

# THE FINANCIAL SERVICES TRIBUNAL

Case No: PFA76/2024

In the matter between:

**HAYLEY MARIE WARD  
MICHELLE ROBYN WARD  
ANDREA LYNNE WARD**

Applicant

and

**ALLAN GRAY RETIREMENT ANNUITY FUND AND  
ALLAN GRAY PRESERVATION FUND  
PENSION FUNDS ADJUDICATOR**

First Respondent

Second Respondent

*Summary: Application for reconsideration in terms of Section 230 of the Financial Sector Regulation Act 9 of 2017 of the second respondent's decision to dismiss the applicant's complaint against the first respondent concerning its re-allocation of a death benefit in terms of section 37C (1) (bA) of the Pension Funds Act 24 of 1956*

Tribunal: LTC Harms (Chair), GM Goedhart SC

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## DECISION

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### INTRODUCTION

1. The applicant, Ms Hayley Marie Ward, seeks a reconsideration in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 (*the FSR Act*), of the decision by the second respondent (*the Adjudicator*) dismissing her complaint against the first respondent.

2. The complaint concerns the re-allocation of a death benefit by the first respondent to Mr Wayne Millard in terms of section 37C of the Pension Funds Act 24 of 1956 (*the Act*) following the death of the applicant's mother, Ms Gail Pamela Millard (*the deceased*), on 15 August 2023, aged 58.
3. The applicant and her siblings, Michelle Robyn Ward (*Michelle*) and Andrea Lynne Ward (*Andrea*) are the major daughters of the deceased born of her first marriage. Mr Millard was the deceased's second husband to whom she had been married for 18 years at the time of her death. He was 61 as at the date of his wife's death.
4. The applicant has cited her siblings as applicants in the reconsideration application. She was however the only complainant before the second respondent and is the only signatory to the reconsideration application. Ms HM Ward is thus considered as the applicant before this Tribunal.
5. The Allan Gray Retirement Fund (*AGRF*) and the Allan Gray Pension Preservation Fund (*AGPE*), cited collectively as the first respondent (*the Funds*), are registered funds in terms of the Act. The Funds share the same board of trustees, and the Funds' re-allocation decision was made by these trustees.
6. The parties have agreed that the reconsideration application can be determined on the papers without the need for an oral hearing.

## BACKGROUND

7. The deceased was a member of the AGRF from 1 October 2021 and of the AGPE from 29 January 2007. The total death benefit available for distribution was R7 943 571,31, comprising an amount of R7 919 190.83 in the AGPE and R24 380.38 in the AGRF.
8. The deceased's nominated beneficiaries in respect of the AGPE were: Mr Millard (10%); the applicant (30%); Michelle (28%); and Andrea (32%). In respect of the AGRF, the deceased's nominations were 20% each in respect of Mr Millard, the applicant and Andrea and 40% in respect of Michelle.
9. The Funds conducted an investigation as they were required to do in terms of section 37C of the Act, and determined that Mr Millard and the deceased's mother, Mrs Ledwick, were factually dependent on the deceased. The applicant and her siblings are the deceased's legal dependants, but were not factually dependent on the deceased for support at the time of her death. In the exercise of their discretion in terms of section 37C(1)(bA) of the Act, the Funds re-allocated the death benefit as follows:

		Original Allocation <sup>1</sup>		Re-allocation	
Dependant's Full Names	Relationship & Age	AGPE	AGRF	AGPE	AGRF
Wayne Millard	Spouse (61)	60%	20%	58,44%	20%
Andrea Lynne Ward	Major daughter (30)	10,70%	20%	11,22%	20%
Michelle Robyn Ward	Major daughter (28)	9,30%	40%	9,82%	40%
Hayley Marie Ward	Major daughter (25)	10%	20%	10,52%	20%
Heather Gwendoline Ledwick	Mother (78)	10%	0%	10%	0%

### THE COMPLAINT AND SUBSEQUENT EVENTS

10. The applicant, a chartered accountant, lodged a complaint with the Adjudicator on 17 April 2024.<sup>2</sup> The crux of the complaint is that because the Funds used the incorrect life expectancy for Mr Millard, an excessive portion of the death benefit was re-allocated to Mr Millard, thereby unjustly enriching him to the prejudice of the applicant and her siblings. Had the correct facts and figures been used, the Funds ought to have allocated at most 19% of the total death benefit to Mr Millard and not 58%.

