



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

CASE NO: PFA/GA/3529/2005/RM

In the complaint between:

P. F. NTSANE

Complainant

and

MUNICIPAL EMPLOYEES PENSION FUND

First Respondent

WESTONARIA LOCAL MUNICIPALITY

Second Respondent

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

1. Introduction

1.1. This complaint concerns the payment of a death benefit by the first respondent.

1.2. The complaint, submitted on the complainant's behalf by her legal representative, was received by this Tribunal on 3 May 2005 and a letter acknowledging receipt thereof was sent on 24 June 2005. On the same day letters were dispatched to the respondents giving them until 15 July 2005 to file a response to the complaint. A response from the second respondent was received on 2 September 2005. The first respondent submitted responses through its administrator, Akani Retirement Fund Administrators (Pty) Ltd, on 15 July 2005, 22 November 2005 and 25 November 2005. The complainant's legal representative submitted replies on 3 August 2005 and 12 September 2005. After considering the submissions it is unnecessary to hold a hearing in this matter.

1.3. The complaint was initially submitted to the Office of the Public Protector, but was re-directed to this office as the complaint fell outside the jurisdiction of that office. The complainant subsequently acknowledged that the complaint ought to have been lodged with this office. The facts are known to the parties

so they will not be repeated here, save for that which has a bearing on this determination. The determination and reasons therefor appear below.

2. Factual Background

2.1. The complainant is the mother of Mr. L. Ntsane (“the deceased”), who passed away on 27 July 2003. The deceased was employed by the second respondent and by virtue of his employment was a member of the first respondent. In terms of the rules of the first respondent a death benefit became payable to the deceased’s dependants following his passing away.

3. The complaint

3.1. The present complaint encompasses two issues, firstly that the complainant is dissatisfied with the lump sum death benefit of R10 660.60 she received from the first respondent, secondly the complainant also required a breakdown of the death benefit allocation.

4. The Responses

4.1. The second respondent responded to the complaint by merely stating that it had no knowledge of the submissions the complainant made, save to admit that the

deceased was an employee and a member of the first respondent.

4.2. Akani Retirement Fund Administrators (Pty) Ltd. (“the administrator”) responded on behalf of the first respondent. The administrator advised that, following investigation, it was established that the deceased was not married but had a minor son, Sekhonyana Motumi, who was born out of a relationship with Ms. F. Motumi. The complainant and Ms. Motumi, on behalf of her minor son, submitted death benefit claims. There was no dispute that the minor child was the son of the deceased.

4.3. The administrator goes on to explain that the board of management considered the death benefit claim and exercised its discretion in terms of section 37C of the Act. In determining an equitable share of the benefit the following factors were considered:

4.3.1 The age of the two dependants. The minor son was 8 years old at the time of the deceased’s passing away while the complainant was 46 years old.

4.3.2 The relationship between the two dependants identified and the deceased.

4.3.3 The extent of dependency of the two dependants on the deceased. The

deceased was fully responsible for maintenance of the minor child since he was the child's father. Furthermore, the child's mother was not employed and depended on the deceased entirely to support their minor son. The complainant averred in her application form to the first respondent that she was dependent on the deceased to an extent of R600.00 per month.

4.3.4 The first respondent also considered that the minor child was 13 years away from reaching the age of majority.

4.3.5 The first respondent considered that an amount of R103 476.20 after deductions was available for distribution between the dependants identified.

4.4. The board decided to pay the complainant R10 347.62 while the minor child received R93 128.58, which has been placed in trust.

4.5. In a subsequent response dated 22 November 2005, the administrator advised that the minor child also became entitled to, and is receiving, an annuity in the sum of R571.54 per month in terms of section 41(1)(b) of the rules. Further, they aver that, having considered sections 41(1)(c)(ii) and 41(1)(d) of the rules

when distributing the death benefit, they were of the view that:

“In terms of Section 37 C (*sic*) of the Pension Funds Act, the trustees have discretion to pay dependants traced as they may deem equitable to one of the dependants or in proportions to some of or all traced dependants. Applying a rigid policy in terms of payment of benefits may result in trustees fettering their discretion. Any provisions in the Rules that may be contrary to the Act, in our view will be overridden by the provisions of the Pension Funds Act.

In this case the trustees considered the above sections of the rules of the Fund and also considered the peculiar facts of the dependants and arrived at their decision.”

5. Reply

5.1. In reply the complainant submitted, *inter alia*, as follows:

“Had the Board of Trustees applied its mind to the rules of the Fund, especially Rule 41(1)(b)(c) and (d) it would certainly have arrived at a different decision based on fairness and equity and the complainant would have been paid the benefit as if she is a child i.e. equal benefit to what the child was entitled to if Rule 41(b)(c) and (d) are applicable.

In the light of the abovementioned submission the complainant totally disagrees with the Fund’s Trustees (*sic*) decision in allocating her a 10% share of the death benefit instead of 50%.”

6. Determination and reasons therefor

6.1. With respect to the leg of the complaint that relates to provision of a breakdown of the death benefit payment, during the course of our investigation the respondents provided the complainant with a breakdown of the death benefit payment, so this matter has been resolved.

