



**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR
HELD IN JOHANNESBURG**

CASE NO: PFA/GA/3542/05/VIA

In the complaint between:

MIRRIAM MASHEGO	1st Complainant
LAWRENCE MASHEGO	2nd Complainant
PHILLIP MASHEGO	3rd Complainant

And

SATU NATIONAL PROVIDENT FUND	1st Respondent
MAKGOBATHE MUHAMMED AL-AMEEN	2nd Respondent

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

1. The introduction

1.1 This matter concerns the distribution and payment of a death benefit in terms of section 37C of the Act.

1.2 The complaint was received by this office on 20 May 2005. On 24 June 2005 a letter was dispatched to the first respondent giving it until 15 July 2005 to file its response to the complaint. A response was received from the first respondent on 13 July 2005. On 19 October 2005 a copy of the response was sent to the complainants for a reply by 31 October 2005. A reply was received from the complainants on that day. On 23 June 2006 a copy of the complainant's reply was sent to the first respondent for a response by 30 June 2006. A response thereto was received on 27 June 2006. On 11 August 2006 Makgobathe Muhammed Al-Ameen was joined as the second respondent in this matter in terms of section 30G(d) of the Act and was requested to file his response to the complaint by 25 August 2006. No response was received from the second respondent.

1.3 Subsequent to considering the written submissions before this tribunal, it is unnecessary to hold a hearing in this matter. The determination and reasons therefor follow.

2. The background facts

2.1 The complainants are the children of the late Mrs. C Mashego (“the deceased”). The deceased was employed by Pictorial Press. By virtue of her employment the deceased was a member of the first respondent until her death on 23 December 2002.

2.2 The deceased was allegedly married to the second respondent, the complainants’ father, and their marriage subsisted at the time of her death. However, the complainants allege that the deceased and the second respondent had separated prior to her death.

2.3 When the deceased passed away in December 2002 the first respondent became liable to pay a death benefit of R69 968.93 to the deceased’s beneficiaries. The board of trustees (“the trustees”) identified the second respondent as the deceased’s sole legal dependant by virtue of him being the surviving spouse. The trustees resolved to pay 50% of the benefit to the second respondent and the remainder to the complainants in equal proportions.

2.4 The complainants have not received payment of their respective benefits because they have refused to provide the first respondent with their respective bank account details.

3 The complaint

3.1 The complainants are dissatisfied with the trustees' decision that the second respondent was the deceased's sole "legal dependant". The complainants are also dissatisfied with their resolution to pay 50% of the benefit to the second respondent. As such the complainants require this office to investigate whether the trustees effected an equitable distribution when they resolved to pay 50% of the benefit to the second respondent.

3.2 As regards the allocation to the second respondent, the complainants state that their parents were separated prior to the deceased's death. They also state that the deceased was not buried at the second respondent's traditional home as custom dictates. Furthermore, that the second respondent did not contribute to the funeral costs.

3.3 The complainants further states that the deceased made it clear in her nomination form that they were her dependants and the trustees ought to have paid the benefit in accordance with her wishes.

3.4 The complainants, in reply to the first respondent's response, also challenge the validity of the customary marriage between the deceased and the second respondent and the conversion thereof to an Islamic marriage.

4. The response

4.1 The first respondent states that the second respondent and the deceased were married according to African customary law in 1983. Furthermore, that the marriage was converted to an Islamic marriage in January 1998. According to the first respondent, the trustees regarded the second respondent as the legal widower of the deceased and he was her sole dependant.

4.2 As regards the division of the death benefit, the first respondent states that the trustees paid the second respondent 50% thereof after he agreed that the benefit be divided equally between the complainants and him.

4.3 According to the first respondent the trustees complied fully with section 37C(bA) of the Act and the rules. The first respondent requests that this tribunal uphold the decision of the trustees and dismiss the complainants' complaint.

