



**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR
(HELD IN CAPE TOWN)**

CASE NO: PFA/WE/9248/2006/KM

In the complaint between:

ANNE MARGARET GOWING

Complainant

and

LIFESTYLE RETIREMENT ANNUITY FUND

First Respondent

KARIN HASSERIIS

Second Respondent

FELICITY LOOPSTRA N.O.

Third Respondent

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION
FUNDS ACT 24 OF 1956 (“the Act”)**

1. Introduction

- [1.1] The complaint concerns the allocation of a benefit in terms of the provisions of section 37C of the Act, consequent on the death of the complainant's brother, Mr H. Hasseriis.
- [1.2] The complaint was received by this office on 20 June 2006 and a response was received from the respondent pension fund on 21 July 2006. The second and third respondents were joined to the proceedings as interested parties by this office, and responses were received from them on 18 September 2006 and 19 January 2007 respectively. The complainant replied to the response filed by the first respondent on 30 October 2006, and the fund filed a further response date 12 January 2007.
- [1.3] Having reviewed all the submissions filed of record in this matter, I consider it unnecessary to hold a hearing. My determination, together with reasons for arriving at the finding, is set out hereunder.

2. Background

- [2.1] The complainant is the nominated beneficiary for 100% of the proceeds of the benefit payable from the fund as a consequence of the death of her brother, Mr H. Hasseriis ("the deceased") on 18 March 2004. The first respondent is the Lifestyle Retirement Annuity

Fund, a pension fund as defined in the Act. The second respondent is Mrs K. Hasseriis, the wife of the deceased at the time of his death, who appears in her own capacity, as well as in her capacity as guardian of the minor child, Skye Hasseriis, born of the marriage between herself and the deceased. The third respondent is Ms F. Loopstra, the former partner of the deceased, who appears in her capacity as guardian of the minor child, Karla, born of the relationship between herself and the deceased.

- [2.2] On the death of Mr Hasseriis a benefit of approximately R70 000 became available to his beneficiaries as identified by the board of trustees of the fund, acting in terms of its powers under section 37C of the Act. The above amount is taken from the complaint, and has nowhere been placed in issue by any of the respondents.
- [2.3] The board resolved to distribute the benefit between the second respondent and the two minor children, born to the second respondent and the third respondent respectively, thus excluding the complainant from any share in the funds.

3. Complaint

- [3.1] The complainant is aggrieved that the board has disregarded her brother's express wishes in relation to the disposition of the proceeds of this benefit.

- [3.2] The complainant was 60 years of age at the time of lodging the complaint, and claims that she is in a constrained financial situation. It is necessary for her to continue in employment as a nurse, since she has a bond of R95 000 on her house, and her “civil pension” amounts to only R1 800 per month. She also has no medical aid at present. She lives alone, having been widowed in 1981. Her two daughters live in the United Kingdom, but are unable to support her, as they are not yet financially established. In reply to the suggestion in the second respondent’s response (below) that she is able to earn a substantial income through doing locum work overseas, the complainant states that she is prevented from engaging in such employment by virtue of a reciprocal “no poaching” agreement between the two countries.
- [3.3] According to the complainant, her brother indicated to her that, in the event of his death, he wished to provide for her to the extent of the benefit contained in the fund. This was allegedly on account of the fact that the complainant had taken in and supported their mother for a period of 21 years. Although the deceased had provided the complainant with limited financial assistance in this period, he apparently wished to acknowledge her involvement in their joint obligation and to recompense her appropriately.
- [3.4] Concerning the recipients of the benefit identified by the board of trustees, and why her claim should take precedence, the complainant alleges that they are not in financial need. She states in this regard that they have been provided for by the deceased in terms of trusts

that have been established, and by the other assets that formed part of his estate.

- [3.5] In specific support of this, the complainant claims that the deceased built up an estate worth R7,5 million. She states that the third respondent owns 33% of the equity in the deceased's business and is drawing a substantial monthly salary. In late 2004 she purchased a house worth R2 400 000 and a new Pajero 4X4 vehicle. Her daughter Karla is attending a private school. The third respondent's present husband is also employed at the deceased's former business, and is also drawing a substantial salary.
- [3.6] Trusts have apparently been set up for both the deceased's children which they will receive on attaining the age of 21.
- [3.7] The complainant maintains that the second respondent is in a very fortunate financial position. She now owns 58% of the deceased's business, as well as a fully paid-for house in Bryanston. She also has a new Audi stationwagon. According to the complainant, the deceased bought a piece of land in Nature's Valley in the second respondent's name shortly before he died. This has since been sold with the proceeds going to the second respondent. The complainant also alleges that the second respondent now owns two further properties as a result of the death of her husband, namely a property bought for purposes of a game farm near Diepkloof, and an adjoining property of some minor historical value, overlooking the Magaliesberg mountains. The complainant understands that the

second respondent is presently building a house on the game farm property.

