



4th Floor
Riverwalk Office Park
Block A, 41 Matroosberg Road
Ashlea Gardens, Extension 6
PRETORIA
SOUTH AFRICA
0181

P.O. Box 580, **MENLYN**, 0063
Tel: 012 346 1738 / 748 4000
Fax: 086 693 7472
E-Mail: enquiries@pfa.org.za
Website: www.pfa.org.za

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REGISTERED POST

Dear Madam,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,
24 OF 1956 (“the Act”): MB KLEIN (“Ms Klein”) v UNIVERSITY OF CAPE TOWN
RETIREMENT FUND (“fund”) AND M D'ANGELO (“Morag”)**

[1] INTRODUCTION

- 1.1 The complaint concerns the allocation of a death benefit by the fund following the death of its member, Mr A D'Angelo (“the deceased”).
- 1.2 The complaint was received by the Adjudicator on 09 July 2024. A letter acknowledging receipt of the complaint was sent to Ms Klein on 15 July 2024. On the same date, a letter was sent to the fund, affording it until 05 August 2024 to file its response to the complaint. The fund filed a response on 17 August 2024. The fund's response was forwarded to Ms Klein on 19 August 2024 to afford her an opportunity to file further submissions, if necessary, by 28 August 2024. Ms Klein filed further submissions on 23 August 2024. On 29 August 2028, a joinder letter, together with the complaint and fund responses, was sent

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to Morag, as a beneficiary, to afford her an opportunity to file a response to the complaint by 10 September 2024. No further submissions were received from the parties.

- 1.3 Having considered the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 Ms Klein is the life partner of the deceased. The deceased was a member of the fund from 01 May 1994 until he passed away on 30 November 2022. The deceased was survived by the following persons:

Person	Relationship	Age
Mrs Amanda D'Angelo ("Amanda")	Former Spouse	59
Ms Morag D'Angelo ("Morag")	Daughter	24
Ms Marie Bastienne Klein ("Marie")	Life Partner	56

- 2.2 Upon the deceased's death, gross death benefit became available for allocation to his beneficiaries. The death benefit amounts to R10 104 210.86 as at 12 August 2024. The board has not yet allocated the death benefit.
- 2.3 The fund's decision to exclude Ms Klein from the allocation of the death benefit is the subject of this complaint.

[3] COMPLAINT

- 3.1 Ms Klein submitted that she is the deceased's life partner. She indicated that she submitted a death benefit claim to the fund in February 2023. The fund informed her that she will not be included in the allocation of the death benefit as she was not a nominee or a dependant of the deceased.

- 3.2 Ms Klein submitted that the deceased bequeathed his entire estate to her, including his flat and retirement fund death benefit, on the condition that she set up a trust for Morag with 50% of his death benefit. She submitted that she was the deceased's life partner, as they had been together since 2013, prior to his divorce from Amanda. She submitted that due to the financial strain from his divorce, she had no expectation for him to assist her financially.
- 3.3 Ms Klein submitted that due to financial difficulties, she and the deceased could not move in together. However, they spent weekends together and saw each other during the week. She submitted that they had long-term plans to move in together eventually. She submitted that other than being financially dependent on each other, she and the deceased were dependent on each other in every other way romantically.
- 3.4 Ms Klein provided, *inter alia*, the deceased identity document and the fund's communication of its resolution dated 24 January 2024
- 3.5 Ms Klein requests the Adjudicator to investigate the matter and order the fund to include her in the allocation of the death benefit.

Ms Klein's further submissions

- 3.6 Ms Klein confirmed that after the deceased's divorce to Amanda, Amanda fully supported Morag. She confirmed that the deceased was financially supporting Morag. She submitted that the deceased passed away less than a year after his divorce. She submitted that the deceased wrote his Will days before he passed away.

- 3.7 Ms Klein submitted that a life partnership is based on a reciprocal duty of support to each other (*Bwanya v Master of the High Court, Cape Town* 2021 (1) SA 138 (WCC)). She submitted that she and the deceased had reciprocal duties such as loyalty and emotional support. She submitted that she relied on the affidavits she submitted to the fund from friends and colleagues that confirmed her relationship with the deceased.

[4] **RESPONSES**

Fund

- 4.1 The fund submitted that the deceased was its member from 01 May 1994 until 30 September 2022, when he passed away. It submitted that the deceased submitted a beneficiary nomination form on 26 February 2018, where he nominated Amanda and Morag to each receive 50% of his death benefit.
- 4.2 The fund submitted that the deceased and Amanda divorced on 23 February 2022. It submitted that in terms of the divorce, the deceased and Amanda renounced all maintenance claims against each other. The fund submitted that in terms of the divorce, Morag was not self-supportive. Morag lived with Amanda, and Amanda continued to provide for her financially until she became self-supportive. The deceased was to retain Morag on his medical aid.
- 4.3 The fund submitted that Amanda ceased to be a legal dependant of the deceased after their divorce. However, the deceased did not change his beneficiary nomination form. The fund submitted that at the time of the deceased death, Amanda was still a nominee and it cannot disregard the beneficiary nomination form. The fund submitted that Morag remained a legal dependant at the time of the deceased's death.