5. Determination and the reasons therefor

5.1 Section 37C of the Act makes provision for the disposition of pension benefits upon the death of a member. In terms of the section any such benefit shall not

form part of the assets in the estate of the deceased, but shall be dealt with in terms of the section. Section 37C gives the trustees a discretion insofar as the distribution of death benefits is concerned.

5.2 The main object of the section is to ensure that those persons who were dependent on the deceased during her lifetime, irrespective of whether the deceased was legally required to maintain them or not, are not left without support after her death.

5.3 Section 37C essentially imposes three primary duties on the trustees when they consider the distribution of a death benefit namely:

- To identify the circle of beneficiaries i.e. all the dependants and nominees of the deceased must be traced;
- To effect an equitable distribution of the death benefit where the member is survived by dependants only or dependants and nominees; and
- To determine an appropriate mode of payment of the benefit.

5.4 *Circle of beneficiaries*

5.4.1 The fact that the complainants were nominated as beneficiaries by the deceased does not *per se* entitle them to a portion of the death benefit. It only entitles the complainants to be included in the circle of beneficiaries (consisting of nominees

and dependants). Thus, the trustees' first duty when distributing a death benefit is to ensure that all potential beneficiaries are identified and considered during the distribution phase.

5.4.2 According to the first respondent, the second respondent was the deceased's sole "legal dependant". The term "dependant", for the purposes of section 37C, is defined in section 1 of the Act as follows:

"(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, including a party to a customary union according to Black law and custom or to a union recognized as a marriage under the tenets of any Asiatic religion;

(iii) is a child of the member, including a posthumous child, an adopted child and an illegitimate child;

(c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died;"

5.4.3 What first needs to be decided in this complaint is whether the second respondent qualified as a spouse of the deceased for purposes of sub-section

(b)(ii) of the definition of “dependant” in the Act. When the deceased passed away there was an existing customary union, between herself and the second respondent, which was solemnised according to Islamic rites. The mere fact that the deceased and the second respondent were separated prior to her death does not *ipso facto* constitute a divorce in terms of Islamic Law. In terms of Islamic Law marriages are dissolved when the husband pronounces or issues a *talaq* (Islamic divorce) for the third time (see: *South African Law Commission, Discussion Paper 101: Islamic Marriages and Related Matters: 44*). The complainants have not adduced any evidence to prove that the second respondent pronounced or issued a *talaq*, thereby dissolving the marriage. In the absence of rebutting evidence, the affidavit submitted by the second respondent and the marriage certificate issued under Islamic Law by the Tembisa mosque must be accepted as proof that the marriage was still in existence at the time of the deceased’s death. In terms of the definition of “dependant” in sub-section (b)(ii), a spouse of a member includes a party to a union, such as in this case, recognised as a marriage under the tenets of any Asiatic religion. Thus, the second respondent is a spouse.

5.4.4 Furthermore, even if the customary union in terms of Islamic Law was not properly constituted, the complainants failed to submit any evidence in support of their allegation that the deceased and the second respondent were not married in terms of African customary law prior to the conversion of the marriage to an

Islamic one. Thus, the affidavit submitted by the second respondent can also be accepted as proof that he and the deceased were married in terms of African customary law prior to the conversion of their marriage in 1998 to an Islamic marriage solemnised in terms of Islamic Law (see *Makgwala v Khwinana & Another* [2004] 3 BPLR 5510 (T) at 5511G-H).

5.4.5 In the circumstances, I am satisfied that the second respondent was a dependant of the deceased as defined in part (b)(ii) of the definition of “dependant” in section 1 of the Act and entitled to be considered in the distribution.

5.4.6 As regards the complainants’ status as dependants, they qualify as dependants in terms of part (b)(iii) of the definition of “dependant” because they are children of the deceased. This tribunal is also satisfied that they were nominated as nominees by the deceased. Therefore, the complainants were entitled to be considered in the distribution. Thus, in terms of the definition of “dependant” in section 1 of the Act, all potential beneficiaries qualify as dependants rather than nominees and section 37C(1)(a) is applicable to the present distribution. The first respondent incorrectly averred that section 37(1)(bA) is applicable to this distribution, but nothing rides on this classification in the present complaint.