- [3.8] The complainant concludes that it is clear from the above that none of the identified dependants of the deceased are in need of financial assistance. She therefore requests that his intentions, as evident from the nomination form, be honoured, and that the full benefit be awarded to her.

4. First Respondent's response

- [4.1] The first respondent's response is succinct in the extreme. It merely states that the second respondent and the two minor daughters of the deceased were identified as the legal dependants of the deceased. It accepts that the complainant was a nominated beneficiary, but states that:

“our trustees did not consider Mrs Gowing as a dependant of the late Mr Hasseriis as she was the sister and not actually financial dependant on the deceased” (sic)

5. Second Respondent's response

- [5.1] The second respondent's response takes issue with a number of the assertions made in the complaint, but is not candid or forthcoming

about the overall financial circumstances of herself or her daughter.

- [5.2] The second respondent states that she was retrenched in May 2005 and has not worked since. She denies that she receives a monthly salary from her husband's business. She also denies that the Nature's Valley property was purchased in her name. However, she states that she did purchase a piece of land in Southbroom, Natal South Coast, and the deceased was purchasing the adjacent plot when he died. The second respondent admits that this property has since been sold.
- [5.3] The second respondent states further that all the necessary paperwork was submitted to the fund, including a letter stating that her late husband's intent was for his sister to have some financial compensation for all the years she looked after their mother, and that she (second respondent) wanted her to remain the beneficiary of that policy. She then goes on to state that she was subsequently made aware of the fact that, irrespective of the deceased's stated wishes, the board of trustees of the fund must decide how the benefit is allocated. It is presumably for this reason that she has reversed her original position, for she now states that, although it is unfortunate that the complainant still has to work at age 60, she (second respondent) finds it "awkward and distasteful" that the complainant should now be pursuing her rights before the Adjudicator. I take this to mean that she submits the decision of the trustees in favour of her and her daughter should stand.

6. Third Respondent's response

[6.1] A response was received from Malherbe Rigg & Ranwell, attorneys, on behalf of the third respondent. Her view is stated at the outset in the following terms:

“At this juncture we have not received nor are we aware of any submissions that were made to Liberty Life Limited by the Executor of the Estate of the Late H B Hasseriis nor on what basis the trustees decided that the dependants of the Late Mr H B Hasseriis required the funds from the Retirement Annuity for their support and maintenance.

We can only assume, based on the documentation before us and the pattern followed therein that the submissions made to Liberty Life Limited where at best inadequate or incomplete, in at worst fraudulent in their non disclosure.” (sic)

[6.2] In particular, the third respondent maintains that the second respondent has been economical with the facts relating to the true financial situation in which she and the two minor children find themselves subsequent to the passing of the deceased. In this regard, she contends that the following circumstances are relevant:

[6.2.1] The deceased's 55% member's interest in his business (Orchard Marketing CC) was sold for approximately R2.95 million, and an amount of close to R1 million was received for his loan account in the corporation. These amounts were paid over to the estate prior to the filing of the response to

this complaint by the second respondent.

[6.2.2] There are various properties held in the name of the second respondent or the deceased.

[6.2.3] The house in which the second respondent presently lives, is fully paid for.

[6.2.4] There are two vehicles belonging either to the second respondent or the deceased (it is not clear which), an Audi station wagon and an Isuzu Frontier bakkie, both of which are fully paid for.

[6.2.5] The second respondent's failure to take up further employment since her retrenchment in May 2005 has not been explained. The third respondent suggests that the reason the second respondent has remained unemployed is that she has taken up the life of a professional gambler, and has entered tournaments at enormous cost (the third respondent gives as an example the All Africa Poker Tournament during November 2006 at a cost of R15 000 for entrance alone).

[6.3] The third respondent submits that the above facts in themselves are sufficient to show that there is no financial need on the part of either the second respondent or her daughter, and that they have in fact been well provided for by the deceased. In addition, she states that her own daughter has also been substantially catered for in terms of

the trust set up in her favour by the deceased, and she is in any event financially supported by the third respondent and her present husband. The third respondent concludes by stating that she supports the claim of the complainant, and contends that there was no reason for the board not to follow the express wishes of the deceased.

[6.4] The second respondent was given an opportunity of responding to the above allegations, but chose not to do so, despite the fact that she was advised that inferences adverse to her case may be drawn in the event that the contentions remained unchallenged.

[6.5] A further response was received from the first respondent dated 12 January 2007. However, it does not deal with the material contained in the responses of the other parties who have been joined to the proceedings. Instead it amplifies on its reasons for not including the complainant in the distribution. It has cited rule 6.2.2 as well as section 37C of the Act in support of its decision. Rule 6.2.2 reads as follows:

“6.2.2. A MEMBER may nominate one or more people whom he would like to receive shares of the BENEFIT, which would be paid if he died before retirement. The nomination must be made in writing in the form provided for this purpose by the ADMINISTRATOR. The FUND does not have to allocate shares of the BENEFIT in accordance with such nomination but the BOARD OF MANAGEMENT must take the nomination into account when deciding who should receive a share of the BENEFIT.”

