

THE FINANCIAL SERVICES TRIBUNAL

Case Number: PFA31/2024

In the matter between:

**MACHOENE EPHIA SEMENYA
MOSA SEMENYA
OFENTSE SEMENYA
KGOHATSO SEMENYA**

**1ST APPLICANT
2ND APPLICANT
3RD APPLICANT
4TH APPLICANT**

AND

**OLD MUTUAL SUPERFUND PENSION FUND
THE PENSION FUNDS ADJUDICATOR
DIKETSO SEMENYA
PHUTI ALBERTINA SEMENYA**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT**

DECISION

Panel Members: MF Legodi (Deputy Chairperson), Adv K Magano and Adv O

TONGOANE

INTRODUCTION

[1] Re-allocation of pension benefits by **Old Mutual Superfund Pension Fund** (the Fund), to take care of other beneficiaries not nominated by the late Mr RM Semenya (the deceased), who was a pension member of the Fund, has become the centre of a dispute in this application for reconsideration. The deceased died on 15 July 2023.

[2] The application is in terms of section 230(1)(a) of the Financial Sector Regulation Act No. 9 of 2017 (FSRA), and it provides that a person aggrieved by the decision may apply to the Tribunal for a reconsideration of the decision in accordance with Part 4 of Chapter 15 of FSRA.

[3] The question in these proceedings is whether the **Pension Fund Adjudicator** (hereinafter referred to as the Adjudicator) and cited in these proceedings as the first respondent, was wrong in confirming the decision of the Fund in terms of which the accrued pension benefits of the deceased in the amount of **R2 492 553. 93** was reallocated with two additional beneficiaries being added as the dependants of the deceased.

[4] The re-allocation and addition of other beneficiaries were made in terms of section 37C (1) (bA) of the Pension Funds Act NO. 1 of 1956 (the Act). Section 37(1) (bA) of the Act provides as follows:

“(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 12 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”.

Background facts

[5] The deceased was survived by his mother, (79yrs), his wife (47yrs), stepdaughter (29yrs), son (23yrs), son (20yrs), son (10yrs) and another son (8yrs). At the time of his death, the deceased had already submitted a nomination form in writing which is dated 16 June 2016 wherein he determined the allocation of his pension

benefits as follows: 50% to his wife, 5% to his stepdaughter aged 29, and 15% for each of his three children aged 20, 10 and 8 respectively.

[6] As indicated, the deceased died on 15 July 2023. Upon the deceased's death, death benefits amounting to R2 492, 553.93 became payable to his nominees as per his nomination, and dependants as contemplated in section 37C of the Act quoted in paragraph [4] above.

[7] Pension benefits claim was lodged with the Fund. The Fund after it had investigated and after having given interested parties an opportunity to be heard on its investigation and findings, reallocated the benefits and added the deceased's mother and his 23 years old son as his dependants.

[8] The reallocation and addition of the beneficiaries were made as follows: The deceased's wife share was reduced from 50% to 25%, the 8year old son's share increased from 15% to 30%, the 10 year old son's share increased from 15% to 20%, the 20 year old son's share decreased from 15% to 10% and the 29 year old daughter's share was kept at 5% as per the deceased's 2016 nomination.

[9] As indicated in paragraph [7] above, two beneficiaries were added by the Fund and confirmed by the Adjudicator. This is another point of contention prompted by the unhappiness of the deceased's wife.

Was the Adjudicator wrong in confirming the Fund's reallocation?

[10] Reallocation is allowed in terms of section 37C of the Act. The nomination by a member of a fund can be departed from, if a fund concerned or its board deem it equitable. If there is more than one nominee or dependants, a fund concerned can reallocate the pension benefits in proportions to any or all the dependants or nominees.

[11] Starting with addition of the two dependants in this case, that is, the mother and a 23-year-old working son, it is important to have regard to the definition of a "dependant" in relation to a member of any fund established in terms of the Act.

