

THE FINANCIAL SERVICES TRIBUNAL

Case No: PFA34/2024

In the matter between:

NELISIWE CAROL BHENGU

Applicant

and

PENSION FUNDS ADJUDICATOR

First Respondent

TOYOTA SOUTH AFRICA PROVIDENT FUND

Second Respondent

NBC FUND ADMINISTRATORS (PTY) LTD

Third Respondent

ZINHLE NOKULUNGA MSANE

Fourth Respondent

DECISION

Tribunal Panel: Judge LTC Harms (Chairperson) & Prof M Sigwadi

Date of decision: 06 November 2024

Summary: *Death Benefit – Distribution – Pension Funds Act 24 of 1956 – allocation and distribution of a death benefit to take place in the manner provided for in section 37C – paternity testing – no legal basis to interfere with the Determination of the Pension Funds Adjudicator.*

INTRODUCTION

1. The Applicant, Ms Nelisiwe Carol Bhengu (47 years old), seeks reconsideration of a determination made by the first respondent, the Pension Funds Adjudicator (“the Adjudicator”) on 14 June 2024 (“the Determination”).
2. This application is made in terms of section 230 of the Financial Sector Regulations Act 9 of 2017 (“the FSR Act”).
3. The Determination was made pursuant to a complaint lodged by the Applicant to the Adjudicator in terms of section 30M of the Pension Funds Act 24 of 1956 (“the Pension Funds Act”).
4. The parties waived their right to a formal hearing, and what follows is the decision of the Tribunal.

FACTUAL BACKGROUND AND CHRONOLOGY OF EVENTS

5. The Applicant was married to the late Mr AM Bhengu, who passed away on 21 May 2022 (“the deceased”). At the time of his death, the deceased was a member of the second respondent, Toyota South Africa Provident Fund (“the Fund”). The deceased is survived by a son, Nkosinathi Bhengu (15 years old), and a daughter, Sindisiwe Bhengu (14 years old). The Applicant is the mother of the above mentioned two children, Nkosinathi and Sindisiwe. The deceased is also survived by another daughter, Zinhle Nokulunga Msane (21 years old) who is the fourth respondent (“Zinhle”). Zinhle was born from a relationship between the late fund member (the deceased) and another woman. The paternity of Zinhle is, however, disputed by the Applicant.

6. There is also Smangele Ndlovu (28 years old), Zinhle's elder sister, who once stayed with the deceased until 2004 when she went to live with her biological mother. The deceased in 2005 nominated her to receive 50% of his pension fund death benefit, however, later in 2007, the deceased decided to exclude her from the nomination form. There was a maintenance order against the deceased for Smangele which was stopped after a DNA test result indicated that the deceased was not her father. The circumstances of Smangele for the purpose of the death benefit distribution and Tribunal's ruling in this matter are different from those of Zinhle as it will be seen in the discussion that follow below.
7. The Fund did not allocate any death benefit to Smangele, and there is no dispute before this Tribunal regarding her (Smangele) exclusion. In this ruling, we do not delve too much into the circumstances and submissions relating to Smangele except only where it is necessary to clarify issues relating to the dispute between the Applicant and Zinhle.
8. Following the deceased's death, a death benefit of R 1 096 798 from the Fund became available for distribution to his beneficiaries in terms of section 37C of the Pension Funds Act.
9. The Fund, having been notified of the deceased's death, conducted an investigation to determine how the amount available for distribution was to be apportioned.
10. The Fund issued a resolution and decided to apportion the deceased's death benefit as follows:

BENEFICIARY	RELATIONSHIP	PERCENTAGE
Nelisiwe Carol Bhengu	Wife	50%
Nkosinathi Bhengu	Minor son	20%
Sindisiwe Bhengu	Minor daughter	20%
Zinhle Nokulunga Msane	Major Daughter	10%

11. The above resolution stated that the death benefit allocated to Zinhle was to be retained in the Fund pending the submission of her unabridged birth certificate.

a) The Complaint

12. The Applicant objected to the Fund's decision to distribute and apportion the death benefit in a manner set out above in paragraph 10 and lodged a complaint with the Adjudicator. The complaint was, *inter alia*, based on the following grounds:

12.1. The Applicant (complainant before the Adjudicator) submitted that Zinhle should have been excluded as she is not the deceased's biological child and refused to do a paternity test.

