THE FINANCIAL SERVICES TRIBUNAL

Case No: PFA16/2024

In the matter between:

MARNA GOUWS (HEILIE MARIA GOUWS)	**Applicant**

and

MOMENTUM RETIREMENT ANNUITY FUND	**First Respondent**
PENSION FUNDS ADJUDICATOR	**Second Respondent**
K E BUCHINGER	**Third Respondent**

DECISION

Summary: *Application for the reconsideration, in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 ("the FSRA"), concerning the decision taken by the second respondent on 11 April 2024 of payment of a death benefit following the death of Mr M J Gouws, the deceased to the third respondent in terms of section 37C of the Pension Funds Act*

THE COMPLAINT:

1. The applicant is the daughter of Mrs H M Gouws and the sister of the

deceased Mr Johan Gouws.

2. The deceased was a member of the first respondent. He passed away in November 2021. He nominated K Buchinger, A Gouws, the applicant, and the Gouws Family Trust as beneficiaries of his death benefit in his will.

3. The applicant lodged the application for reconsideration as she is aggrieved that the first respondent excluded her mother from the allocation of the death benefit.

4. The applicant lodged a complaint with the second respondent, on behalf of her mother, Mrs H M Gouws, claiming that she was a dependant of the deceased.

5. According to the applicant her mother was reliant on the deceased for payment of electricity, water, municipal accounts, maintenance, food and the salaries for the domestic staff.

6. The applicant further alleged that she and her two brothers would not be able to pay the amount of R 6508.00 each per month to maintain her mother, whose medical expenses had escalated due to age and ill -health after the deceased had passed away.

BACKGROUND:

7. As a result of the deceased's death a lump sum, the death benefit, in an amount of R 584 964.00 became available from the fund for allocation to his dependants in terms of section 37C of the Pension Funds Act("PFA").

8. The board of management of the first respondent allocated the entire sum to the third respondent, the life partner of the deceased.

9. A complaint was lodged with the PFA under case number PFA/WC/00095022/2023. The result was that the board of the first respondent was ordered to re-exercise their discretion and to reconsider their decision. The board decided to stand by the

original decision and once more decided to allocate the entire death benefit to the third respondent.

10. The third respondent had inherited a house from the deceased to the value of R 1 200 000.00, which caters for her housing needs. She received no further inheritance from the deceased.

11. The final Liquidation and Distribution account did not show a short fall in the estate of the deceased as alleged by the applicant. After the Glacier Investments of R1 006 572.00 was used to cover the alleged short fall there was a surplus in the estate of R2 630 153.00 payable to the Johan Gouws Family Trust.

12. The applicant and her siblings had each received an amount of R966 741.00 in their personal capacity from the estate. They had jointly inherited R5 530 376.00 in their personal capacity and in the name of the Johan Gouws Family Trust.

13. The applicant claims that she and her siblings, her two brothers, cannot afford to pay an amount of R 6 508.00 per month each for the needs of their mother.

14. A payment of the death benefit of R558 849.00 from Allan Gray Retirement Fund was allocated to Mrs H M Gouws, the mother of the applicant.

15. The first respondent's response to the complaint by the applicant was that the Board had considered dependency as the crucial principle in the allocation of the death benefit.

SECTION 37 C OF THE PFA AND LEGAL PRINCIPLES:

16. This section provides that:

"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 sections 37A and 37Dm, 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 traces a dependant or dependants of the member, the benefit shall be paid to such a 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."

17. "Dependant" is defined in section 1 of the Act as:

"(a) a person in respect of whom the member is legally liable for maintenance;

(i) a person in respect of whom the member is not legally liable for maintenance if such person:

(ii) was, in the opinion of the Board, upon the death of the member, in fact dependant on the member for maintenance;

(iii) Is the spouse of the member;

(iv) -------

(b) A person in respect of whom the member would have become legally liable for maintenance, had the member not died."