- [12] In terms of section 1 of the Act, “dependant” 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 legally liable for maintenance, if such person (i) was in the opinion of the board, upon the death of the member in fact dependant on the member for maintenance, (ii) is the spouse of the member; (iii) is a child of a member, including a posthouse child, an adopted child and a child born out of wedlock and; (c) a person in respect of whom the member would have become legally liable for maintenance, had the deceased not died.
- [13] Starting with the mother of the deceased, the question is whether a child has a duty to maintain his or her parent. Children have a responsibility to support their parents and grandparents, but always subject to the rule that support must be claimed from closer relatives first. The basis of a child’s duty to support a parent or parents is the sense of dutifulness.
- [14] A parent who claims support from a child must prove his or her need and the child’s ability to support. In **Smith v Mutual Federal Co Ltd 1998 (4) SA 620 (C)**, the court emphasised that, to prove need for maintenance, a stringent criterion of need must be established. A parent must show his or her own indigence and inability to support themselves.
- [15] In **Oosthuizen v Stanley 1938 AD 322-328**, the court referred to the quality and condition of the person to be supported. It was held that where a parent must be supported, it is not only his or own needs, but also those of his dependants.
- [16] In **Van Vuuren v Sam 1972 SA 633 (A) 642 Rabie JA** stressed that the support of parents must be confined to the basic needs, namely food, clothing, shelter, medicine and care in times of illness.
- [17] In terms of the Maintenance Act 99 of 1998, parents and children have a reciprocal duty of support and the basis for a child’s duty to support his or her parents is the sense of dutifulness. This is derived from section 2(1) of the

Maintenance Act which provides that the provisions of the Act, shall apply in respect of the duty of any person to maintain any other person, irrespective of the nature of the relationship between those persons giving rise to that duty. The Fund found that the deceased's mother was a dependant of the deceased. For this, the Fund determined that 5% of R2 493 553.93 to the mother of the deceased was fair, impartial and equitable regard being had to the shares for other nominees and or dependants as contemplated in section 37(C) quoted in paragraph [4]. The Adjudicator agreed with the Fund. We are unable to find any misdirection in this regard.

[18] The deceased's mother was 79 years old when her son died. She was not working and was financially dependent on old pension benefits. The Fund in its reallocation process, concluded that she is a factual dependant and that she is receiving only a state old age grant.

[19] The Fund also considered the fact that the deceased's mother was not receiving any significant support from the deceased's siblings. This finding cannot be faulted. That being so, the mother of the deceased was correctly found to be a person in respect of whom the deceased would have become legally liable for maintenance, had the deceased not died as contemplated in section 1(c) of the Act.

[20] The Adjudicator, correctly so in our view agreed with the Fund that the deceased's mother was a future dependant of the deceased and that the deceased financially assisted her with ad hoc payments. Whilst other siblings of the deceased assisted their mother, the deceased would also have been obliged to look after his mother in the future had the deceased not died. We also find that 5% proportional sharing of the deceased's accrued pension benefits in the amount of R2 492 553.93 is the circumstances fair as so confirmed by the Adjudicator.

[21] This then brings us to the other beneficiary added by the Fund to which the Adjudicator agreed and to which we do not agree. This relates to the deceased's son of 23 years old. He was described by the Fund as being

employed and that, he “was not financially dependent on the deceased”; but was included for a share as a factual dependant ‘because there is an excess and he earns a modest (and unstable commission based) income’, so was the conclusion by the Fund and confirmed by the Adjudicator in its decision.

[22] The Fund further concluded by stating as follows:

“He would be financially dependent on the deceased if he was unemployed in the future had the deceased not died”.

[23] The Adjudicator found nothing wrong with this finding by the Fund. This in our view, is too speculative. In fact, the finding that the deceased’s son “*was employed... was not financially dependent on the deceased*”, should have ended any consideration of the deceased’s son being a dependant of the deceased as defined in section 1 of the Act.

[24] There was no legal duty on the deceased to support him, neither could it be said that upon the death of the deceased, his son was in fact dependant on the deceased for maintenance. It was speculative to conclude that he became a person in respect of whom the member or deceased would have become legally liable for maintenance as defined in paragraph (c) of section 1 of the Act.

[25] Unfortunately, the Adjudicator agreed with the inclusion of the 23-year-old son of the deceased to share 5% of the accrued pension benefits of the deceased in the amount of R2 492 553.93. In dismissing the first applicant’s complaint, the Adjudicator found that the deceased’s son was ‘*a factual dependant*’ because there is an excess and he earns a modest (and unstable commission-based income). It is not clear how the excess came about to allocate portion of the pension benefits to a son who was not dependent on the deceased and whom the deceased was not obliged to maintain.