12.2. Thus, the Applicant requested the Adjudicator to investigate the matter and order that Zinhle be subjected to a paternity test. She indicated that should it turn out that Zinhle is not the deceased's biological child, Zinhle's benefit should be reallocated to the deceased's dependants.

b. The Fund's Response to the Complaint

13. The Fund provided the Adjudicator with an affidavit from Zinhle stating that she is the deceased's daughter and lived with the deceased from 2008 until 2018 when she moved out of the deceased's family home. She stated that she moved out as the deceased was married to the Applicant who is not her biological mother, and the Applicant was not treating her well. Zinhle submitted that after moving out, the deceased stopped supporting her financially
14. Zinhle's submission that her father, the deceased, used to support her financially since she was young (2008) until she left the deceased's household in 2018 was not disputed by the Applicant. In the absence of any evidence suggesting that the affidavit was not truthful, the Trustees accepted it at face value, as they were entitled to do.
15. The Applicant knows Zinhle as they lived together with the deceased in the same household until Zinhle's moving out in 2018.
16. Lungile Rachel Bhengu ("Lungile") stated that she is the deceased's sister. She submitted that the deceased had four children, two children (Zinhle and Smangele) were born before his marriage to the Applicant and had two others (Nkosinathi and Sindisiwe) born out of his marriage. The deceased was staying in his parents' house.
17. Nonhlanhla Cynthia Nkuku ("Nkuku") stated that she is the deceased's cousin. She submitted that the deceased had four children as indicated by Lungile.
18. The Fund provided a copy of the deceased's beneficiary nomination form for 2005 and 2007 in support of its submissions. On 04 August 2005, the deceased

nominated Smangele and Zinhle to receive 50% each of the death benefit. On 23 July 2007, the deceased nominated the Applicant to receive 100% of the death benefit, and therein also listed Zinhle and Nkosinathi as his dependants.

19. In addition, the Fund provided paternity test results for Smangele dated 06 January 2014 indicating that the deceased is not Smangele's biological father.¹ Further, the Fund provided copies of its correspondence regarding the Applicant's request. In one correspondence, Zinhle was requested to submit an unabridged birth certificate, whilst another indicated that the Applicant was refusing to pay for the paternity test. The Fund proceeded to allocate the death benefit as indicated in paragraph 10 above.

c. Submissions from Zinhle:

20. That she used to stay with her biological mother and the deceased before the deceased got married to the Applicant. She stated that the Applicant's two minor children, Nkosinathi and Sindisiwe, were born while she lived with the deceased. Zinhle submitted that it was not true that she refuses to do a paternity test. She confirmed that she is willing to take the test through the doctor nominated by the Fund. She, however, stated that she cannot afford the paternity test and that it should be paid for by whoever is requesting it.

21. She cooperated with every request from the Fund including the submission of all the information it wanted. Thus, it is not true that she refuses to submit a copy of the unabridged birth certificate as she never had any. She reiterated that she left the family home because the Applicant was abusive towards her.

¹ See pars 6 and 7 above for more details about Smangele.

22. Zinhle submits that if she avails herself for the paternity test and the results are positive, the Fund should allocate her a share of the death benefit similar to the ones allocated to the Applicant's two minor children.²

d) The Adjudicator's Determination

23. The issue for determination was whether the board allocated the death benefit equitably in accordance with section 37C of the Pension Funds Act.

24. The Adjudicator considered the complaint and dismissed it. In her reasoning, the Adjudicator summarised the principles of section 37C of the Pension Funds Act and the board's responsibilities when allocating a death benefit.

25. On the issue of Zinhle's legal dependency, the Adjudicator stated the following in her determination:

"5.8. The Complainant is aggrieved by the allocation of the death benefit to Zinhle. She submitted that Zinhle should be subjected to a paternity test and if the results come otherwise, her benefit should be reallocated amongst the deceased's beneficiaries.

