

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/KZN/2786/2001/NJ

In the complaint between:

Mark Bester

First Complainant

Karin Bester

Second Complainant

and

Central Retirement Annuity Fund

Respondent

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

1. This is a complaint lodged with the Office of the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act 24 of 1956 ("**the Act**"). The complaint relates to the payment of a death benefit in terms of section 37C(1)(a) of the Act, in particular, the exclusion of complainants from sharing in the distribution.
2. No hearing was held in this matter. An investigation under my supervision was conducted by my investigator, Naleen Jeram. In handing down this determination, I have relied exclusively on the documentary evidence and written submissions gathered during the course of our investigation.
3. The first complainant is Mark Bester, an adult male, residing in Oak Park, Pietermaritzburg, Kwa-Zulu Natal. The second complainant is Karin Bester, an adult female, currently residing in Australia. Both complainants are represented by Mr Mark Bester.

4. The respondent is Central Retirement Annuity Fund, a pension fund duly registered under the Act and falling within the ambit of paragraph (a) of the definition of “pension fund organization” contained in section 1 of the Act (“**the fund**”). The fund is represented by Mr P G Jonker of Sanlam Personal Finance. In terms of rule 4, the fund is controlled and managed by a management committee, which consists of at least 4 members. The assurer (Sanlam) appoints all the management committee members except the independent management committee member, who is nominated by the other members of the committee. The rules of the fund allow its management committee to apply to an insurance company to issue policies in favour of the fund on the lives of the members and purchase other retirement products. Hereafter, the fund collects contributions from the members and in turn pays it over to the insurance company. A member may decide what contribution he or she wishes to make to the fund, subject to certain minimum amounts set by the insurer with whom the fund concludes the policy contract. Contributions commence at the inception date of membership, and are payable as the management committee of the fund agrees with the insurance company. All the monies payable by the insurance company in terms of the provisions of the policy is paid to the fund. The management committee in turn deals with the payment of benefits in accordance with the rules of the fund.
5. Mr JJ Bester (“**the deceased**”) and Ms Sylvia Bester were married in 1987 in community of property. Prior to this marriage, the deceased had two children, namely, Mark Bester and Karin Bester (the complainants) from a previous marriage. On 10 September 1991 the deceased and Sylvia Bester were divorced. However, they re-married in 1994. On 1 February 1997 the deceased became a member of the fund and nominated Mark Bester as his beneficiary. Hereafter, on 1 June 1998, a further life policy was purchased for the deceased in respect of which, he nominated Karin Bester as the beneficiary. On 24 February 2000 Mr Bester passed away. At the time of his death, he and his wife were estranged and from the papers it appears as if he was in the process of instituting divorce proceedings.

6. Upon the death of Mr Bester, two life annuities, (guaranteed for 10 years) payable by the fund became available for distribution as a death benefit. The commencing values of the two annuities were R535.89 and R554.60 respectively. It is common cause that the deceased was survived by three dependants, namely, Mark, Karin and Sylvia.
7. In making an equitable distribution amongst the dependants, the fund considered the following material information. Ms Sylvia Bester was 55 years of age and experiencing grave financial difficulties. In terms of a joint will signed on 8 January 1996, she was the sole beneficiary of the estate. However, she received no assets from the estate. On the other hand, Mark and Karin were 34 and 36 years of age respectively and financially independent. Based on the above considerations, in particular, the greater financial needs of Ms Sylvia Bester, the fund decided to award both life annuities to her.
8. The complainants are dissatisfied with their exclusion from the distribution. Mr Bester essentially contended that there were two legal bases, in terms of which, they were entitled to the death benefits. Firstly, he argued that by virtue of the respective nomination forms completed by the deceased (wherein the deceased had nominated the complainants as beneficiaries), he and his sister were by right entitled to the benefits.
9. Secondly, he submitted that Ms Sylvia Bester in any event consented to him and his sister receiving the death benefits. The complainants attached the following consent form signed by Ms Bester, the material provisions thereof read:

I, Sylvia Bester ID No 451124 0068 009 being the duly authorized EXECUTOR in the Estate of the Late J J Bester, ID No. 411108 5142 082 – Letter of Authority NO. 2797/00, do hereby confirm that I have no objection to the proceeds of the below mentioned policies being paid out

to the nominated beneficiaries as stated in the policies.

16282027X8-Beneficiary-K.M Bester and M.S Bester in equal shares.

16867775X5-Beneficiary-M.S.Bester

On the strength of this consent, the complainants argued that they were entitled to the death benefits and sought an order directing the fund to immediately commence paying them their respective monthly annuities.

10. Mr Jonker acting on behalf of the fund submitted that the consent form was improperly completed. He referred to a statement by Ms Sylvia Bester, the relevant portions of which, read:

I must point out that as I was destitute, I have been sharing with my divorced daughter and her 2 children, and all the furniture in the house belongs to her. The only "assets" I have are my clothes.

