

THE FINANCIAL SERVICES TRIBUNAL

CASE NO: PFA13/2024

In the matter between:

DUDUETSANG LITHEKO Applicant

and

LINDIWE VUSO First Respondent

MPHO NKABITI Second Respondent

CLASSIC PRESERVATION PENSION FUND Third Respondent

THE PENSION FUNDS ADJUDICATOR Fourth Respondent

Summary: Section 37C read with section 1 of the Pension Funds Act 24 of 1956 regulate the distribution of benefits upon the death of a member of a pension fund – The board of trustees of a fund is vested with discretionary powers to decide on an equitable distribution of death benefits - Test is whether the discretion of the board of trustees has been properly exercised.

DECISION

INTRODUCTION

[1] The Applicant, Duduetsang Litheko, is the major child of a deceased member of the Classic Preservation Pension Fund and the Classic Retirement Annuity Plan, Mr PM Litheko (“the deceased”). The deceased was a member of the Classic Preservation Pension Fund and Classic Retirement Annuity Fund until the time of his death. As a result, a death benefit in the amount of R 1 034 778.34 became available for distribution to the beneficiaries of the deceased¹ and in terms of the fund rules. The board of trustees of the Classic Preservation Pension Fund and the Classic Retirement Annuity Fund invoked the provisions of section 37C of the Act to deal with the allocation and distribution of the death benefit. The latter forms the subject matter of this application.

[2] The First Respondent is Ms L Vuso the customary wife of the deceased.

[3] The Second Respondent is Ms Ms Nkabiti, the mother of the deceased.

[4] The Third Respondent is the Classic Preservation Pension Fund (“the

¹ Part B, page 20 of the Tribunal record.

Fund”), a pension fund registered in terms of section 4 of the Pension Funds Act, 24 of 1956.

- [5] The Fourth Respondent is the Pension Funds Adjudicator as defined in the Pension Funds Act 24 of 1956 (“The Adjudicator”).
- [6] The application is in terms of Section 230 of the Financial Sector Regulation Act 9 of 2017 and concerns the reconsideration of the decision taken by the Adjudicator in terms of Section 30M of the Pension Funds Act 24 of 1956 (“the PFA”).
- [7] Section 230(1) of the Financial Sector Regulation Act 9 of 2017 (“the FSR Act”) sets out the basis for the Applicant to lodge this application for consideration and seek an appropriate relief under section 234(1).
- [8] Before I deal with the submissions raised by the Applicant in this application, it is necessary to deal first with the application for condonation brought by the Applicant. The application for condonation is not opposed. In any event, **it seems to me that** the reasons advanced for late filing of the reconsideration application meet the threshold for condonation. As a result, it is not necessary to deal with the condonation application at any length. It suffices that there is no discernible prejudice to any of the parties if condonation for late filing is granted. As a result,

condonation is granted.

[9] At this stage, it is convenient to consider the merits of the present reconsideration application. The following are the common cause facts:

[9.1] The Applicant is the major child and daughter of the deceased member. The deceased passed away on 30 June 2021.

[9.2] The Applicant alleges that the deceased completed a beneficiary nomination form on 5 October 2026 and nominated the Applicant to receive 100% of his death benefits from the fund. The Applicant submits that she should receive 100% of the deceased death benefit.

[9.3] At the time of his death, the deceased was survived by his customary wife, who is the First Respondent. Moreover, the deceased and the First Respondent were in a relationship of mutual financial dependence and the deceased financially maintained and provided for the First Respondent with a monthly financial support of R 2 800.00 towards her monthly expenses². However, the deceased and the First Respondent, his customary wife, were not living together at the time of his passing.

[9.4] The deceased was also survived by his major child, 29 years of age

² Part B, page 24 of the Tribunal record.

(Applicant), his major son, 32 years of age, ex-spouse, 54 years, and his mother, 78 years of age (Second Respondent).

[9.5] The Fund considered the Applicant as a beneficiary of the death benefit, and an allocation of 50% was made to her. In arriving at the allocation, the fund considered the circumstances of each identified dependant (see the list below), the nomination form, and the deceased last Will and Testament, among other factors.

[9.6] According to the records before the Tribunal, the Fund embarked on a process of tracing the dependants of the deceased. The Fund confirmed that the following individuals listed in the **below** table were identified as potential dependants and ultimately, the Fund allocated the death benefit in terms of section 37C of the PFA as follows³:

Name	Date of Birth	Relationship	Nature of Dependency	Allocation of total benefit
Duduetsan g Litheko	05.05.19 92	Daughter	Factual & Legal Dependant	50%

³ Part B, page 27 of the record Letter to the Applicant from THE fund dated 24 October 2022.

			and Nominee	
Thebe Tiro Choabi	01.08.19 88	Son	Legal Dependant	0%
Audrey Hlatywayo	10.12.19 66	Ex-Spouse	Not a dependant	0%
Lindiwe Vuso	03.08.19 69	Traditional Spouse	Legal and possible future dependant	25%
Mpho Sylvia Nkabiti	19.07.19 42	Mother	Dependant	25%

[9.7] The Applicant is specifically dissatisfied that the First Respondent was considered in the distribution of the deceased's benefits by the board. She avers that the deceased was not married at the time of his passing and that she was not aware of the customary marriage between the deceased and Ms L Vuso, the First Respondent. In the Applicant's view, the First Respondent should be excluded from the deceased death benefits.