[6.6] It states that it was decided that the fairest method of dealing with the benefit was to apply the provisions of the Act contained in section 37C. It goes on to observe that the complainant did not provide the Board of Management with sufficient evidence of her factual and legal dependence on the deceased. Therefore, it concludes, in applying section 37C no benefit was payable to the complainant.

[6.7] It therefore requests that the complaint be dismissed.

7. Determination and reasons therefor

The provisions of the Act

[7.1] The payment of a death benefit arising from a pension fund organization as defined in section 1 of the Act is regulated by section 37C of the said Act, which in part reads:

“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 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.

- (b) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member, and the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the benefit or such portion of the benefit shall be paid to such nominee: Provided that where the aggregate amount of the debts in the estate of the member exceeds the aggregate amount of the assets in his estate, so much of the benefit as is equal to the difference between such aggregate amount of debts and such aggregate amount of assets shall be paid the estate and the balance of such benefit or the balance of such portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee.

- (bA) If a member has a dependant and the member has also designated in writing to the fund a nominee to such member pay the benefit or such portion thereof to such dependant or nominee in such proportions as the board may deem equitable: Provided that this

paragraph shall only apply to the designation of a nominee made on or after 30 June 1989: Provided further that, in respect of a designation made on or after the said date, this paragraph shall not prohibit a fund from paying the benefit, either to a dependant or nominee contemplated in this paragraph or, if there is more than one such dependant or nominee, in proportions to any or all of those dependants and nominees.”

- (c) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member and if the member has not designated a nominee or if the member has designated a nominee to receive a portion of the benefit in writing to the fund, the benefit or the remaining portion of the benefit after payment to the designated nominee, shall be paid into the estate of the member or, if no inventory in respect of the member has been received by the Master of the Supreme Court in terms of section 9 of the Estates Act, 1965 (Act No. 66 of 1965), into the Guardian’s Fund.

[7.2] The legislature regards pension assets as a critical and essential component of any natural person’s rights and therefore it has established a mandatory scheme (set out in section 37C) in terms of which a death benefit has to be distributed. As can be seen, the Act differentiates between dependants and nominees, who may or may not be dependants of the deceased. The term “beneficiary” will be

used here to indicate the generic class of dependants and nominees.

[7.3] A nominee is a person designated in writing by the deceased to receive the benefit, or a portion thereof. “Dependant” is defined in section 1 of the Act to include a broad category of persons who were financially dependent on the deceased (factually or legally), or who stood in a particular family relationship to him, such as a spouse or child, major or minor, or who would have become legally dependent on the deceased had the deceased notionally been alive.

[7.4] Section 37C contemplates four possible situations:

[7.4.1] Where there are dependants but no nominees (here the board must distribute the benefit between them as it deems equitable) (section 37C(1)(a));

[7.4.2] Where there are nominees but no dependants, the benefit must be distributed to the nominees in the proportions outlined in the nomination form, (but it is subject to any debts of the estate) (section 37C(1)(b));

[7.4.3] Where there are dependants and nominees (again the board must make an equitable distribution) (section 37C(1)(bA)), and

[7.4.4] Where there are no dependants or nominees then the benefit must be paid to the estate (section 37C(1)(c)).

8. The First Respondent's decision

- [8.1] What is significant about the third situation (which obtains in the present complaint) is that the Act specifically mandates the board to consider the circumstances of *all* beneficiaries. This is found in the wording stating that “the fund shall ... pay the benefit or such portion thereof *to such dependant or nominee in such proportions as the board may deem equitable.*” (My italics).
- [8.2] The first respondent is incorrect, therefore, in assuming that once a dependant is identified, the claim of a nominee need no longer be entertained. This is simply incorrect in law. The first respondent has further entrenched this misconception by requiring (as it reports in its second response) that the complainant provide it with evidence of her factual or legal dependence in order to be considered. This confuses the nature of the respective types of beneficiary. A nominee is not entitled to be considered as a beneficiary because he or she was financially dependent on the deceased. The entitlement flows from the fact that the person concerned *was nominated* by the deceased. No more is required.
- [8.3] The decision of the board therefore falls to be set aside on the ground

that it excluded a nominee who ought to have been included for consideration as a beneficiary in the distribution.