- 4.4 The fund submitted that the deceased bequeathed his entire estate to Ms Klein. It submitted that the deceased Will reads as follows:

“I bequeath my whole estate to: Marie Bastienne Klein,
Identity number, 6601140183087, including my flat in Sea Point and all its
contents, on condition that she uses half of the money received from my UCT
Pension Fund to set up a trust to provide for my daughter Morag Isabella
Audry D’Angelo, ID number 9406010224087”

- 4.5 The fund submitted that the deceased bequeathed his entire estate to Ms Klein on the condition that she utilise half of the proceeds received from the fund to set up a trust for Morag. It submitted that the deceased’s Will does not stipulate what should happen should Ms Klein fail to set up such trust, and that portion of the Will creates an unenforceable obligation.
- 4.6 The fund submitted that it resolved to exclude Ms Klein as a beneficiary of the death benefit as she was not a nominee or a dependant of the deceased. It submitted that Ms Klein was not a factual dependant as she could not prove financial dependency on the deceased. The fund submitted that the deceased and Ms Klein were not living together at the time of his death. It submitted that Ms Klein is purely relying on the fact that she was the deceased’s life partner. The fund submitted that it is not at liberty to accept every relationship as a life partner on the basis of a claimant’s understanding of the nature of their relationship.
- 4.7 In conclusion, the fund submitted that Ms Klein did not qualify to be a beneficiary of the death benefit.

Fund’s further submissions

- 4.8 On 18 September 2024, the fund submitted that the death benefit is currently valued at R10 104 210.86 as at 12 August 2024. It submitted

that it became aware of the deceased's death in December 2022. However, there were delays in obtaining the information from the potential beneficiaries.

- 4.9 On 23 September 2024, the fund elaborated on the delay in the allocation of the death benefit. It provided a sequence of events. In summary, the fund was notified of the deceased's death on 02 December 2022, and it received Ms Klein's death benefit claim on 02 February 2023. Between April 2023 and December 2023, the fund attempted to arrange meetings with Amanda and Morag. However, it was difficult to arrange same as they were still grieving the loss of the deceased. The fund received Amanda and Morag's death benefit claim forms on 13 December 2023. On 13 March 2024, the board resolved that it needed more information to make an equitable allocation of the death benefit. On 23 March 2024, the board resolved that it needed more information regarding Ms Klein's dependency on the deceased. On 10 April 2024, the board resolved to exclude Ms Klein from the allocation of the death benefit. On 15 May 2024, Ms Klein appealed the board's decision to exclude her from the allocation of the death benefit and a response was sent to her legal representatives on 04 June 2024. The fund submitted that it awaits the Adjudicator's determination before making the final allocation.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

- 5.1 The issue to be determined is whether or not the fund made an equitable allocation of the death benefit in terms of section 37C of the Act.

Allocation of death benefit

5.2 In the Supreme Court of Appeal (“SCA”) matter of *Municipal Employees Pension Fund v Mongwaketse* (969/2019) [2020] ZA SCA 181 (23 December 2020) at paragraphs [42] to [44], Wallis JA held that the rules of a fund are its constitution, and that the doctrine of *ultra vires* applies. If the rules of a fund do not afford a fund the legal power or capacity to do something then such purported act by the fund is *ultra vires* and accordingly null and void. The Constitutional Court affirmed the SCA’s findings in *Municipal Employees Pension Fund and Another v Mongwaketse* (CCT34/21) [2022] ZACC 9 at paragraph [39] where it stated that the application of the *ultra vires* doctrine to pension funds is consistent with the constitutional principle of legality.

5.3 The payment of a death benefit is regulated in terms of section 37C of the Act, which provides as follows:

“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 (other than a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules) 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.”

5.4 It is the board's responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the beneficiaries, to thereafter decide on an equitable distribution and finally to decide on the most appropriate mode of payment of the benefit payable. Their duties in this regard were summarised in *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA), at paragraph 24 and 25, as follows:-

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

- the age of the dependants – younger, minor children may need to be allocated larger amounts of the benefit, as they may need a longer period of dependency before they are capable of supporting themselves;
- the relationship with the deceased – the board must ensure that it does not fetter its discretion by favoring legal dependants over factual dependants without justification;
- the extent of dependency – the board must consider whether a beneficiary was totally or partially dependent on the deceased. The person's dependency in relation to other beneficiaries should also be compared. Those who were more dependent would probably need greater assistance and therefore a greater benefit;
- the wishes of the deceased placed either in the nomination form and/or his last will – this is merely one of the factors to be considered by the board when effecting an equitable distribution and the board must ensure it does not fetter its discretion;
- financial affairs of the dependants including their future earning capacity potential – the board should consider the beneficiaries, this includes income, expenses and other assets and liabilities. The board should examine any bequest made to the beneficiaries by the deceased, the standard of

living and life insurance proceeds paid to any beneficiary;

- future earning capacity – the board must look at the beneficiaries' employment prospects and consider if they are in financial difficulties and whether the financial hardship is of a temporary nature and the prospects of securing gainful employment;
- amount available for distribution – benefits available for distributions may not be enough to cover the maintenance needs of all beneficiaries forcing the board to consider other factors when determining an equitable distribution. This may lead to awarding a benefit which is less than maintenance needed of a dependant or a nil benefit in certain circumstances.