*5.9. It is imperative to note that biological relationships is not the sole factor to be considered in the allocation of a death benefit. The Act speaks of dependency, rather than a biological relationship as a crucial factor in determining whether or not anyone should be allocated a portion of a death benefit (see *Kekana v Nedcor Defined Contribution Provident Fund [2010] 3 BPLR 295 (PFA)*). Therefore, whether the deceased's*

² See pars 59 and 60 below of this ruling where we state that we do not find a need to interfere with the board's discretion and the Adjudicator's determination in this regard.

identified beneficiaries are entitled to be allocated a portion of the death benefit does not hinge only on their biological relationship with the deceased, but on their dependency and the extent thereof. Thus, the fund must be guided by the provisions of section 37C of the Act which foster the imperative that the most crucial objective is to ensure that all those who were dependent on the deceased during his lifetime are not left destitute after he passes away, Therefore, financial support during the lifetime of the deceased must be one of the important factors to be considered.

5.10 The submissions indicate that the deceased's cousin and sister confirmed that Zinhle is the deceased's child. Unlike Smangele, it has not been proven that she is not the deceased's biological child. She also indicated that she moved out of the family home due to the complainant's behaviour towards her. In addition, the submissions indicate that the complainant declined to pay for the paternity test she is requesting. In her submissions, she stated that if it comes out that Zinhle is not the deceased's child, her benefit should be reallocated. These two factors indicate that the complainant is also not certain that Zinhle is not the deceased's biological child. Be that as it may, the circumstances do not warrant a paternity test.

5.11 The deceased's children qualify as his legal dependants in terms of section 1(b)(iii) of the Act. Should it turn out that any one of them is not his biological child it could be that they qualify as his factual dependants. Therefore, they are entitled to portions of the death

benefit. Zinhle is the deceased's major child and qualify as his legal dependants in terms of section 1(b)(iii) of the Act by being his children (see Zwane v National Fund for Municipal Workers and another [2019] 3 BPLR 905 (PFA) and consequently qualify for allocation of the death benefit (see Bruce v Lifestyle Retirement Annuity Fund [2001] 7 BPLR 2198 (PFA)).

5.12 Therefore, Zinhle has a right to be considered for a death benefit.

Whether or not she will at the end receive anything, will be subject to the factors of dependency as presented before the board (see Wilkinson and Another v The Pension Funds Adjudicator and Others PFA73/2019 Financial Services Tribunal ("FST") in paragraph 4.7). Dependency must be established at the time the board makes its decision.

5.13 Although she was not residing with the deceased and indicated that the deceased was not supporting her, as things stand, she is the deceased's child, and the deceased had an obligation to support her. Zinhle was unemployed and a student at the time of his passing. Although her dependency is limited as compared to Nkosinathi and Sindisiwe, she is not yet self-sufficient. She also received a smaller portion of the death benefit. The Fund allocated her 10%.

5.14 In the case of VR Krzus v Momentum Pension Preservation Fund and MMI Group Limited [2019] (PFA) 4 para 4.2 the Adjudicator held that where there is more than one dependant, the board of the fund must make an equitable distribution which could lead to only one dependant

being paid, some paid in proportions, or all paid in proportions. Therefore, considering the factors stated in paragraph 5.4 above, the Adjudicator finds that the board of the fund made an equitable allocation of the death benefit.

5.15 The Fund's task in distributing a death benefit in terms of section 37C of the Act is to identify all the potential beneficiaries (see Van Schalkwyk v Mine Employees' Pension Fund and Another [2003] BPLR 5087 (PFA) at paragraph 15). The board is vested with discretionary powers to decide on an equitable distribution of the death benefit. It is only in cases where it has exercised its powers unreasonably and improperly or unduly fettered the exercise thereof, that its decisions can be reviewed (see Mongale v Metropolitan Retirement Annuity Fund [2010] 2 BPLR 192 (PFA)). In case, the Adjudicator is satisfied that the board took into account relevant factors and ignored irrelevant ones in the allocation of the death benefit in terms of section 37C of the Act. Therefore, there is no reason to set aside the board's decision. Thus, the complaint should be dismissed."