6.2. What remains to be determined is the main complaint relating to the quantum of the death benefit paid by the first respondent. The payment of death benefits is regulated by section 37C of the Pension Funds Act, 1956 (“the Act”), read in conjunction with the definition of a “dependant” in section 1. The primary purpose of this section is to protect those who were financially dependent on the deceased during his lifetime. In effect, section 37C overrides the freedom of testation of the deceased. It is the responsibility of the Board of management (“the Board”) when dealing with 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 allocated.

6.3. In order for the Board to ensure that it makes an equitable distribution of the benefit, they will normally undertake an investigation to determine potential dependants. The Board must then decide on a distribution of the death benefit after the deceased’s dependants have been identified. Section 37C(1)(a) of the Act is applicable to the present distribution. It reads as follows:

“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.”

6.4. In deciding on an equitable distribution among the dependants the Board’s duty in this regard was cogently summarised in *Sithole v ICS Provident Fund and Another* [2000] 4 BPLR 430 (PFA), at paragraphs 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;
- 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.

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

6.5. The Board conducted a proper investigation in this case and it is common cause that all the dependants were properly identified. It is also vested with a discretionary power to decide on an equitable distribution of the death benefit. It is trite law that only in instances where the functionary has exercised its discretionary powers unreasonably and improperly, or has unduly fettered its exercise thereof, that its decision can be reviewed.

6.6. After considering all the information before this tribunal I am satisfied that the board has acted reasonably and properly in making the distribution, has taken into account all the relevant factors, and has not taken into consideration any irrelevant factors, as is evident from paragraph 4.3. above. Therefore, no legal grounds exist for this tribunal to alter the board's decision in regard to the distribution of the lump sum death benefit that was paid in terms of rule 41(1)(d).

6.7. However, as the complainant's legal representative has pointed out, the rules provide for the payment of more than just the lump sum death benefit. The relevant section reads as follows:

“41. BENEFITS PAYABLE UPON DEATH

(1) If a MEMBER dies before the PENSION AGE while in the service of a LOCAL AUTHORITY, the following benefits shall be paid:

(a) To his surviving spouse...

(b) to his surviving CHILDREN, an ANNUITY equal to a percentage of the ANNUITY determined in terms of paragraph (a), which percentage shall be determined according to the number of CHILDREN from time to time in accordance with the under-mentioned table:

NUMBER OF CHILDREN	PERCENTAGE
1	25
2	40

3	55
4 or more	70

Provided that if in respect of any month no benefit is payable in terms of paragraph (a) or subsection (10), the above-mentioned percentage shall be doubled in respect of that month;

- (c) to his surviving PARENT or PARENTS jointly who was, in the opinion of the COMMITTEE, dependant (*sic*) upon the MEMBER, -
- (i) if no benefits are payable in terms of paragraph (a) or (b), whether such benefits were previously payable or not, an ANNUITY in total not more than the ANNUITY determined in terms of paragraph (a); or
 - (ii) if there are benefits payable in terms of paragraph (a) or (b), a benefit in terms of paragraph (b) as if he is, or they are, a CHILD jointly;
- (d) to his surviving spouse or children or PARENT or PARENTS jointly, if an ANNUITY is payable in terms of paragraph (a), (b) or (c), a GRATUITY equal to three times the annual PENSIONABLE EMOLUMENTS of the deceased MEMBER at the date of his death.”

6.8. This tribunal now turns to consider the provisions of rule 41(1)(c). It is common cause that the complainant is the mother of the deceased and was dependent on the member. Further, the minor child is receiving a monthly annuity payable in terms of rule 41(1)(b). Therefore, in terms of rule 41(1)(c)(ii), the complainant is entitled to receive a monthly annuity from the first respondent as if she were a child jointly with the minor child. The payment of this monthly annuity, in addition to the lump sum death benefit, is not contrary to the provisions of

section 37C of the Act. However, the first respondent has failed, or neglected, to pay this benefit to the complainant.

7. In the result thereof, the following order is made:

7.1 The first respondent is ordered to pay to the complainant all arrear monthly annuities that were due to her in terms of rule 41(1)(c), from August 2003 to the date of this determination, as a lump sum, together with interest thereon at the rate of 15.5% *per annum* computed from the date that each payment became due to date of payment, within 4 weeks of the date of this determination;

7.2. The first respondent is ordered to commence paying to the complainant her monthly annuity due to her in terms of rule 41(1)(c) from the month following the payment of her arrear benefit as ordered in paragraph 7.1. above.

SIGNED AT JOHANNESBURG ON THIS DAY OF 2007

M Mohlala
Pension Funds Adjudicator

Cc: Mrs. P.F. Ntsane
c/o Mr. D. Tshingowe
Tshingowe Law Services C.C.
P.O. Box 1098
Florida
1710

Per Registered Post

Fax: 011 472 9023
Your ref.: DS/D10731

Cc: The Principal Officer: Municipal Employees Pension Fund
Private Bag X36
Kempton Park
1620

Fax: (011) 578 5300

Registered office: 73 Elston Avenue
Benoni
Johannesburg

Cc: Mr. R. Kesarparshad
Director Legal: Akani Retirement Fund Administrators
Private Bag X36
Kempton Park
1620

Fax: (011) 578 5300

Cc: Advocate PGZ Pekalski
Legal Advisor: Westonaria Local Municipality
P.O. Box 19
Westonaria
1780

Fax: (011) 753 4176

S30M filing: Magistrate's Court

Legal representation: *Tshingowe Law Services* for complainant
Advocate P.G.Z. Pekalski for Westonaria Local Municipality