18. The duty of the Board of trustees of the Fund, as the first respondent, are that they must allocate and pay the benefit in a fair and equitable manner.

19. The Board must identify the dependants of the deceased member. Thereafter the Board must establish which distribution will be fair and equitable by considering all relevant factors. Thereafter the Board must decide in which manner the benefit must be paid.

THE DECISION BY THE FUND:

20. The Fund found that the applicant had only dealt with the house that the third respondent had inherited from the deceased and not with any of her other living expenses. The first respondent had considered the rental income that the third respondent had received, the amount she receives as a salary and the shortfall she had in maintaining the house

and her living expenses. The first respondent took into consideration that the deceased and the third respondent had been living together for 8 years and that he had contributed R5 500.00 per month for her medical aid, gap cover and the utility bills of the house. The first respondent found that she had a rental income of R 19 958.00 per month and a salary of R 10 736.00 per month.

21. The first respondent found that the deceased would not have been able to maintain his mother on his own and that his siblings would have to had contribute to her living expenses had he not passed away. The first respondent projected that Mrs Gouws' life expectancy was seven years and she would need R 451 641.00 to maintain her for that period. This amount is adequately covered by the death benefit of the Allan Gray Retirement Annuity Fund that amounts to R 558 849.00. The result is that she does not require any financial assistance from her children. In the case of her needs escalating her surviving children had each inherited at least R 966 741.00 from the deceased's estate and should be able to assist Mrs Gouws, should such a need arise.

22. The first respondent, correctly, stated that dependency is the critical measure to establish the allocation of the death benefit.

23. The third respondent submitted that Mrs H M Gouws had not been financially dependent on the deceased as she had provided him with R 500 000.00 to purchase a property in 2020.

24. The third respondent submission was that she was 57 years of age. Her further submission was that she could not cover all her expenses as she had to pay the monthly expenses on the property, as well as her medical aid and gap cover, which had previously been, for eight years, the responsibility of the deceased.

THE ADJUDICATOR'S DETERMINATION:

25. The Adjudicator, the second respondent, had the duty to determine whether the Board had conducted a proper investigation resulting in

an equitable outcome in terms of the provisions of section 37C of the PFA.

26. Dependency on the deceased for financial support is of critical importance. The Adjudicator had to determine whether Mrs H M Gouws was dependent on the deceased or would have been dependent on the deceased for financial assistance, had he not passed away.

27. Mrs Gouws receives a pension of R 5000.00 a month which can not cover all her expenses. She was 78 years old at the death of the deceased. It is common cause that the entire amount of the deceased's death benefit, in the amount of R 539 695.00, from Allan Gray Retirement Fund was allocated to Mrs H M Gouws.

28. The Adjudicator referred to the factors which should be considered when deciding who the dependents are and referred to the case of *Sithole v IC Provident Fund and Another* 2002[4] BPLR 430 para 24-

25. According to Sithole's case the facts that the Board must consider are:

"The age of the dependents;

The relationship with the deceased;

The extent of dependency;

The wishes of the deceased;

The future earning capacity of the beneficiary;

The amount available for distribution."

29. The Adjudicator acknowledged that children have a duty to pay maintenance in respect of parents under certain circumstances, but reiterated that there should be a need and proof that there was regular support and that the parent will in future require financial, medical and other support.

30. The Adjudicator took into consideration that Mrs Gouws was allocated the full amount of the death benefit of R 539 695.00. It was also

considered that the deceased's siblings had each received R 966 741.00, as well as being beneficiaries of the Johan Gouws Family Trust.

31. Although the deceased had bequeathed the house to the third respondent, she was responsible for her monthly expenses, including rates and taxes, medical aid, gap cover and the utility bills, which leaves her with a surplus amount of R 464.00.

32. The deceased had been responsible and paying R 5 500.00 per month for the third respondent's medical aid, gap cover and utility bills, which she had to pay after he had passed away. Her life expectancy is 21 years, and her total loss of support was calculated at R 1 138 126.00. She had not received any other benefits from the deceased's estate.