26. The Adjudicator was satisfied that the board considered relevant factors and did not abuse its discretion in allocating the deceased's death benefit. According to her, the death benefit was properly allocated to the deceased's dependants, and there was no reason to set aside the board's decision.

27. The Adjudicator dismissed the Applicant's complaint based on the above reasoning.

THE RECONSIDERATION APPLICATION

28. The Applicant is unhappy with the Adjudicator's determination and seeks to have it reconsidered and set aside.

29. The grounds for reconsideration are as follows:

29.1. The Applicant accepts that initially the deceased and her were living with Smangele and Zinhle in the same household. She further submits that through the court, the deceased stopped maintaining Smangele after the DNA test results came out negative, and Smangele had to vacate the deceased's home.

29.2. The Applicant further submits that *"on about February 2016, the deceased discovered that Ms. Msane³ was not his daughter through his friend. It happened that the friend knew both the deceased and the alleged father of Ms Msane. The deceased then instructed our client to take Ms Msane to Scottsburg (Dududu area Khakhama), South Coast, KwaZulu Natal where she was suspected to belong to. The Khomo family where Ms. Msane was taken accepted her as one of their own. The family informed our client that Ms. Msane's father is Bongani Khomo. In fact, during the school holidays July 2016. Ms Msane voluntarily left the deceased home to Mandawe on the mother's home. The relatives of Ms. Msane's mother and the father are fully aware that she is not the deceased child. Since then Ms. Msane never comeback to Umlazi to reside with the deceased. According our client the matter*

³ It should be noted that Ms Msane is Zinhle, the fourth respondent.

was resolved.”

29.3. In responding to the Adjudicator’s determination of 14 June 2024, the Applicant correctly disputed that the Applicant did not get married to the deceased in 2007 but in 2018. She further conceded to Zinhle’s submission that the deceased stopped supporting her (Zinhle) when she moved out of the deceased home. She also confirmed that Zinhle has not been residing with the deceased for about 5 years before his death.

29.4 The Applicant had an issue with the affidavits submitted by Lungile and Nkuku in that, according to the Applicant they painted a picture that both Zinhle and Smangele were permanently residing with the deceased till his death. The Tribunal does not engage on this submission because in the Tribunal record, it is clear that both Zinhle and Smangele were not residing with the fund member (the deceased) at the time of his death. This information is not disputed by any of the parties in this matter. Again, the Applicant also had an issue with the correctness of Lungile and Nkuku’s submission that the deceased had two daughters born out of wedlock. The Applicant correctly stated that Smangele was excluded by the DNA test very early and that the Fund accepted this and there was no allocation of benefit to Smangele.

29.5 The Applicant disputed that Zinhle had been willing to do paternity test. She submits that she paid for the test at Umlazi Magistrate Court (Maintenance Court) where Zinhle did not come. The proof of the refund from the court was made available to the Adjudicator and is also included

herein as part of the Tribunal record. The Applicant states that the Fund never informed her that Zinhle is willing to do paternity test by the doctor recommended by the Fund. The Applicant was of the view that the Adjudicator in her determination ignored the fact that she arranged and paid for Zinhle to undergo a paternity test at the maintenance court, but Zinhle failed to honour the appointments.

29.6 The Applicant states that Zinhle has failed since 2022 to submit her unabridged birth certificate as required in the resolution of the Fund.⁴ The Applicant was of the view that the Fund is not addressing this delay or non-compliance with its resolution.

29.7 The Applicant further submits that it is not entirely correct that she intended to exclude Zinhle from receiving a death benefit but according to her, a qualifying person has to provide evidence to the Fund and comply with the Fund's instructions.

29.8 The Applicant argues that the paternity test is to simplify things as the deceased was no longer supporting Zinhle. However, if it could transpire that the name of the deceased does not appear on the unabridged birth certificate, a paternity test will be required as there will be nothing linking Zinhle to the deceased.