[9.8] Following an investigation, the board received submissions from family members who confirmed that the deceased and the First Respondent were

married and that lobola negotiations had taken place on 24 October 2020 between the deceased and First Respondent's families.

[9.9] From the responses submitted to the PFA which also form part of this record, it is apparent that the Fund was aware of the First Respondent's financial circumstances when the board of trustees of the fund applied its discretion to allocate the death benefit.

ANALYSIS

[10] As required by the provisions of that statute, the Fund considered the deceased's benefit in terms of section 37C of the PFA.

[11] Section 37C, read with section 1 of the PFA, regulates the distribution of benefits upon the death of a member of a pension fund. The relevant provisions of section 37C of the PFA provide 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 ... payable by such a fund upon the death of a member, shall, ... 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 fund, to one of such dependants or in proportions to some of or all such dependants.***”

[my emphasis]

[12] In *Kaplan & Another NNO v Professional & Executive Retirement Fund & Others*⁴, the Supreme Court of Appeal (“SCA”) interpreted the import of section 37C as meaning that the benefits must be disposed of according to the subsection's statutory scheme.

[13] A dependant is defined in section 1 of the Act 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-

⁴ 1999 (3) SA 798 (A) at p83, paras A – C

- (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*
- (d) *liable for maintenance, had the member not died;”*

[14] The definition of a “dependant” does not include a former -spouse.

[15] For the board of trustees to make a fair and equitable decision, they are required to identify the dependants and nominees of the deceased member and effect equitable distribution of the benefits among the dependants and nominees. The objective of section 37C of the PFA is clear, and it is to ensure that dependants of a deceased person continue to be supported. A nominee, however, only receives a portion of the benefit if:

- (a) There are no existing dependants;
- (b) The deceased member’s estate is solvent;
- (c) The nominee is alive at the time when the board of trustees makes their decision;
- (d) The nominee was not the cause of the deceased member’s death.

- [16] A nominee is someone who has been designated by the member in writing to the fund to receive the benefit or a portion thereof. If there are dependants and nominees, the nominee does not automatically qualify for a portion of the death benefit. Section 37C (1) **(bA)?** will then apply. The trustees must take all relevant factors into consideration in deciding on the allocation between the dependants and the nominees when effecting distribution of death benefit.
- [17] As is plain from the wording of section 37C, it imposes a duty on the board of trustees to conduct a proper investigation to determine all the “dependants” of the deceased member. What this means is that the trustees cannot merely follow the beneficiary nomination made by the member during his/her lifetime. Instead, the nomination will merely serve as a guide to the trustees when the board of trustees are exercising their discretion. However, the beneficiary’s dependence on the deceased when he/she was alive remains the overriding factor that should be taken into consideration.
- [18] As our courts have observed, section 37C, in a way, overrides the freedom of testation. That is so because it places a limitation on the common law right to testamentary freedom, and this is justified if one considers the important socio-economic purpose underpinning section 37C. In *Mashazi*

*v African Products Retirement Provident Fund and Another*⁵, the court explained the effect of section 37C on the freedom of testation as follows:

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*“Section 37C of the Act was intended to serve a social function. It was enacted to protect dependency, even over the clear wishes of the deceased. **This section specifically restricts freedom of testation in order that no dependants are left without support.** Section 37C (1) specifically excludes the benefits from the assets in the estate of a member. Section 37C enjoins the trustees of the pension fund to exercise an equitable discretion, taking into account a number of factors.” (Added emphasis)*

[19] On the common cause of the present matter, it is clear that the board of trustees of the Fund conducted an extensive investigation before arriving at a decision to allocate and distribute the death benefit. It is also important that decision must be considered because the board of trustees is vested with discretionary powers to decide on an equitable distribution.

[20] When the Applicant challenged the decision of the board of trustees, she initially approached the PFA with her complaint. The Adjudicator considered the issues raised by the Applicant and concluded that the board of trustees properly exercised its discretion when effecting distribution.

⁵ 2003 (1) SA 629 (W) at 635C

Aggrieved by the decision of the PFA, the Applicant instituted the present application for reconsideration. The Applicant has not advanced any facts which suggest that the board of trustees failed to exercise its discretion properly. It is worth mentioning that there was no suggestion that the board of trustees failed to properly exercise its discretionary powers, nor could we find any. Given the discretionary powers vesting in the board of trustees, the decision of the Adjudicator was correct and accords with the proper application of section 37C. In our view, the application for reconsideration lacks merit.

CONCLUSION


[21] On the papers filed with the Tribunal, we find that the Applicant has not established a case to justify a reconsideration of the decision by the Adjudicator.

[22] In the circumstances, the Tribunal can find no grounds to interfere with the decision of the Adjudicator.

ORDER

[23] The application for reconsideration is dismissed.

Signed on behalf of the Tribunal on 28 August 2024 by Ms Zama Nkubungu-Shangisa
(Panel Member) with the panel consisting also of:

A handwritten signature in black ink, appearing to be 'C Pretorius', is centered within a light gray rectangular box. The signature is fluid and cursive, with a large initial 'C'.

Judge C Pretorius (Chair); and

Adv M Mphaga SC.
