

IN THE FINANCIAL SERVICES TRIBUNAL

PFA11/2018

In the matter between:

LANCELORD NDUMISO LUTHULI	First Applicant
ALISHA NICOLE WADE	Second Applicant
and	
THE PENSION FUNDS ADJUDICATOR	First Respondent
UMGENI WATER PENSION FUND	Second Respondent
SANLAM LIFE INSURANCE LIMITED	Third Respondent
UMGENI WATER	Fourth Respondent

Coram: LG Nkosi-Thomas SC, Mr. Lucky Makhubela and Mr. Ahmed Jaffer

Reconsideration of the Pension Fund Adjudicator's decision in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 (the "FSR Act"). Application dismissed for absence of a showing of irrationality, unlawfulness or illegality attaching to the impugned decision.

DECISION

A. INTRODUCTION

1. This is an application for the reconsideration of the determination of the Pension Fund Adjudicator ("**the PFA**"), dated 20 September 2018, in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 ("**the FSRA**").

2. The impugned determination, in terms, dismissed the first and the second applicants' complaint challenging Umgeni Water Pension Fund's decision ("**the Fund**") to pay the implicated death benefit to ABSA Beneficiary Fund.¹
3. The first and the second applicants will hereinafter, collectively, be referred to as "**the applicants**".

B. THE COMMON CAUSE FACTS

4. On 21 September 2016, the first applicant submitted a death benefit claim to the Fund on behalf of Estate HN Luthuli and the dependants of the deceased member, the said dependants being the sole beneficiaries of the deceased in terms of her will.
5. The deceased member was the first applicant's sister. She left a will in terms whereof she directed that a trust for the benefit of her minor children be created and nominated the first applicant as the executor of her estate and trustee of the said testamentary trust.²
6. On 11 July 2017 the Fund declined the aforesaid claim in the following terms³:

"...we regret that payment of the childrens' benefits cannot be made to Nonsie Luthuli Testamentary Trust. The [w]ill unfortunately does not state that a separate Trust account was to be opened for each child and, as a separate trust cannot be set up for the exclusive use of each child, cross-subsidisation between the childrens' income and expenses will occur.

¹ Tribunal Record, p28.

² Tribunal Record, P48.

³ Tribunal Record, p102.

Each beneficiary has to own his capital and income and be responsible for his own expenses and the Testamentary Trust does not accommodate those requirements.

The childrens' benefits will be transferred to the ABSA Beneficiary Fund where each child's benefit will be credited to an account opened in his name. All investment returns will be added to that child's account and any expenses paid will be debited to that child's account. If required, a monthly income can be paid to the child's guardian or caregiver. On attaining the age of 18 years, any credit balance in the beneficiary fund will be paid to the child. Beneficiary Funds are approved in terms of the Pension Funds Act, so they are governed by the same rules and regulations that are applied to pension and provident funds."

7. Based thereupon and on 17 October 2017, the applicants lodged a complaint with the PFA against the Fund in the following terms⁴:

"The complaint stems from what is supposedly the decision of the Board not to pay the benefits payable under the Fund to the Trust as stipulated by the deceased member in her Will, but to pay such benefits to the ABSA Beneficiary Fund instead."

8. The PFA dismissed the complaint, thereby upholding the Fund's decision.⁵

C. BEFORE THIS TRIBUNAL

9. Consequent to the above, and on 14 December 2018, the applicants lodged this application.

⁴ Tribunal Record, p 39, para 10.

⁵ Tribunal Record, para 6.

10. In terms thereof, the applicants:

10.1 Seek condonation of their late filing of this application;⁶ and

10.2 A substitution order in terms whereof the Fund should be directed to pay the subject death benefit of the minor children to the Nonsie Luthuli Testamentary Trust, Registration No. MT6532/2016/DBN (**“the NL Trust”**).⁷

11. We deal with these, in turn, below.

(i) The Condonation Application

12. Rules 31 and 32 of the Financial Services Tribunal Rules provide that an application for condonation may be made on affidavit or in written submissions and must be filed with the secretariat and all other parties to the proceedings. The application must be succinct and show good cause.

13. The date of the impugned determination is 20 September 2018 whereas that of the application for reconsideration is 14 December 2018.

14. In terms of section 230(2)(b) of the FSR Act, the applicants were enjoined to bring this application within sixty (60) days after they were notified of the decision, or such longer period as may on good cause be allowed.

⁶ Tribunal Record, Part A, p 2, para 4.

⁷ Tribunal Record, Part A, p 15, para 27.

15. In this regard, the applicants contend that the period referred to under section 230(2)(b) of the FSR Act ought to be computed from the date on which they received the determination from the PFA. The applicants, however, do not disclose such a date in their application.
16. They simply seek condonation for their lateness “*out of caution, and to the extent that this referral might be out of time*” based on some generalised factual averment that “[a] copy of the determination was sent by post to... and was received by the first complainant early in December 2018.”⁸
17. In considering whether or not an application for condonation should be granted, numerous factors fall properly to be considered. Those include the explanation proffered for the delay, the length of the delay and the prospects of success in regard to the reconsideration application.
18. The applicants have not proffered a full explanation for their delay and neither do they disclose, with any degree of specificity, the date on which they received the determination of the PFA.
19. The manner in which this condonation application has been approached is far from satisfactory. Based on the result that we reach on the merits of this application, we consider it unnecessary to deal with the condonation application in any detail as it will not alter the outcome of this application.