5.4.7 It is also noted for the sake of completeness that the first complainant was a minor when the deceased passed away in December 2002. The first complainant

was 18 years old at the time. It appears that the trustees ignored this important and relevant fact when they considered the first complainant's dependency. A claimant's dependency should be established at the date of death of the deceased and not at the date when the benefit is distributed. From the first respondent's submission, it is evident that the trustees considered the first complainant's dependency as at the date of distribution of the benefit rather than at the date of death of the deceased.

5.5 *Equitable distribution of the benefit*

5.5.1 The requirement of effecting an equitable distribution has to be given effect in instances where there are more than one dependant and/or nominees. In order to ensure an equitable distribution the trustees must consider all the relevant factors to the exclusion of the irrelevant factors. The trustees may not fetter their discretion, nor should their decision reveal an improper purpose. Our courts and this tribunal have on numerous occasions stated that the trustees should consider a range of factors (see, for example, *Van der Merwe and Others v Southern Life Association Ltd and Another* [2000] 3 BPLR 321 (PFA) at 327 I-J & 328 A-B) during the distribution phase including, but not limited to, the following:

5.5.1.1 The age of the dependants,

5.5.1.2 The relationship with the deceased,

5.5.1.3 The extent of dependency,

5.5.1.4 The financial affairs or status of the dependants,

5.5.1.5 The future earning potential and employment prospects of the dependants,

5.5.1.6 The wishes of the deceased expressed in the nomination form or last will and testament, and

5.5.1.7 The amount available for distribution.

5.5.2 The onus is on the first respondent and its trustees to properly investigate the level and extent of dependency of the identified dependants. From the papers before this tribunal, it appears that the trustees ignored relevant factors during the distribution phase in particular, as regards the first complainant's age and financial dependence on the deceased. It is also evident that the trustees ignored the ages of the other dependants as well, their financial status, the relationship between the deceased and the second respondent, the wishes of the deceased and the extent of dependency on the deceased of all the dependants. The complainants have also informed the first respondent that they were unemployed and the first respondent confirmed that the complainants handed in sworn affidavits stating that they were dependent on the deceased at the time of her death, but this seems to have been ignored.

5.5.3 The trustees, in substantiation of their decision, merely refer to the ages of the dependants, the marriage between the deceased and the second respondent, and state that they contacted the second respondent's attorney advising him of

the complainant's claim. They were advised that the second respondent was prepared to accept a "50/50" split of the benefit between him and the complainants'. Why the trustees were prepared to accept the distribution proposed by the second respondent is not explained. It alludes to inadequate investigation of each dependant's personal circumstances, an unacceptable fettering of the trustees' discretion and ignoring of relevant factors by the trustees (see *Matene v Noordberg Life Assurance Scheme & Another (2)* [2001] 2 BPLR 1610 (PFA) at 1614C-G). Therefore, the trustees' decision as regards the distribution of the death benefit falls to be set aside.

5.5.4 As a general rule where discretion has been improperly exercised our courts are reluctant to substitute their own decision for another administrative functionary's decision, but tend to refer the matter back to the functionary, unless there are exceptional circumstances. Such exceptional circumstances do not exist in this matter. Accordingly, this tribunal will not substitute its own decision for the trustees' decision but will instead refer the matter back to first respondent with an order that they effect an equitable distribution of the proceeds in terms of section 37C of the Act after properly considering the circumstances of all the dependants. As regards the quantum of the death benefit, the trustees will have to re-consider the distribution of the entire proceeds rather than the 50% remaining in the first respondent's bank account. Further, the final distribution and payment of the whole death benefit to the identified dependants will not

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Parties not represented