

IN THE FINANCIAL SERVICES TRIBUNAL

CASE NUMBER: PFA 93/2020

In the matter between:

MICHAEL LEFA SELEBALO

First Applicant

NTHABISENG GEORGINAH SEGAGE

Second Applicant

And

AFROX PROVIDENT FUND

First Respondent

PENSION FUND ADJUDICATOR

Second Respondent

SANLAM EMPLOYEE BENEFITS (PTY) LTD

Third Respondent

NTSETSANE EMELDA LIPALI

Fourth Respondent

Tribunal: Mr. JM Damons (chair), Mr. Elias Phiyego and Ms. K. E Moloto Stofile

For the Applicants: Mr. Bazuka Mhungo

For the First Respondent: Not in attendance

For the Second Respondent: Not in attendance

For the Third Respondent: Not in attendance

For the Fourth Respondent: Mr. Robert Mokgalabone

Hearing: 23rd September 2021

Decision: 15th October 2021

Summary: Application for reconsideration of a decision in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 ("FSRA") – application to reconsider the determination issued by the PFA in terms of section 30M of the Pension Fund Act – Failure to afford an affected party a hearing and/or opportunity to make representations prior to issuing a determination – determination offends the rules of natural justice – set-aside and remitted to the PFA.

DECISION

INTRODUCTION

1. This is an application for reconsideration of a decision in terms of section 230(1) of FSRA. The Applicants in this matter are Mr. Michael Lefa Selebalo and Nthabiseng Georginah Segage (the First and Second Applicants respectively). The applicants are siblings to the late L Selebalo who was a member of Afrox Provident Fund (First Respondent). The Fund was administered by Sanlam Employee Benefits (Pty) Ltd (the third Respondent). The Fourth Respondent is Ms. Ntsetsane Emelda Lipali who claims to be a lifetime partner of the late L Selebalo.
2. This matter concerns a dispute on the allocation of a death benefit that became payable upon the passing of Mr. L Selebalo (the deceased).

FACTUAL BACKGROUND AND COMPLAINT

3. The deceased passed away in December 2018 and upon his passing a death benefit became payable. It seems that during his lifetime the deceased had nominated one NE Lipali (the 4th Respondent / Ms. Lipali) as a beneficiary to his pension benefits. In 2014 the deceased relocated to Kimberley and there is a dispute on whether the relationship between the deceased and Ms. Lipali ended then? What is clear is that the deceased removed Ms. Lipali off as a beneficiary from his medical aid.

4. Another issue raised in this matter was that the deceased wanted to remove Ms. Lipali as a beneficiary of his pension fund, as she was and remained the only nominated beneficiary. This however did not materialize. When the member died, Ms. Lipali was still the nominated beneficiary on the nomination form.
5. The Board investigated the matter as there were allegations that there was a potential child somewhere. This allegation could not be substantiated. The Board then allocated the death benefit to the siblings of the deceased, being Mr. ML Selebalo and Ms. NG Segage who are the applicants in this matter.
6. Aggrieved with the allocation made by the Board, Ms. Lipali took the matter to the PFA. The findings of the PFA were that because there was no beneficiary, the benefit had to be allocated to the person so nominated (per the nomination form)¹ in accordance with Sec 37C(1)(b) of the Act. This was because there was no dependant identified and a period of twelve months had lapsed since the board was still trying to locate the unknown child, if he/she existed at all.
7. Of importance, although the Applicants had been identified as beneficiaries by the Board, they were excluded as parties to the proceedings before the PFA, and not notified of proceedings before the PFA nor invited to make any representations at such proceedings.
8. The Applicants were aggrieved with the determination of the PFA and accordingly filed this reconsideration application.

PRELIMINARY ISSUES

9. The Applicants initially filed the reconsideration application without any legal representation. The Applicants have in the meantime appointed a legal practitioner. Before this Tribunal, there were arguments that the Applicants seek to augment their initial application and consequently the Tribunal was urged to discard the new grounds.