⁸ Tribunal Record, p2, para 2.

(ii) The Merits

20. In regard to the merits of the application, we are inclined to dismiss the application for the reasons that follow.
21. This application concerns the pension fund benefits payable to the minor children of the deceased.
22. The second respondent paid out such benefit to ABSA Beneficiary Fund in terms of section 37C of the Pension Fund Act.
23. The applicants dispute the second respondent's entitlement to pay the said benefit to the ABSA Beneficiary Fund and they contend that inasmuch as the Fund's decision is not in the best interests of the minor children, it fell properly to be overturned by the PFA.
24. Given their failure before the PFA, the applicants now seek a substitution order directing the Fund to pay the death benefit to the Nonsie Luthuli Testamentary Trust referred above.⁹ The said death benefit is in the amount of R802 498,76.
25. The applicants base their application on the assertion that they were, at all times material hereto, persons recognised in law as responsible for managing the affairs, or meeting the daily care needs, of the minor children.

⁹ Tribunal Record, p15.

26. They maintain that section 37(C)(2)(a)(i)(aa) of the Pension Fund Act is applicable *in casu*. In terms thereof:

“(2)(a) For the purposes of this section, a payment by a registered fund for the benefit of dependant or nominee contemplated in this section shall be deemed to be a payment to such dependant or nominee, if payment is made to –

- (i) A trust contemplated in the Trust Property Control Act, 1998, nominated by –*
 - (aa) the member ...*
 - (cc) a person recognised in law or appointed by a Court as the person responsible for managing the affairs or meeting the daily care needs of a minor dependant...*
- (ii) A person recognised in law or appointed by a court as the person responsible for managing the affairs in meeting the daily care needs of a dependant or nominee.”*

27. Section 37C(1)(a) of the Pension Funds Act reads 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 (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 (3) and 37D, 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.

28. The Pension Funds Act defines the word “**dependant**” as follows in section 1:

*“**dependant**’, in relation to a member, means-*

(a) a person in respect of whom the member is legally liable for maintenance ...”

29. Section 37C(1) of the Pension Funds Act provides that upon the death of a member, the benefit payable by the pension fund shall not form part of the assets in the estate of such a member, but shall be dealt with in the manner set out in the subparagraphs that follow.

30. Properly construed, section 37C(1) provides that the benefit does not automatically accrue to the deceased’s estate but must be distributed in accordance with the section.

31. The purpose of section 37C was enunciated in *Mashazi v African Products Retirement Benefit Provident Fund and Another 2003 (1) SA 629 (W)* at 632H

– J as follows:

“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. The fund is expressly not bound by a will, nor is it bound by the nomination form. The contents of the nomination form are there merely as a guide to the trustees in the exercise of their discretion.”

32. This purpose was recently reaffirmed by the Supreme Court of Appeal in *FundsatWork Umbrella Provident Fund v Guarnieri and others 2019 (5) SA 68 (SCA)* at p70 para 5 where the following was stated:

“[5] The issue in this appeal arises from the fact that s 37C of the PFA removes the allocation of pension benefits on the death of a pension-fund member from the unfettered choice of the member, whether by will or by nomination. It reflects a legislative decision that funds becoming available in that way should be available to be used for the benefit of the deceased's dependants so that they are less likely to be a drain on the state's resources. This serves the social purpose of providing some protection for dependants, without entirely overriding the wishes of a deceased who has nominated beneficiaries or made a will.”

33. There is no doubt that the minor children qualify as dependants. Based on this fact alone, it was competent for the Fund to allocate the death benefit to the minor children in equal parts.
34. The applicants are aggrieved by the Fund's chosen mode of payment. They contend that the Fund ought to have paid the death benefit into the testamentary trust above in terms of the provisions of section 37(C)(2)(a)(i)(aa) of the Pension Fund Act cited in full above.

35. The Fund, in its discretion, paid the death benefit to ABSA Beneficiary Fund. The applicants maintain that in doing so, the Fund acted *ultra vires*. In this regard, we are of the opinion that the PFA correctly held that the trustees of the Fund were entitled, in their discretion, to pay the death benefit into ABSA Beneficiary Fund.

36. The PFA held as follows in that regard¹⁰:

“In distributing death benefits, the trustees may pay death benefits allocated to a minor dependant to such a dependant’s legal guardian, trust fund or a beneficiary fund. Their preference to pay such a benefit in any one of the methods set out above must be informed by reason and such a beneficiary’s best interest.”

37. There is nothing to suggest an absence of a rational connection between the evidence that served before the PFA and the decision arrived at by her. In particular, there is nothing to suggest that the decision to pay the death benefit into Absa Beneficiary Fund is not in the best interest of the minor children.

D. CONCLUSION

38. Based on what has gone before, the application falls to be dismissed.

¹⁰ Tribunal Record, para 5.6.

39. Accordingly, the following order is made:

39.1 This application is dismissed.

A handwritten signature in black ink, consisting of several vertical strokes on the left and a large, sweeping horizontal stroke that curves upwards on the right.

LG NKOSI-THOMAS SC

CHAIRPERSON

SANDTON

AFSA JHB CHAMBERS

6 NOVEMBER 2019