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<sup>1</sup> The re-allocation made before the Funds became aware of the accruals/inheritances in the deceased's will.

<sup>2</sup> The Funds had responded to the applicant's email of 12 March 2024 on 4 April 2024. This correspondence preceded the complaint.

11. The Funds responded to the complaint on 14 June 2024. A copy of the Funds' response was sent to the applicant on 2 July 2024. The Adjudicator's covering letter erroneously indicated that the applicant had to respond by 8 June 2024. When the error was realised, the applicant was given the opportunity to respond by 12 July 2024, and she did so by 11 July 2024.
12. The Adjudicator delivered her decision dismissing the complaint on 13 September 2024. The applicant's response of 11 July 2024 was not taken into account in the decision. The applicant lodged the application for reconsideration on 12 November 2024.
13. On 14 November 2024, the Funds addressed a letter to the applicant setting out that a life expectancy of 16.81 years for Mr Millard was used. Following receipt of this letter, the applicant filed an application to submit further evidence on 20 November 2024.<sup>3</sup>
14. The Funds responded to the application for reconsideration on 5 December 2024.

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<sup>3</sup> Section 232(5) of the FSR Act, read with Rules 22 to 25 of the Financial Services Tribunal Consolidated Rules.

15. The applicant then filed a further response to the Funds' response. That response is undated.<sup>4</sup>
16. The Adjudicator filed further reasons on 12 December 2024. In the further reasons, the Adjudicator acknowledges that the first applicant's response of 11 July 2024 was not taken into account in the determination of 13 September 2024 due to a *bona fide* error. The error notwithstanding, taking into account the reply of 11 July 2024, the crux of the complaint remains that the Funds allocated an excessive amount of the death benefit to Mr Millard.

#### THE RECONSIDERATION APPLICATION

17. The Funds' letter of 14 November 2024 was received by the applicant after she had timeously submitted the reconsideration application. The application to submit further evidence was brought by 20 November 2024, and there was no delay in bringing the application to submit further evidence. The applicant's application to submit further evidence is granted.
18. The applicant accepts that the Funds have a statutory discretion to re-allocate a death benefit in terms of section 37C of the Act.

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<sup>4</sup> Record, Part A: p147-152: Applicant's augmented grounds for reconsideration received on 22 January 2025.

19. The reconsideration application as initially formulated set out that the applicant and her siblings:
  - 19.1. are aggrieved by the value amount re-allocated by the Funds to Mr Millard. The amount is excessive and the net result does not agree with the inputs used by the Funds;
  - 19.2. were prejudiced by the amount allocated to Mr Millard, which resulted in his unjust enrichment;
  - 19.3. are aggrieved by the Adjudicator's decision not to set aside the re-allocation determined by the Funds;
  - 19.4. are aggrieved by the "maladministration" of the Adjudicator in that she didn't consider the comments made by the applicant of 11 July 2024, and failed to investigate the amount allocated, but only investigated whether the Funds had grounds to re-allocate in accordance with section 37C.
20. The applicant's initial complaint to the Adjudicator was that, having worked backwards from the re-allocated amount, the applicant determined that the Funds likely used a life expectancy of 29 years for Mr Millard. This life expectancy of 29 years was said to be out of kilter with the sources considered by the applicant which reflected life expectancies of 14.01 years (as per the

South African Revenue Services Life expectancy tables) and 13.3 years (as per the Census 2011: Estimation of Mortality in South Africa).

21. The letter of 11 July 2024 to the Adjudicator adds a further grievance, being that the Funds had allocated the surplus (above what was needed for the factual dependants) according to the nominations made by the deceased. The complaint was that, as the Funds had already exceeded the deceased's original nominations with their re-allocation decision in a manner which favoured Mr Millard, the Funds ought to have distributed the surplus of the death benefit in the AGPE as between the applicant and her siblings only, and not included Mr Millard.
22. In the further evidence affidavit of 20 November 2024, the applicant accepts that a life expectancy of 16.81 as used by the Funds was reasonable.<sup>5</sup> However, even accepting all the Funds' inputs (the real discount rate of 3%, a yearly shortfall amount of R259 668 and a life expectancy of 16.81 years), and even accepting that there are different calculation methodologies, the net dependency, after deduction of amounts already received should have yielded an amount of R2 226 366.29, and not R4 350 456.26 as calculated by the Funds.