Regarding the signature on the document that Mark is inquiring about, I would like to state the following:

He told me immediately after the death of my late husband, that the Policies would be paid out to himself and his sister and that I had no legal claim whatsoever. I did not have the funds to obtain legal advice and at that stage was in quite a turmoil and Mark was very domineering and took control saying that if I opposed him, he had a lawyer and that frightened me as I was just managing to live and not able to get the help of lawyer so I was forced to sign the papers he brought to my office just before I was due to start work, and he actually put the papers on the bonnet of his car for me to sign, and would not come inside as he was in "rush". I know he did require me to sign a letter to say that he firearms were his because in the will they were left half to Mark and half to my son who is overseas and does not want them. I really feel that as Mark is comfortably off, and the fact that he and his father did not get along, and I looked after this father and put up with all the physical and emotional abuse, that I deserve some financial stability at this stage of my life.

My late husband and I had a 4 bedroom house fully furnished with everything paid up, and on

one of his drunken sprees, he sold the lot to a second hand dealer for R4,000.00 and went to Johannesburg, leaving just my clothes on the floor, and since then I had to live on my own small income. I am not trying to take from Mark and his sister what he feels is rightfully his (*sic*), but I do need this small monthly amount to help me live.

My income and expenditure per month

Monthly Gross Income	2,800.00
Less Deductions	R429.94
Less my half of the rent	R750.00
Less my half of the lights	R200.00
Less my half of the telephone	R200.00
Transport costs as I have no car	R100.00
Medical Levies	R100.00

This leaves an amount of R620.06 for food and clothing etc.

11. The fund accepted the version of Ms Sylvia Bester that the consent form was improperly obtained and therefore had no effect in law. Regarding the distribution amongst the dependants, Mr Jonker submitted that the fund considered all relevant factors and essentially made an equitable distribution by excluding the complainants. He requested that the complaint be dismissed.

12. In the instant matter, payment of the death benefit is regulated by section 37C(1)(a) of the Act, which reads:

(1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit 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.

13. As I have held previously, the section establishes a mandatory scheme, in terms of which, a death benefit has to be distributed. Furthermore, the benefit cannot form part of the deceased member's estate. In terms of this compulsory scheme, where the deceased is survived by dependants only, in terms of section 37C(1)(a), the board of management of the fund is required to make an equitable distribution amongst the dependants. It does not follow that nomination as a beneficiary automatically entitles one to share in the distribution. At very best, it is only one of a number of relevant considerations to be taken into account by the board when making an equitable distribution.
14. Turning to the argument in respect of the consent form signed by Ms Bester, *ex facie* the document, it is evident that she had no objections to the fund paying the death benefits to the respective complainants. It is unfortunate that the complainants have chosen not to join Ms Bester as a party to these proceedings. Nevertheless, Mr Jonker has provided me with the letter from Ms Bester claiming that she signed the consent form under undue influence. In his subsequent reply, Mr Bester did not deny the contents of this particular letter and therefore I can only assume that the factual scenario set out in the letter is correct. Accordingly, by virtue of consent being improperly obtained, the consent form probably does not constitute a valid contract in law.
15. In any event, even if the consent had been duly obtained, it does not materially assist the complainants. In terms of section 37C of the Act, a death benefit can only be distributed to a dependant as defined in section 1 of the Act, a nominee or the estate of the deceased member under certain circumstances, *notwithstanding anything to*

the contrary contained in any law. The section itself is only subject to a pledge in terms of section 19(5)(b)(i), the provisions of section 37A(3) of the Act and section 37D of the Act. Any consent by a dependant to the effect that the benefit may be paid to the other dependants or other wishes of any beneficiary do not fall within the ambit of these exceptional sections. Therefore, the alleged consent by the complainant would not entitle the complainants to *ipso facto* share in the distribution. Once again, at very best, it may be one of the considerations to be taken into account by the board when making an equitable distribution.

16. In making the equitable distribution, the board of management needs to consider relevant factors and ignore irrelevant considerations. It may not fetter its discretion, nor should its decision reveal an improper purpose. From the evidence before the board, the fund was greatly concerned by the grave financial circumstances of Ms Sylvia Bester and her limited working capacity by virtue of being 55 years of age. This was in contrast to the complainants' financial positions and ages. Therefore, even though Ms Bester appeared to be estranged with the deceased immediately prior to his death, the fund considered it equitable to distribute both annuities to Ms Bester. I can find no fault in the distribution or the reasoning behind the distribution. The board had considered all relevant factors, including the ages of the beneficiaries, their respective financial positions, the wishes of the deceased, the beneficiaries' relationships with the deceased during his life time, and the limited amount available for distribution. Accordingly, there are no grounds permitting me to interfere with the board's decision.
17. Thus, for the foregoing reasons, the complaint is dismissed.

DATED at Cape Town this 17th day of July 2001.

John Murphy

Pension Funds Adjudicator