29.9 According to the Applicant, Zinhle "*lost to be a factual dependent at the time she moved out*". She further argues that Zinhle's legal dependency in this matter can only be established by her (Zinhle's)

⁴ See par 11 above of this ruling regarding the Fund's resolution in this regard.

unabridged birth certificate or the paternity test result positively identifying the deceased as the father. And that in the absence of an unabridged birth certificate or paternity results the Adjudicator misdirected herself by accepting Lungile and Nkuku's evidence.⁵

29.10 The Applicant desired the following outcome before us:

- Review and set aside the Adjudicator's Determination of 14 June 2024.
- Order Zinhle to submit the unabridged birth certificate to the satisfaction of the Fund within 3 months.
- Zinhle be subjected to a paternity test and the Applicant shall avail her children for such purpose.
- Should Zinhle fail to comply with any of the above or the paternity test results come out negative, then for the Fund to reconsider the allocation of the death benefit in exclusion of Zinhle.

30. The Fund did not file any heads of arguments to oppose the reconsideration application but only submitted documents that they relied on to decide on the allocation of the death benefits.

31. The Adjudicator submitted the underlying documents and a statement of further reasons on which her decision was based.⁶ Briefly, she states that the board exercised its discretion properly, and consequently, there was no basis for her to

⁵ See pars 16 and 17 above of this ruling regarding Lungile and Nkuku's evidence in this regard.

⁶ This is in terms of Rule 13 of the Financial Services Tribunal Rules.

interfere with its discretion.

LEGAL PRINCIPLES

32. Section 37C of the Pension Funds Act provides a specific legal process that bypasses wills and gives the pension fund boards the power to decide how to distribute the death benefits.

33. The allocation and distribution of a death benefit takes place in the manner provided for in section 37C of the Pension Funds Act.⁷ Such benefit does not form part of the deceased member's estate, and the board of a pension fund is enjoined to exercise an equitable discretion, considering several factors.⁸

34. Section 37C of the Pension Funds Act places a duty on the trustees of the fund to allocate and pay the benefit in a manner that it deems fair and equitable. This duty is three-fold and requires that the trustees identify the dependants⁹ and nominees of the deceased member, effect an equitable

⁷ The relevant provisions of section 37C of the Pension Funds Act provide 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 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 board, to one of such dependants or in proportions to some of or all such dependants."

⁸ *Kaplan and Another NNO v Professional & Executive Retirement Fund and Others* 1999 (3) SA 798.

⁹ "Dependant" is defined in section 1 of the Pension Funds Act as follows:

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

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

distribution of the benefit amongst the said dependants and nominees, taking into account relevant factors, and select an appropriate mode of payment for the benefit.¹⁰ Having identified the dependants, the board of the Fund is vested with a large discretion to determine to which respective needs and in what proportions the death benefit will be distributed among the class of dependants.¹¹

35. A pension fund is expressly not bound by a deceased's will nor to a nomination form. In *Mashazi v African Products Retirement Benefit Provident Fund and another*,¹² Hussain J said this:

“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. The 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.”

36. Section 37C of the Pension Funds Act limits the testamentary freedom of the

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- (i) was, in the opinion of the board, upon the death of the member, in fact dependent on the member for maintenance;
 - (ii) is the spouse of the member;
 - (iii) is a child of the member, including a posthumous child, an adopted child and a child born out of wedlock.
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died.”

¹⁰ *Ramanyelo v Mine Workers Provident Fund* [2005] 1 BPLR 67 (PFA) pars 9 and 13. Also see *Baloyi v Ellerine Holdings Staff Pension Fund* [2005] 7 BPLR 606 (PFA) par 14.

¹¹ *Fundsatwork Umbrella Pension Fund v Guarnien* [2019] JOL 42094 (SCA).

¹² *Mashazi v African Products Retirement Benefit Provident Fund and Another* 2003 (1) SA 629 (W) at 632I-J.

deceased in that the deceased is not able to distribute his death benefits as he wishes. Even though the member usually completes a nomination form, such nomination is not binding as the benefit must be distributed in accordance with section 37C of the Pension Funds Act.¹³ Therefore, the fact that the Board did not follow the allocations as appearing in the deceased's nomination form or will does not mean that the Board incorrectly exercised its discretion. It must be noted that the purpose of section 37C of the Pension Funds Act is to ensure that the deceased's dependents are not left destitute after his death. The Fund is bound by the provisions of section 37C of the Pension Funds Act.¹⁴

37. The Board is statutorily obliged to undertake its own investigation and ensure that there is equitable distribution of the death benefit to the beneficiaries. The locus classicus on this issue is *Sithole v IC Provident Fund & Another*,¹⁵ where the court held that:¹⁶

“The Board is required to consider inter alia the following factors namely:

- The age of the dependants;*
- The relationship with the deceased;*
- The extent of the dependency;*
- The wishes of the deceased;*
- The future earning capacity of the beneficiary;*
- The amount for available for distribution.”*

¹³ *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3706 B- D.