[26] “Unstable commission-based income”, cited in the Adjudicator’s decision, has not been verified or confirmed on the record of the proceedings before the Adjudicator. This was despite the fact that the deceased’s son in his response

or comment when invited by the Adjudicator to do so, suggested for verification with the person he was working for.

- [27] In his email of 23 April 2024 addressed to the Adjudicator, the deceased's son indicated that whereas he was not directly employed by the bank, he was working with the financial advisor as an assistant to the financial advisor. He stated that he was not permanently employed and that his contract can be terminated anytime depending on his performance.
- [28] This say so statement, appears not to have been investigated. First, by the Fund and second, by the Adjudicator. There is no indication on record how long he has been employed as an assistant financial planner. There is also no indication how much he was paid for the months that preceded his letter of 23 April 2024.
- [29] His assertion that he was not earning enough and that he would often run short of transport and food, does not appear to have been investigated before the Adjudicator took a decision. The deceased's son made the assertion that he was not earning enough and that he would often run short of transport and food, without indicating how much he earned for the months that preceded his letter of 23 April 2024.
- [30] The deceased's son in his letter further speculated as to what might happen to his Financial Planner. He stated in his letter to the Adjudicator that his current job does not have a guarantee because if the Financial Advisor may decide to quit his job, he would become jobless. He also suggested without more, that the financial advisor he was working for, may decide to pursue for greener pastures.
- [31] Again, what is stated in paragraph [30] above, was speculative and needed more investigation. Of course, the deceased's son invited the Adjudicator to verify his assertions with the Financial Planner concerned. The deceased's son expressed himself as follows:

“I therefore would love to declare that the information as provided is true and not misleading. Feel free to investigate the information as provided and you can also contact my line manager (Financial Advisor) on 072 251 1584 / 010 237 8509 to check if the information I provided is genuine”.

- [32] It does not appear from the Adjudicator’s ruling that this lead provided by the deceased’s son, was pursued. Instead, the Adjudicator in paragraph 4.7 of his decision agreed with the findings by the Fund. The Adjudicator held as follows:

“The Fund established that Lesetja is a major, 23 years old, and employed. He was not financially dependent on the deceased. He was included as a factual dependant as he earns modest income and would have been dependent on the deceased if he became unemployed in the future had he deceased not passed away”.

- [33] The Adjudicator then, in paragraph 4.15 of the decision, confirmed that the deceased’s son in question was employed by a financial advisor as a Financial Advisor Assistant and that the deceased’s son submitted that he was not employed on a permanent basis by the bank, he works for the financial advisor and that his income was commission based.

- [34] In conclusion, the Adjudicator indicated in paragraph 5.15 of the decision that he was satisfied the Fund considered relevant factors and did not abuse its discretion in the allocation of the deceased’s death benefits. We are unable to agree with this conclusion insofar as it relates to the deceased’s son employed as an Assistant Financial Planner for reasons already alluded to in the preceding paragraphs.

- [35] After the hearing on 6 November 2024, the Adjudicator was directed to provide us with the investigation report by the Fund and any other information at its disposal when the decision was made. The response thereto is stated as follows:

“Kindly note that there was no investigation report submitted to the Adjudicator from the Fund. The Adjudicator determined the matter based on the Fund’s detailed response, highlighting the reasoning behind the Board’s allocation”.

- [36] Perhaps it is better for the Adjudicator in the future to insist on being provided with investigation reports before making a final determination. The *“Board’s allocation”* in the quotation above, is with reference to the Fund’s reallocation by changing the allocation as per the deceased’s nomination and also adding the deceased’s son in question as a dependant. As indicated in the preceding paragraphs, there was no sufficient information before the Adjudicator to confirm the Fund’s reasoning for reallocation with specific reference to the deceased’s son employed as Assistant Financial planner. The decision regarding the deceased’s 23-year-old son, has to be set aside.
- [37] As regards to rest of the reallocation indicated in paragraph [8] above, one is unable to find anything wrong on the part of the Adjudicator. The Adjudicator found that the Fund in reallocating and changing the proportional sharing as per the deceased’s nomination and adding the deceased’s mother as a dependant, were for good reasons.
- [38] In terms of section 37C, proportions on sharing and addition of other persons as dependants, have to be guided by what is fair to those nominated and to those who might be recognised as dependants. An element of fairness and impartiality or acting for good reasons is required as part of equity. That is, fairness and justice.
- [39] Equitable distribution requires one to inter alia, consider the age of dependants, the relationship with the deceased, the extent of dependency, the wishes of the deceased either in the nomination form and or financial affairs of the dependants including their future earning capacity potential.