9. **Remission of the matter for decision**

[9.1] It remains to be decided whether to remit this matter to the first respondent for a re-exercise of discretion, or whether to replace the decision with my own. As a general principle, the courts are wary of assuming a discretion which has been entrusted to another tribunal or functionary, and will refer the matter back to that tribunal or functionary for a fresh decision. However, the principle may be departed from in exceptional circumstances, where for instance:

[9.1.1] The end result is in any event a foregone conclusion, and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter;

[9.1.2] Further delay would cause unjustifiable prejudice to the applicant;

[9.1.3] The tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again;

[9.1.4] The court is in as good a position to make the decision itself.

- [9.2] In the present case it is clear that the first respondent has done minimal, if any, investigation into the circumstances of the beneficiaries. Indeed, the manner in which the board has performed its obligations in terms of Section 37C is less than satisfactory. In view of the manner in which the initial investigation was conducted, and the seeming indifference to the complaint (evidenced by a cursory response that does not even set out the salient facts), there is nothing to suggest that a reconsideration of the matter will be undertaken with any more vigor or competence, or that there will be a proper consideration of the relevant issues.
- [9.3] An important factor is the protracted length of time it has taken to finalise this matter. So far, more than three years have elapsed. It would be unfair to all concerned to permit the further delay that would be occasioned by remitting the matter, especially if there is a complaint flowing from the second decision of the board. Moreover, in the course of the investigations performed by this office in soliciting responses from the various parties, sufficient information has been placed on record for me to be in as good a position as the first respondent to make the decision.
- [9.4] With due consideration to all the above factors, I am of the view that justice would not be served by remitting the matter to the first respondent. Accordingly, I propose to substitute my own decision for that of the board of trustees of the first respondent.

10. Consideration of the beneficiaries' claims

[10.1] When making an equitable distribution amongst beneficiaries, the following are relevant factors (see *Jones v National Technikon Retirement Fund and Others* [2002] 1 BPLR 2960 (PFA) at 2964B-D):

- The ages of the beneficiaries;
- The wishes of the deceased;
- The beneficiaries respective relationships with the deceased;
- The future earning capacity / potential of the beneficiaries;
- The financial status of the beneficiaries; and
- The amount available for distribution.

[10.2] It is apparent from the information contained in the responses, and reported in some detail above, that the deceased left a substantial estate, and that his wife and two daughters are more than adequately provided for in terms of what they have or what they will receive from the estate.

[10.3] It is evident that the deceased wished to make a gesture to his sister

in nominating her as his beneficiary. It seems that this was intended as recompense for the fact that she took sole responsibility for the care of their mother for a period of 21 years. The amount of approximately R70 000 that the benefit represents is no more than a token in relation to the estimated assets of R7 500 000, (and translates to less than a nominal 1% of the estate). These are the figures cited by the complainant, but they have not been placed in dispute.

[10.4] It is equally evident that the second respondent initially accepted this gesture on the part of the deceased, but was later moved (when she found out that the nomination was not binding on the fund) to change her position on the issue, and proceeded to lay claim to the funds on her own behalf, and on behalf of her daughter. Conversely, the third respondent, against her own daughter's financial interest, recognizes the imperative of honouring the deceased's wishes in regard to the disposition of the benefit. She claims categorically that the family of the deceased has been very well provided for in terms of trusts that have been set up and several fully paid for properties and other assets.

[10.5] Whilst it is true that the trustees cannot be bound by the member's wishes, as that would be an improper exercise of their discretion, nevertheless, where possible, they should take cognisance of the intention manifested in a nomination. (See *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 3705I-3706C.) There is no reason to suppose that the

deceased had not applied his mind to the disposition of his assets, and it appears that his immediate family (who are dependants for purposes of this benefit) have been amply catered for through other mechanisms. It is also clear from the information furnished that none of them, although classed as “dependants” are in financial need. On the other hand the complainant, whilst not a dependant, is in precarious financial circumstances. It is she whom the complainant wished to benefit from this source. I can find absolutely no reason in the circumstances for disregarding the deceased’s express wish that his sister be the recipient of any benefit payable from the first respondent as a result of his death.

[10.6] For the reasons set out above, the decision taken by the first respondent to distribute the benefit to the deceased’s dependants cannot stand, and should be replaced with a disposition in favour of the complainant. Since the first respondent is afforded a twelve month period by statute in which to identify the dependants, *mora* interest cannot run on the principal sum prior to the expiry of that period.

11. Relief

[11.1] My order is therefore as follows:

[11.1.1] The decision of the board of trustees of the first respondent allocating the benefit payable as a consequence of the death

of the deceased is hereby set aside.

[11.1.2] The first respondent is hereby ordered to pay to the complainant the entire proceeds of the benefit, less any permissible deductions, together with interest thereon at 15,5% from 19 March 2005 to date of final payment, within two weeks of date hereof.

DATED AT CAPE TOWN ON THIS THE DAY OF 2007.

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR

Cc: Lifestyle Retirement Annuity Fund

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Principal Officer

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Section 30M filing: Magistrate's Court