¹⁴ *Kaplan and Another NNO v Professional & Executive Retirement Fund and Others* 1999 (3) SA 798.

¹⁵ *Sithole v IC Provident Fund and Another* 2002 [4] BPLR 430 PFA, pars 24 – 25.

¹⁶ This principle was also confirmed in *Mohlomi v ICS Provident Fund* [2014] JOL 314420 (PFA).

38. The percentage that the Board would allocate to the various dependants is based on the children's ages and other relevant factors at the time of the deceased's passing.
39. It is not in dispute that the Trustees were, in terms of paragraph 37C of the Pension Funds Act, obliged to trace the dependants of the deceased. It is clear from the record that the Trustees traced the dependants of the deceased and proceeded to allocate the benefit according to the extent of the dependency.

ANALYSIS AND DISCUSSION

40. The crux of the Applicant's ground for reconsideration application is that Zinhle is not a dependant of the deceased, neither through factual dependency nor legal dependency, and therefore she (Zinhle) should not be allocated a share of the death benefit unless if she provides an unabridged birth certificate or paternity test results confirming that the deceased is her father. Consequently, the Applicant submits that the Adjudicator was wrong in dismissing her complaint and that her decision should be set aside by this Tribunal.
41. This Tribunal notes that the Applicant did not submit any evidence to prove that Zinhle was not the deceased's legal dependant.
42. The Applicant submits that the deceased discovered through a friend that Zinhle was not his child. The Applicant does not submit any evidence to corroborate these submissions. There is no sworn statement or affidavit in the

Tribunal record confirming the same neither from the Applicant nor the deceased's friend or any other relative.

43. Contrary to the lack of supporting evidence from the Applicant, the deceased's sister (Lungile) and cousin (Nkuku) have submitted affidavits confirming that Zinhle is the child of the deceased.
44. The Applicant acknowledges that Zinhle lived in the same household with the Applicant and the deceased from 2008 until 2018 and in the Tribunal's record, she does not dispute that during the time that Zinhle was in their household, the deceased financially supported Zinhle as his child.
45. The deceased in 2005 nominated Zinhle and her elder sister, Smangele, to receive 50% each of the pension death benefit. This nomination was then changed by the deceased in 2007 to replace Zinhle and Smangele. The deceased nominated the Applicant to receive 100% of the death benefit.
46. It is important to note that although Zinhle was no longer nominated to receive a death benefit, since 2007 the deceased continued to include her (Zinhle) as one of his dependants and this information remained in the beneficiary nomination form until his death in 2022.
47. The Applicant in her further submission documents states that "*the nomination form does not qualify Zinhle to be the daughter of the deceased and therefore the PFA is wrong to say Zinhle is the child of the deceased*". Although the Applicant is correct that the nomination form does not qualify Zinhle to be the daughter of the deceased, Zinhle being listed on the deceased's beneficiary nomination form as a dependant entitles her to be

considered as one of the deceased's dependants. As to whether she should be allocated a benefit or not that is a decision that is made by the board after consideration of relevant factors.

48. The Applicant further states that *"it is common cause that should the deceased have discovered before submitting the nomination form that Zinhle was not his daughter, he would have not put her name on the form"*. In paragraph 45 above it is stated that the deceased completed a beneficiary form in 2005 which he changed in 2007 to nominate the Applicant to receive 100% of the death benefit. This shows that the deceased was already aware of the importance of amending the beneficiary nomination form where there was a need and changes in his life's circumstances.

