

THE FINANCIAL SERVICES TRIBUNAL

CASE NO: PFA 91/2020

In the matter of:

C.C FERREIRA

Applicant

and

PENSION FUNDS ADJUDICATOR

1ST Respondent

GF FERREIRA

2nd Respondent

CJ FERREIRA

3rd Respondent

ENGINEERING INDUSTRIES PENSION FUND

4th Respondent

METAL INDUSTRIES BENEFIT FUND ADMINISTRATORS

5th Respondent

DECISION

Tribunal: Adv A.T. Ncongwane, SC (Chairperson),
G. Madlanga, and
Zama Nkubungu-Shangisa (members)

Hearing: (Virtual)

Date of decision: 06 September 2021

Appearances:

On behalf of the applicant: Adv J. Malan instructed by Alant Gell &
Martin Inc

On behalf of the second respondent: Mr G. Ferreira (in person)

On behalf of the third respondent: Adv W. Botha instructed by Duminy
Attorneys Inc.

Summary: Application for reconsideration in terms of s. 230 of the FSR Act – Procedural flaws culminating to the determination found to exist- there are material facts that did not serve before the PFA due to the applicant not having being afforded hearing by the PFA. The matter has to be reconsidered by the PFA, together with the revised decision of the Board of Trustees and is remitted to the PFA for further reconsideration.

INTRODUCTION

[1] This is an application in terms of s. 230 of the Financial Services Regulation Act No 09 of 2017 (“the FSR Act”) for reconsideration of the determination of the Deputy Pension Funds Adjudicator (“the PFA / Adjudicator”). The applicant is the spouse of the late Mr JFM Ferreira (“the deceased”) who was a member of the Engineering Industries Pension Fund (“EIPF”), the fourth respondent. EIPF is administered by the Metal Industries Benefit Fund Administrators (“MIBFA”) who is the fifth respondent.

[2] This matter concerns the allocation of death benefits that became payable to the beneficiaries of Mr JFM Ferreira upon his death. The benefit was divided amongst the applicant and the two sons of the deceased from his previous marriage, namely Mr GF Ferreira, the second respondent and Mr CJ Ferreira the third respondent. The second respondent did not accept the manner in which the benefit was divided and the allocation was made and he referred a complaint to the PFA. On the 15th of September 2020 the PFA

issued a determination¹. The PFA found that the allocation of 5% of the death benefit, by the Trustees of EIPF payable to each of the deceased sons is not equitable under the circumstances and should be reconsidered. PFA ordered that the decision of the Board of Trustees (“Trustees”) of the fourth respondent be set aside and the matter was remitted to the Trustees for reconsideration of an equitable allocation of the death benefit to the complainant and his brother.²

[2.1] The Trustees of EIPF complied with the order of PFA and made a new allocation of death benefits that it considered to be more just and equitable. On the 19 October 2020, MIBFA informed the applicant that they are proceeding with the distribution in accordance with the revised allocation by the Board of Trustees of EIPF³. The applicant was aggrieved with the determination of the PFA and proceeded to file this reconsideration application.⁴

BACKGROUND

[3] As stated above, Mr JFM Ferreira was a member of the EIPF. After a long relationship with the applicant, they became married to each other in community of property⁵. At the time of the deceased death, he was still married to the applicant. From the facts in the record, it seems that the

¹ The record, Annexure C, pages 42 to 54, signed by the deputy Pension Funds Adjudicator. Mr M.P. Thulare.

² See: Record, Annexure ‘C’, page 53.

³ Record, Annexure ‘O’, page 69.

⁴ See: The Record pages 1 to 23.

⁵ See: The Record, application page 5 paragraph 8.2, line 12.

deceased's marriage to the applicant was his second marriage and his two sons were born from the deceased's previous marriage.

[4] Upon the deceased's death, a death benefit became payable to potential beneficiaries. The Trustees of EIPF as authorised by s. 37 (C) of the Pension Funds Act No 24 of 1956 (" the Act")⁶ identified the beneficiaries and resolved to distribute the death benefit amongst them as follows:

[4.1] Ms Colleen Ferreira (the spouse), the applicant herein, was allocated 90% of the death benefit.

[4.2] Mr Gareth Fernando Ferreira (the major son), the second respondent herein, was allocated 5% of the benefit; and

4.3] Mr Clinton Joakim Ferreira (a major son), the third respondent herein, was allocated 5% of the benefit.

[5] On 15th of March 2020, the second respondent, due to him being aggrieved by this allocation, lodged a complaint with the PFA challenging the allocation. The PFA found that:

⁶ Section 37 (C) of the Act, in relevant part, provides as follows:
"Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit... payable by such fund upon death of a member, shall... 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 12 months of the death of a member becomes aware of or traces a dependent or dependents of a member, the benefit shall be paid to such dependent or, as may be deemed equitable by the fund, to one such dependents or in proportions to some of or co such dependents.
...
(bA) If a member has a dependant and the member has also designated in writing to 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 of such portion thereof to such dependent or nominee in such proportions as the Board may deem equitable."