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<sup>5</sup> Record, Part C, p3: *"We consider the 16.81 years to be on the upper end of a 61 year old male life expectancy, however we consider this life expectancy to be reasonable."*



23. In regard to the complaints against the Adjudicator, the applicant questioned the due diligence and transparency of the Adjudicator, in that the Adjudicator ought to have had regard to the letter of the Funds of 14 November 2024, and whether these inputs were reasonable and acceptable. The Adjudicator failed to take into account that the Funds did not address why their calculation differed so much from that of the applicant. There is, in essence, an insistence that the Adjudicator ought to have performed a recalculation.<sup>6</sup> The applicant is dissatisfied that the precise methodology used by the Funds has not been provided, and that there has been a lack of transparency.

#### SECTION 37C OF THE ACT

24. The Funds exercised their discretion in terms of Section 37C of the Act, the relevant extract of which provides:

*“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 (other than a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules) 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*

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<sup>6</sup> Record, Part A, p148.

*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.*

*(b) ...*

*(bA) If a member has a dependant and the member has also designated in writing to the fund a nominee to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the fund shall within twelve months of the death of 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."*

25. Section 37C of the Act takes precedence over any nomination by a member of a fund.<sup>7</sup>
26. The section reflects a legislative decision that funds that become available as a death benefit should be used for the benefit of the deceased's dependants, and serves the social purpose of providing some protection for dependants without entirely overriding the wishes of a deceased who has nominated beneficiaries.<sup>8</sup>
27. The nominations made by the deceased are there as a guide to the trustees in the exercise of their discretion.<sup>9</sup>

#### THE FUNDS' EXPLANATION

28. The amount re-allocated to Mr Millard, after the deduction of the life policy (R1 015 105) and the accrual claim (R249 534.74), was R4 350 456.26. The Funds estimated that Mrs Ledwick's net financial dependency after taking into account the R100 000 inheritance was R791 919.08. The net financial dependency of Mr Millard and Mrs Ledwick was provided for in full, given that the amount of the death benefit exceeded the amount R 5 142 375,34. The

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<sup>7</sup> *Kaplan & Another NNO v Professional & Executive Retirement Fund & others* 1999 (3) SA 798 (SCA) at 803B-C.

<sup>8</sup> *Fundsatwork Umbrella Pension Fund v Guarnieri and others* 2019 (5) SA 68 (SCA); [2019] 2 BPLR 321 (SCA); [2019] JOL 42094 (SCA); [2019] ZASCA 78 (SCA) at para 5.

<sup>9</sup> *Mashazi v African Products Retirement Benefit Provident Fund* 2003(1) SA 629 (WLD) at 632I-633A.

balance of the death benefit in AGPE (35%) was re-allocated in accordance with the deceased's nominations between Mr Millard, the applicant and her siblings. This resulted in the increase of Mr Millard's allocation from 54,94% to 58,44%, and in the applicant being allocated 10,52%, Michelle 10,52% and Andrea 11,22%.

29. The Funds explained that the Act does not prescribe a calculation methodology and that the methodology used by the Funds is in keeping with what is used by the courts in South Africa to calculate a loss of support claim.
30. A detailed explanation of the methodology used by the Funds is set out in the letter of 4 April 2024 addressed to the applicant (per paragraph 2) as well as in the response to the complaint dated 14 June 2024 (per paragraph 20). Over and above the assumptions pertaining to the real discount rate of 3%, a yearly shortfall amount of R259 668 and a life expectancy of 16.81 years (*the Assumptions*),<sup>10</sup> the Funds also assumed that the deceased's likely retirement age would have been 63 and that at this point her income would have dropped by a third.
31. The Funds explained that the Act does not specify what factors the board may or should consider in effecting an equitable distribution. However, at common law, the board needs to consider a wide range of factors such as: (i) extent of dependency; (ii) respective financial affairs/ financial status of each

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<sup>10</sup> The Assumptions are what the applicant used in her calculations, described as "inputs".

beneficiary; (iii) future earning potential and prospects; (iv) ages of the beneficiaries; (v) relationship with the deceased; (vi) amount available for distribution and (vii) the wishes of the deceased.