49. Also, when the deceased had doubts as to the question of whether Smangele was his child or not, he proceeded to have a paternity test done to prove that he was not Smangele's father. The Tribunal notes that, according to the Applicant's submissions herein, the deceased discovered through a friend in 2016 that Zinhle was not his child. Even though the deceased was already familiar with the need of paternity testing to prove or disprove fatherhood, for a period of eight years from February 2016 (date of alleged discovery) to May 2022 (date of death) the deceased neither found any need to do a paternity test to disprove his fatherhood of Zinhle nor to amend his nomination form to remove her as a dependant.

50. The Applicant submits that Zinhle is the child of a certain Mr Bongani Khomo and that the Khomo family have accepted Zinhle as one of their own. In the Tribunal's record there is no affidavit(s) confirming this submission from either

Mr Khomo, the alleged father of Zinhle, or from any member of the Khomo family. In short, the Applicant has not submitted any evidence to prove that Zinhle may be linked to another family entirely than that of the deceased.

51. The Tribunal considered the Applicant's submission about the deceased discovering through a friend that Zinhle is not his child but found that it did not warrant a reconsideration of the Adjudicator's endorsement of the Fund's allocation. The Applicant has not submitted any evidence to exclude Zinhle being a dependent of the deceased for purposes of the death benefit allocation.

52. Furthermore, the Applicant now refuses to pay for Zinhle's paternity testing which the Applicant herself is requesting.¹⁷ This refusal is significant because it appears from the Tribunal's record that the Fund does not see the need to conduct and fund the paternity test.¹⁸

53. Zinhle submits that she was willing to undergo the paternity test but does not have money to pay for the cost. She further submits that she was not aware of the paternity test appointments that were arranged by the Applicant at the Magistrate Court in 2022. In the Tribunal's record there is no evidence (except for the appointment letters and the refund receipts) from the Applicant that the dates and times of the paternity testing appointments were communicated to Zinhle or that she was aware of the arranged appointments.

54. The Applicant submits that without an unabridged birth certificate or paternity test

¹⁷ See *Kekana v Nedcor Defined Contribution Provident Fund* [2010] 3 BPLR 295 (PFA) where the Adjudicator held that the alleging party needs to adduce evidence to prove that the child is not the biological child of the deceased fund member.

¹⁸ In *Y D (now M) v LB* 2010 6 SA 338 (SCA), the Supreme Court of Appeal held that scientific tests on a child to determine paternity should not be ordered where paternity has been shown on a balance of probabilities.

result, there is nothing linking Zinhle with the deceased. The Tribunal observes that the fact that Zinhle lived in the same household with the deceased and the Applicant from 2008 to 2018 when she left, and that the deceased had initially nominated her to receive 50% of the death benefit in 2005, and thereafter in 2007 when the deceased amended his beneficiary nomination form, he included Zinhle as one of his dependants. It is our view that this information is sufficient to link Zinhle as a legal dependant of the deceased. Unlike the situation of Smangele where the Fund was in possession of the DNA results to prove that the deceased was not her father, there was no evidence or paternity test results in possession of the Fund to disprove Zinhle's paternity.

55. The Board's resolution on the distribution of the death benefit stated that "*the benefit in respect of Zinhle Msani is to be retained in the Fund, pending the submission of her birth certificate*". We note in the Tribunal's record that Zinhle states in an affidavit that for her to get an unabridged certificate, her father's (the deceased's) original death certificate is required, and the deceased's family members are not assisting her in this regard.
56. Even though the board's resolution requested for Zinhle's unabridged birth certificate which it has not yet received, in the absence of any evidence from the Applicant to definitively disprove that Zinhle is a legal dependant of the deceased, this Tribunal does not find anything improper or irregular in the Adjudicator's determination that Zinhle qualifies as a legal dependant of the deceased. Given these circumstances, the board's exercise of discretion in allocating 10% of the death benefit to Zinhle appears reasonable. There is no sufficient justification to challenge the board's decision based on the available

facts and evidence.