In making their decision, the board needs to consider all relevant information and ignore irrelevant facts. Further, the board must not rigidly adhere to a policy or fetter their discretion in any other way.”

5.5 Section 1 of the Act defines a dependant as follows:

“**Dependant**, in relation to a member, means –

- (a) a person in respect of whom the member is legally liable for maintenance;
- (b) a person in respect of whom the member is not legally liable for maintenance, if such person –
 - (i) was in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;
 - (ii) is the spouse of the member,
 - (iii) is a child of the member, including a posthumous child, an adopted child and a child born out of wedlock.
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died.”

A spouse is defined as a person who is the permanent life partner or spouse or civil union partner of the member in accordance with the Marriage Act, 1961 (Act 68 of 1961), the Recognition of Customary Marriages Act, 1998 (Act 68 of 1997), or the Civil Union Act, 2006 (Act 17 of 2006) or the tenets of a religion.

- 5.6 The law recognises three categories of dependants based on the deceased member's liability to maintain such a person, namely, legal dependants, factual dependants and future dependants. In principle, a member is legally liable for the maintenance of a spouse and children as they rely on the member for the necessities of life. In the case of factual dependants, where there is no duty of support, a person might still be a dependant if the deceased in some way contributed to the maintenance of that person. The person alleging to be a factual dependant will have to prove that he was dependent on the deceased, despite the deceased not having a legal duty to maintain at the time of the member's death.
- 5.7 The fund submitted that it identified Ms Klein, Amanda and Morag as potential dependants of the deceased. The fund established that the deceased and Amanda divorced on 22 February 2022, therefore ceasing Amanda's legal dependency on the deceased. The fund identified that Morag is still a legal dependant as she is the deceased's daughter and was financially assisted by the deceased at the time of his death. The fund was correct in identifying Morag as the deceased's dependant in terms of section 37C of the Act.
- 5.8 The fund submitted that it considered Ms Klein as a potential dependant of the deceased. However, the fact that a person qualifies as a legal or factual dependant does not automatically give them the right to receive a portion of a death benefit (see *Varachia v SA Breweries Staff Provident Fund and Another* [2015] 2 BPLR 314H-I (PFA)). The deciding factor is financial dependency (see *Morgan v SA Druggists Provident Fund and Another* (1) [2001] 4 BPLR at 1890G-H (PFA)). Therefore, as part of its investigation in terms of section 37C,

the fund must take various factors into account consideration when allocating a death benefit and dependency is one of them.

- 5.9 The facts indicate that though Ms Klein was the deceased's life partner, it is undisputed that she was not financially dependent on the deceased as the deceased did not financially assist her in any way, nor did they share a common household where they were financially co-dependent on each other. Ms Klein also acknowledges that due to the deceased's financial stress from his divorce from Amanda, she had no expectation of support from the deceased. Further, Ms Klein has not been left destitute because she has not suffered any financial loss due to the death of the deceased. On this basis, the fund was correct in excluding Ms Klein from the allocation of the death benefit.

Conclusion

- 5.10 The fund's task in allocating a death benefit in terms of section 37C of the Act is to identify all the potential beneficiaries (see *Van Schalkwyk v Mine Employees' Pension Fund and Another* [2003] BPLR 5087 (PFA) at paragraph 15). The board of the fund is vested with discretionary powers to decide on an equitable distribution of the death benefit. It is only in cases where it has exercised its powers unreasonably and improperly or unduly fettered the exercise thereof, that its decision can be reviewed (see *Mongale v Metropolitan Retirement Annuity Fund* [2010] 2 BPLR 192 (PFA)). The duty of the Adjudicator is not to decide what is the fairest or most generous distribution, but rather to determine whether the board has acted rationally and arrived at a proper and lawful decision (see *Ditshabe v Sanlam Marketers Retirement Fund & Another* (2) [2001] 10 BPLR 2579 (PFA), at 2582 F-G).
- 5.11 In light of the above, the Adjudicator is satisfied that the board of the fund took into account relevant factors and did not abuse its discretion

in the allocation of the deceased's death benefit. The death benefit was properly allocated to the dependants of the deceased and there is no reason to set aside the board's decision. Thus, the complaint falls to be dismissed.

[6] ORDER

6.1 In the result, the complaint cannot succeed and is therefore, dismissed.

DATED AT PRETORIA ON THIS 04TH DAY OF OCTOBER 2024

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M Filing: High Court.

Parties: unrepresented