- [40] As regards to the 8,10, and 20-year-old children of the deceased, 30%, 25% and 10% respectively were reallocated. That is, increasing what was initially for each 15% each, to 30% and 25% respectively in respect of the 8- and 10-years old children of the deceased. The 20-year-old son of the deceased already at tertiary, his initial 15% sharing as per the nomination, was decreased to 10%.
- [41] In doing so, the Adjudicator confirmed what was considered by the Fund. Their ages, needs and dependency on the deceased before his death, were considered. This cannot be faulted. The wishes of the deceased regarding the stepdaughter of 29 years old, was also considered. The Fund decided not to interfere with 5% allocation in terms of the nomination by the deceased and was confirmed by the Adjudicator. This too cannot be faulted.
- [42] The deceased's wife, who is cited in these proceedings as the first applicant, is aggrieved by the Adjudicator's decision regarding everything done by the Fund and confirmed by the Adjudicator. Her 50% sharing as per the nomination, was reduced to 25%. This, the Adjudicator found that the Fund properly considered all relevant factors and that there was nothing wrong with the Fund's reallocation.
- [43] The Fund's decision in this regard was based on several grounds. The deceased's wife having failed to establish that she had been staying with the deceased as husband and wife, and that she was romantically involved and sharing a marital home with the deceased.
- [44] The Adjudicator also agreed with the Fund's findings that the deceased and his wife did not live with each other for a period of about 5 years. This was confirmed by the deceased's stepdaughter who is the first biological child of the deceased's wife, the first applicant. The allegation was also confirmed by the deceased's mother and the deceased's brother.
- [45] It was important to protect the interests of the two minor children who are still having many years before they become of age. The 20-year-old son is still at

tertiary and relatively still young. The reduction of his of 15% to 10% in favour of the two minor children cannot be construed as unfair or not equitable. The two children, aged 8 and 10 respectively, are having a long way to go even after matric. The 30% and 25% respectively in our view, is equitable and fair. Their benefits would be controlled and monitored by the Guardian Fund to take care of their immediate needs.

[46] Lastly, 25% of R2 492 553.93 for the deceased's wife, should be sufficient to take care of herself. It is a reduction She has a decent home. Therefore, she should be able to maintain herself. The wish to build a home in Limpopo should be her choice. This is not an aspect that can be seen as a consideration, to upset the Adjudicator's decision.

[47] She is in her middle age. She was a nurse before. Although she suggested on 6 November 2024 during the hearing that she was boarded out due to ill-health, she did not provide sufficient evidence to suggest that it would not be possible to do other forms of work or that she is not employable in any other capacity. Considering all of the above, the decision by the Fund and confirmed by the Adjudicator cannot be faulted safe for the deceased's son employed as Assistant Financial Planner.

[48] In the results, the reallocation of 5% to the deceased's son employed as an Assistant Financial Planner must be set aside for reasons already mentioned in this decision. The application for reconsideration regarding the rest of the nominees and the mother of the deceased as a dependant of the deceased, is destined be dismissed.

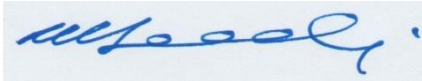
ORDER

[29] Consequently, an order is hereby made as follows:

29.1 The application except for the deceased's son aged 23 and employed son as Assistant Financial Planner, is hereby dismissed.

29.2 The reallocation of 5% to the deceased's son employed as Assistant Financial Planner is hereby set aside and referred to the Adjudicator for reconsideration.

SIGNED on behalf of the panel members on 19 November 2024

A handwritten signature in blue ink, appearing to read 'MF Legodi', is shown within a light blue rectangular box.

MF Legodi

DATE OF HEARING: 06 NOVEMBER 2024
DATE DELIVERED: 19 NOVEMBER 2024