57. This Tribunal finds that the Applicant failed to demonstrate a genuine uncertainty as to the paternity of Zinhle and that there was no substantial and substantiated doubt about the deceased's paternity to Zinhle which needed to be resolved.¹⁹ In this regard the Adjudicator was correct in concluding that the circumstances of this case do not warrant a need of paternity testing.
58. We conclude that there is no legal basis for Zinhle to be subjected to a paternity test when the fund member (the deceased) himself had accepted her as his child up until his death.²⁰
59. The board's measured approach in the distribution of the death benefit is further evident when considering the allocation. Zinhle received 10%, while the Applicant received 50% and her two minor children each received 20%. This allocation demonstrates the Board's careful consideration of all evidence, including the need of a bigger share of 20% each to the two minor dependants compared to 10% received by Zinhle, an adult dependant.
60. The 10% allocation awarded to Zinhle, compared to the Applicant's 50% and the 20% to her two minor children, demonstrates a measured approach.
61. In *Gerson v Mondi Pension Fund and Others*²¹ the court held the following: -

“As already alluded to in the preliminary ruling, the effecting of an equitable distribution requires of the board of trustees to take into consideration all the

¹⁹ See *M and Z v D and Setshaba Pension Fund* [2018] ZAGP JHC 602.

²⁰ Zinhle appears on the deceased's beneficiary nomination form as one of his dependants and the deceased while still alive did not find a need to do a paternity test to disprove his fatherhood to Zinhle.

²¹ *Gerson v Mondi Pension Fund and Others* 2013 (6) SA 162 (GSJ) at page 168 pars 15 and 28.

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. It should be noted that even if I may not necessarily agree with the decision of the board, that in itself is not a ground for setting aside the board's decision. This is because it is not my role as a reviewing tribunal to decide on what is the fairest and most generous distribution. The test in law is whether the board has acted rationally and arrived at a proper and lawful decision."

62. This Tribunal can only interfere with the Fund's decision where it is demonstrated that it had taken into account irrelevant, improper, or irrational factors or where its decision can be said to be one that no reasonable Fund directing themselves could have reached.
63. There is no indication that the Fund acted irrationally or took into consideration irrelevant facts. In our view, the Fund exercised its discretion properly and did indeed arrive at a proper and lawful decision, as the Adjudicator found. The Applicant did not prove that the decision of the Fund was arrived at on consideration of improper, irrelevant or irrational considerations.
64. It appears from the record that even though the board investigated Zinhle's legal dependency, the Trustees never saw a need to conduct or to pay for the cost of paternity testing.²² The Applicant did not place any evidence before the Trustees to corroborate her claim that Zinhle was not a child and a legal dependant of the deceased.
65. The Applicant also did not rebut Zinhle's submission that she did not receive information about the two paternity testing appointments that the Applicant had

²² The Pension Funds Adjudicator held in *Madubanya v Central Retirement Annuity Fund and Another* PFA/GP/00029783/2016/MD that a board of trustees should only resort to paternity testing if the evidence obtained by the board could not establish that the child was a non-legal dependant of the member.

arranged for her in 2022.

66. The Adjudicator considered the submissions of the parties, including the submissions of the Applicant. We do not find any basis to support that she did not perform her duties properly.

67. Further, the Adjudicator stated that she is not convinced that there is a need to subject the child, Zinhle, to unnecessary paternity testing for the reason, amongst others, that the Fund conducted a proper investigation on whether the child was the deceased's child or not. We have no basis to interfere with the order of the Adjudicator.

68. Placing ourselves in the position of the Adjudicator, we are unable to agree that she was wrong in dismissing the complaint. Accordingly, we find that the Applicant did not establish a right to the relief claimed in her application. On this basis, the Applicant has not succeeded in showing that the investigations of the Fund and the Adjudicator's findings are wrong, that they applied wrong principles or that they exercised their discretion improperly.

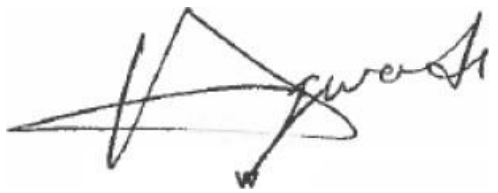
ORDER

69. The following order is made:

69.1. The application for reconsideration is dismissed.

SIGNED at PRETORIA on this 6th day of NOVEMBER 2024.

Signed on behalf of the Tribunal panel.



Prof/Dr M SIGWADI with Judge LTC HARMS