32. The facts taken into consideration by the Funds in respect of the deceased's factual and legal dependants were as follows:

32.1. In respect of Mr Wayne Millard, the deceased's spouse:

32.1.1. He and the deceased were married for 18 years;

32.1.2. He is retired and shared a common household with the deceased and confirmed that his monthly expenses were R33 223.00 and that these exceeded his monthly income of R11 584; i.e. a shortfall of R21 639;

32.1.3. He was financially dependent on the deceased;

32.1.4. He was 61 at the date of death of the deceased;

32.1.5. He received a third-party capital payment from Momentum Life in the amount of R1 015 105;

32.1.6. He inherited 50% of the fixed property (being the deceased's half-share of their communal home valued at R2 500 000.00);

32.1.7. He received an accrual claim of R249 534.74.

32.2. The Funds were not aware of the accrual claim of R249 534.74 during the initial part of the Funds' investigation and therefore not factored into the Funds' original calculations to determine the extent of the spouse's lost support, but it was ultimately considered and factored in as part of the board's decision.

32.3. In respect of the deceased's mother, Ms Heather Gwendoline Ward:

32.3.1. She is retired and was financially dependent on the deceased for rent-free accommodation and the deceased gave her cash and a credit card to use as needed;

32.3.2. She was aged 78 at the date of death of the deceased and a pensioner with a monthly gross income of R2 100.00 (SASSA);

32.3.3. She is widowed;

32.3.4. She inherited an amount of R100 000.00 from the deceased's estate.

32.4. The facts considered in respect of the applicant, Ms Hayley Ward were that:

- 32.4.1. She is gainfully employed and confirmed via email on 29 September 2023 that she was not financially dependent on the deceased;
  - 32.4.2. She was 25 at the date of death of the deceased;
  - 32.4.3. She is employed as a Chartered Accountant with a monthly gross income of R85 000.00;
  - 32.4.4. She is single;
  - 32.4.5. She received a third-party capital payment from Momentum Life of R1 297.274;
  - 32.4.6. She received one-third of the residue of R264 422.34.
- 32.5. In regard to Michelle, the board considered that:
- 32.5.1. She is gainfully employed and confirmed via email on 03 October 2023 that she was not financially dependent on the deceased;
  - 32.5.2. She was 28 at date of death of the deceased;

32.5.3. She is employed in a plant nursery with a monthly gross income of R30 000.00;

32.5.4. She is married and resides in the United Kingdom;

32.5.5. She received a third-party capital payment from Momentum Life of R1 297.274;

32.5.6. She received a one-third of the residue of R264 422.34.

32.6. Lastly, in regard to Andrea:

32.6.1. She is gainfully employed and confirmed via email on 05 October 2023 that she was not financially dependent on the deceased;

32.6.2. She was 30 at date of death of the deceased;

32.6.3. She is employed as a Manager at and receives a monthly gross income of R116 000.00;

32.6.4. She is single and resides in Ireland;

32.6.5. She received a third-party capital payment from Momentum Life of R1 297274;



32.6.6. She inherited one-third of the residue of R264 422.34.

### RECONSIDERATION

33. The applicant does not quibble with any of the Funds' factual findings nor, in the final instance, materially with the Assumptions used by the Funds. Her complaint is that even allowing for different calculation methodologies, she cannot arrive at the figure calculated by the Funds and that therefore, the discrepancy between her calculation and that of the Funds, means that the Funds acted irrationally.
34. In dismissing the complaint, the Adjudicator explained that it is not the function of the Adjudicator to decide what is the fairest or most generous distribution, but rather to determine whether the board has acted rationally and arrived at a proper and lawful decision.<sup>11</sup> Further, that the only inquiry is whether the decision by the Funds to re-allocate is reasonable and rational having regard to the facts taken into consideration. The approach is correct.

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<sup>11</sup> Citing *Ditshabe v Sanlam Marketers Retirement Fund & Another (2)* [2001] 10 BPLR 2579 (PFA) at 2582 para 8. See also *Stacey (Koevort) v Old Mutual Protektor Pension Fund & another* [2005] 1 BPLR 73 (PFA) at para 15.