33. The above were the reasons for the Board's decision, as found by the Adjudicator.

35. The Adjudicator applied the principles set out in *Mongale v Metropolitan Retirement Annuity Fund* [2010] 2 BPLR 192(PFA) and found that the Board had not acted irrationally or unreasonably when exercising its discretion and allocating the full amount to the third respondent.

38. The Board had considered the amount available for allocation, which was R584 964.00, the ages of the beneficiaries, the number of beneficiaries, their income earning potential and the fact that each of the beneficiaries had already inherited from the deceased.

39. The Adjudicator was satisfied *"that the board conducted a proper investigation, that it re-exercised its discretion and that it decided on an equitable allocation of the death benefit."*

The adjudicator dismissed the applicant's complaint.

THE RECONSIDERATION:

40. The applicant has applied to the Financial Services Tribunal for reconsideration in terms of section 230 of the FSR Act of the decision of the second respondent, the Pension Fund Adjudicator.

41. The reason for the application, according to the applicant, is that her mother Mrs H M Gouws were financially dependent on the deceased and is therefore entitled to the death benefit.

Her dissatisfaction with the decision of the adjudicator is that her mother had lived with the deceased till his death, although he had been in a relationship with the third respondent for eight years until his death. According to the applicant her mother's medical condition had deteriorated to such an extent that she needs financial support from her children, who cannot afford to aid her.

42. The third respondent was the life partner of the deceased for 8 years.

The third respondent had lived in the house owned by the deceased and he paid her medical aid, her gap cover and the utility bill for the house.

43. Although she had inherited the house, she was 57 years of age at the time of the deceased's death, she was not catered for any of her other expenses that the deceased had paid. The applicant does not address her dependency on the deceased for payment of the above expenses.

44. The second respondent dealt with the provisions of section 37C of the PFA which provides the Board with discretionary powers. The Board had to decide on an equitable distribution of the death benefit in the amount of R 584 964.00. The Adjudicator, correctly said that it was not a significant amount.

45. In *Gerson v Mondi Pension Fund and Others* 2013(6) SA 162(GSJ)at page 168 par 15 the Court held:

"... the effecting of an equitable distribution requires of the Board of trustees to take into consideration all the relevant factors and discard irrelevant ones. The Board may also not unduly fetter its discretion, nor should its decision reveal an improper purpose. If it has acted as aforesaid, no reviewing tribunal will lightly interfere with their decision."

46. In the present instance there is no evidence of the Board considering irrelevant, improper or irrational factors when making the decision to allocate the full amount to the third respondent.

47. The Board considered Mrs Gouws being a dependent of the deceased and found, correctly, that her children were responsible to support her, where she could no longer do so. However, the allocation of the full amount of R 539 695.00 by the Allan Gray Retirement Fund fully addresses her needs of R 451 641.00 for the rest of her life, without having to burden the applicant and her siblings.

48. The Board and Adjudicator correctly found that the third respondent had also been a dependent of the deceased as she was 57 years old and close to retirement age. She had been reliant on the deceased for her medical aid, gap cover and payment of her utility bills, which he had paid for 8 years whilst they were life partners and he was alive.

49. The Tribunal cannot find that the Board had not considered and dealt with all the relevant factors. The Board had extensively dealt with all the beneficiaries of the deceased, had thoroughly dealt with the dependents of the deceased, finding that both Mrs H M Gouws and the third respondent are beneficiaries and finding the circumstances of both before deciding on a fair determination of the distribution of the death benefit.

50. The second respondent was correct in dismissing the complaint as the Board had dealt with the matter according to the provisions of section 37C of the PFA. The applicant can therefore not succeed in this application for reconsideration.

ORDER:

The application for reconsideration is dismissed.

Signed at Pretoria on 17 July 2024.

C PRETORIUS

Member of the Tribunal

And obo LTC HARMS

Chairperson of the Tribunal