submitted that the deceased had a brother, Yandisa aged 20. He was a grade 11 learner at the time of the deceased's death. He was dependant on the deceased and lived with the complainant. The board of trustees resolved not to allocate a portion of the death benefit to him.

In her determination, Ms Lukhaimane said the board of trustees had failed to exercise its discretion properly and reasonably in allocating the proceeds of the death benefit.

She said Section 37C of the Pension Funds Act governs the disposition of death benefits. It places a duty on the board of trustees to identify the beneficiaries of a deceased member and also vests the board with discretionary powers on the proportions and manner of distributing the proceeds of a death benefit.

As with the exercise of any discretionary power, in effecting an equitable distribution the board is required to give proper consideration to relevant factors and exclude irrelevant ones from consideration.

"The board of trustees may not unduly fetter its discretion by following a rigid policy that takes no account of the personal circumstances of each beneficiary and of the prevailing situation," said Ms Lukhaimane.

She said Section 37C restricts a deceased member's freedom of testation in relation to the benefits payable by the fund in the event of his death. The guiding principle is that such assets do not form part of the deceased's estate and are required to be distributed in accordance with a statutory scheme which gives preference to need and dependency above member's choice.

When making an equitable distribution amongst dependants of the deceased, the board of management has to consider the following factors:

• The age of the dependants

• The relationship with the deceased;

• The extent of dependency;

• The wishes of the deceased placed either in the nomination and/or his last will; and

• Financial affairs of the dependants including their future earning capacity potential.

Ms Lukhaimane said: “From the first respondent’s response, it appears as if, in deciding to award a greater portion of the death benefit to the deceased’s nieces and nephews than the deceased’s biological son, the board took into consideration the ages of the deceased’s nieces and nephew and the fact that their parents, specifically their fathers were unemployed and did not pay maintenance on a regular basis.

“The deceased’s nieces and nephew were all under the age of five. However, the board failed to establish the level of dependency of the three nieces and one nephew on the deceased.

“The board merely stated that they were all dependant on the deceased. However, the level of dependency was not mentioned, or at the very least how they were dependant on the deceased.

“The fact that their parents were unemployed does not automatically translate into financial dependency on the deceased. The deceased did not live with her three nieces and one nephew.

“The board of trustees rightfully did not consider the nieces and nephews future earning capacities as they are all still minors. However, the board failed to consider their parents’ future earning capacities. The parents of the deceased’s three nieces and nephew have a duty to maintain them.

“Abukwe’s mother is 24 years of age and works at a community centre and earned R700 over three months. She also receives a monthly child grant from the State in of R280.

“Abukwe’s father is unemployed and does odd jobs every now and then. However, Abukwe’s parents’ financial state does not absolve them of their duty to maintain him; neither does it mean that their financial position will remain unchanged. The board of trustees failed to consider all relevant factors in this regard.”

With regards to Lulutho, Lukhanyile and Khanyuthulo, Ms Lukhaimane said the board committed the same error in that their financial dependence on the deceased was not established; neither was the extent of their financial dependency considered.

The children also did not live with the deceased but lived with the complainant. Their parents who have a duty to maintain them are in their mid-twenties and their future earning capacities could improve.

“With regards to the deceased’s minor child, Yanga, he qualifies as a legal dependant. The board resolved to allocate a lesser benefit to him than all the other identified beneficiaries.

“The reasoning behind that was that his father paid regular maintenance of R1 100 monthly and paid for his school fees.

“However, it does not seem that they took into account the fact that the complainant also receives a monthly State grant of R1 100 when allocating her a benefit of R159 791.33 as opposed to the R49 715.84 that they allocated to the deceased’s minor child.

“Further, the board did not consider that the deceased’s nieces and nephew also receive a monthly State grant when they allocated higher amounts to them.

“It appears that the board would rather impose the duty to maintain a child on Yanga’s father than on the fathers of the deceased’s nieces and nephew.

“Further, the board of trustees did not consider the fact that Yanga is 10 years old and has but one parent since the passing of the deceased as opposed to the nieces and nephew who still have both parents who are still young.

“In light of the above, this Tribunal finds that the board of trustees fettered their discretion in that they failed to establish the dependency of the deceased’s nieces and nephew on the deceased.

“The board also failed to consider the level of dependency of the deceased’s nieces and nephews and effect an equitable distribution.”

Ms Lukhaimane ordered the setting aside of the allocation of higher amounts of the death benefit to the deceased’s nieces and nephews.

The board of trustees was directed to exercise its duties in the allocation and distribution of the deceased’s death benefit with due regard to the factors considered in this determination, within six weeks.

Further, the board of trustees must report its decision and the reasons therefor to the Pension Funds Adjudicator and the complainant, within eight weeks.