¹ See record of the proceedings, Part A at page 19 par 5.16 - 5.17

10. It was submitted on behalf of the Applicant that the said augmented grounds do appear from the initial reconsideration application and consequently there was no prejudice to any party even if the Tribunal can take note of the augmented grounds.
11. Having considered the arguments, it is the view of this Tribunal that the augmented grounds do not prejudice any party to the proceedings. Moreover, the said grounds appear in the initial reconsideration (although not in the same words). Accordingly, it would be fair to consider the reconsideration application in full, including what is said to be the augmented grounds.

SUBMISSIONS AND ARGUMENTS BEFORE THIS TRIBUNAL

12. At the main, the Applicants submitted four (4) grounds, seeking to have the determination set-aside². It was argued that the determination offends the principles of natural justice in that the Applicants were not afforded an opportunity or a chance to make representation before the determination was issued. Secondly, it was submitted that the determination was unreasonable and irrational. According to the Applicants, the determination was influenced by an error of law with regard to the definition of a dependent. It was also argued that the PFA abused its powers by interfering with the decision of the Board of Trustees which awarded the benefits to the Applicants.
13. It was argued on behalf of the Fourth Respondent that, the reasons the Applicants were not party to the proceedings was because they were never respondents during the proceedings before the PFA. It was only the First and Third Respondents who were party to the proceedings before the PFA. It was stated that the PFA did not deal with the Applicants because, to use the exact word "they were not there", therefore the determination by the PFA is a reasonable one.
14. It was also submitted that this matter has been pending for a long time and thus it would be fair if same can be finalized. According to the Fourth Respondent, the Applicants were represented by the officials who dealt with the matter before the PFA representing the First and Third Respondent. Therefore, according to them,

² See the Applicants heads of arguments at page 5

the Applicants were represented. Mr. Mokgalabone even argued that there was no need for the Applicants to be represented as they did not have an interest because they were not dependents.

ANALYSIS OF THE ARGUMENTS

15. It must be noted that this Tribunal does not intend to deal with each, and every argument raised. The analysis will only be limited to the arguments relevant to the findings.
16. One of the main issues raised in a bid to have the determination reconsidered was that the PFA did not offer the Applicants an opportunity to make representations. It was argued that the determination offends the principles of natural justice. When this issue was raised with the Fourth Respondent's representative, he clearly stated that he will leave same to the wisdom of the Tribunal.
17. Now, it goes without saying that everyone has the right to be heard prior to a decision that affects him/her being taken. In this matter, it is evident that the PFA considered the matter without having invited the Applicants to make any representations. This is strange as the Applicants had a vested interest in the matter as they had been awarded the benefit by the Board of Trustees. Whether the Board was wrong or right regarding the allocation, at the very least the Applicants should have been called upon to make representations before a determination was issued. This would have given the PFA an opportunity to gather more information which could have changed the determination. It is the view of this Tribunal that to have considered a matter where there are other interested persons and having failed to afford those affected persons an opportunity to be heard, such would be procedurally flawed.
18. This Tribunal shares the same view as the Applicants, that the determination offends the very principles of natural justice. The PFA ought to have called upon the Applicants to make representations before the determination was issued. To this end, the determination ought to be set-aside and the matter remitted back to the PFA for a proper determination. The PFA should call upon all interested parties to make representations before a determination is issued.

19. The other arguments of who is a dependent and who is not, can only be determined after all interested parties have made representations before the PFA. [otherwise, I don't understand what this clause was intended to convey.

20. The Argument headed "Unreasonableness and Rationalness of decision" dealing with the question of whether the PFA had the requisite authority to overturn the decision of the Board under circumstances where there is no indication that the board had taken into account irrelevant, improper, or irrational factors....., can also only be determined after all interested parties have made representations before the PFA.

21. On the basis of the findings and reasoning above, this Tribunal is of the view that this matter should be referred back to the PFA for reconsideration. Accordingly, this Tribunal makes the following orders:

21.1 The determination issued by the PFA dated 17th September 2020 is hereby set-aside;

21.2 The matter is remitted back to the PFA for re-consideration; and

21.3 No order as to costs

Signed at PRETORIA on the 15th day of October 2021 on behalf of the Tribunal.



CHAIRPERSON
JM DAMONS