35. The Adjudicator admits that she failed to have regard to the applicant's response of 11 July 2024. Proceedings before this Tribunal constitute a complete re-hearing, and fresh determination, of the matter.<sup>12</sup>
36. The applicant has been given two further opportunities to respond to the Funds' response in this application, being on 20 November 2024 and the undated response filed after receipt of the Funds' submissions of 5 December 2024. This Tribunal has also considered the applicant's response of 11 July 2024. The procedural fairness complaint that the applicant's response of 11 July 2024 was not taken into account by the Adjudicator, has been cured and does not constitute a ground to set aside or remit the decision of the Adjudicator.
37. As explained in *Niemiec*:<sup>13</sup>

*"The Tribunal can consider the merits of the PA's decision afresh – including all the submissions the applicants say they would or could have made, given the opportunity, and those they say were given short shrift by the PA. Therefore, any*

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<sup>12</sup> *Tikly and Others v Johannes NO and Others* 1963 (2) SA 588 (T) at 590F-591A; *Amanda Dolores Laetitia Niemiec and Others v Constantia Insurance Co Ltd and Others* (Case No PA1/2021) [2021] ZAFST 30 (27 October 2021) (***Niemiec***) para 33 citing *Nichol and Another v Registrar of Pension Funds and Others* 2008 (1) SA 383 (SCA); [2006] 1 All SA 589 (SCA) para 22.

<sup>13</sup> *Niemiec*, *Ibid* at para 40.

*procedural fairness concerns the applicants may have regarding the PA's process can be cured by a full and fair hearing on appeal to the Tribunal."*

38. In her final submissions before this Tribunal, the applicant accepts that life expectancy used by the Funds was reasonable, and that there are different calculation methodologies. Utilising only the Assumptions as "inputs", the applicant maintains that an amount of about R2 226 336.29 million should have been re-allocated to Mr Millard.
39. The applicant does not dispute the allocation made by the Funds to Ms Ledwick. This is not an irrelevant consideration, because it points to the amount ultimately re-allocated to Mr Millard as being at the heart of the applicant's complaint, rather than the Funds' calculation methodology. The fact that the calculation methodology used by the applicant yields a different outcome in respect of Mr Millard, does not mean that the Funds' calculation was incorrect, or that its preferred calculation methodology is unreasonable. There is no prescribed calculation methodology in the Act. Moreover, not all of the assumptions considered by the Funds were taken into account by the applicant with reference to, for example, the assumed retirement age of the deceased.
40. The Funds took into account that the applicant and her siblings were not factually dependent on the deceased and that they were of a sufficiently young age to make provision for their future. In contrast, Mr Millard, the deceased's husband of 18 years, was retired and was factually dependent on the

deceased. His monthly shortfall of R21 639,00 was not materially disputed by the applicant.

41. It is so that the re-allocated value amount in respect of the AGPE awarded to Mr Millard exceeds what the deceased has indicated in her nomination. However, such an outcome is envisaged by the scheme of the Act, bearing in mind that the purpose of the Act is to ensure that dependants are provided for notwithstanding the nomination made by the deceased.
42. The Funds did not completely disregard the nominations made by the deceased. The nominations were taken into account by the Funds when it took into account the surplus death benefit available in the AGPE after the calculation of the total net dependency of Mr Millard and Mrs Ledwick.
43. The applicant's complaint that the nomination by the deceased should have been entirely disregarded by the Funds in regard to the surplus because the Funds had already re-allocated an amount in excess of the nomination to Mr Millard is without foundation. In calculating the amount to be re-allocated to Mr Millard appropriate and relevant facts were taken into account. Similarly, in allocating the surplus, the deceased's nomination, a relevant factor, was taken into account. The nomination served as a guide and was properly taken into account by the Funds in respect of the surplus death benefit available after provision for dependency.

44. In the result, this Tribunal finds no reason to interfere with the Adjudicator's decision as it has not been demonstrated to be wrong.

Order

45. The application for reconsideration is dismissed.

Signed on behalf of the Tribunal on 2 May 2025.

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LTC Harms (Chair)

  
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GM Goedhart SC (Panel member)