- [5.1] the deceased nominated the two major sons to receive 50% each of his death benefit by completing a beneficiary nomination form.
- [5.2] the investigation conducted by the first respondent revealed that the deceased's sons were not financially dependent on the deceased. Even if it is so, they were nominated beneficiaries of the deceased. S. 37 (C)(1)(bA) provides that if a member has a dependant and has also designated in writing to the fund a nominee, the Trustees should consider the application of the death benefit to such dependants and/or nominees.
- [5.3] PFA 's finding is accordingly that, It is not necessary for a nominee to prove financial dependence on the deceased. Self-evidently, the deceased's major sons are entitled to a portion of death benefit without having to proof the financial dependence on the deceased.
- [5.4] Based on the evidence placed before the PFA an allocation of 5% (to each of the deceased's sons) was found not to be just and equitable and the Board of Trustees of the EIPF was required to re-exercise its discretion and re-consider an equitable allocation of the death benefit in respect of the complainant, GF Ferreira and his brother CJ Ferreira.⁷

⁷ See: The Record Annexure "C", paragraph 5.11, page 52.

[6] In her application, the applicant asserts that she submitted her death benefit claim to the fourth respondent after the demise of the deceased on the 24th of August 2019.⁸ It was only around July 2020, that she received a letter from the fifth respondent in response to her application for a death benefit. In monetary conversion, a death benefit in the amount of R 4 149 347.63, became payable to the beneficiaries. The resolution by the Trustees was to award the second and third respondents the amount of R207 467. 38 each, and the balance of the amount to be awarded to her. It is in this letter where she was informed about the interim payment that will be made to her in the amount of R 379 687.36 and further informed that as part of the decision of the EIPF, the benefits will be paid out in accordance with the allocations referred to above but this could only occur upon the expiry of a period of 12 months from the date of the deceased death. The reason for the lapse of period of 12 months was to allow time for any claims that may arise from any further proven beneficiaries who may lodge claims for the benefit during the said 12 months period.⁹

[7] Whilst applicant was waiting for the lapse of 12 months period, she received emails from the fifth respondent in relation to details about other sums of money received by her from the deceased estate or from deceased's investment with the BPI Bank in Portugal. The fifth respondent also requested further information required by the Board of Trustees of the EIPF with regards to her proof of financial dependence to the deceased. In

⁸ See: The Record, Application, page 6, para 8.4

⁹ See: Record, Application page 7 to 8, paragraph 8.10.

particular, applicant was asked to confirm if she had received a sum of R 505 517.98, being the 1/3 of the investment in BPI Bank in Portugal.

- [8] On the 19th October 2020, Mr Malebogo from the fifth respondent informed Mr Du Chenne, (an acquaintance of the deceased, assisting the applicant with the lodgement of the death benefit with the fourth respondent), by email which reads in the following:¹⁰

"I received a file this morning. The trustees' new decision is to give the sons additional 7.5% each person of initial benefit received (they will now receive 12.5% each from the death benefit). It calculated to an amount of R 560 161.92 we going to deduct from Mrs Ferreira's share to split between them.

Her (Mrs Ferreira) current value is R3 597 979.23, we will deduct R 560 161.92 from it, the amount payable to her is R 3 073 817.31.

I am busy preparing the file to make final payment to Mrs Ferreira if there is no more dispute."

- [9] The applicant was aggrieved by the EIPF's "new decision" setting out the amended allocation. The applicant informed the fourth respondent to refrain from discharging any payments to the beneficiaries as per the "new decision" as she was dissatisfied with the outcome of the decision and would be lodging a formal dispute.¹¹

- [10] The applicant subsequently received a copy of the first respondent's decision (the determination dated the 15th of September 2020), attached to

¹⁰ See: Record, Annexure M, page 11 para 8.19 and 67 Annexure M.

¹¹ See: Record, Application page 12 para 8.22, annexure R, page 72.

the email dated the 23rd October 2020, from MIBFA. It reads in the following:

“Attached is the determination from the PFA. If you are not happy with the new distribution, please direct the dispute to the adjudicator. The file will retain all sorts of payments until dispute is finalised.”

[11] It is apposite to state that from the record before us no determination dated the 19th October 2021 was filed by the PFA as forming part of the record.

[12] The applicant alleges that she was not a party to the proceedings before the PFA that culminated in the determination dated the 15th September 2020. She only became aware of the nature and grounds of the second respondent's complaint to the first respondent's initial decision, upon receiving of Mr Malebogo's email of the 23rd of October 2020.¹² It suddenly dawned on the applicant that the first respondent appears to have received the second respondent's complaint on the 15 March 2020. She was bewildered by this as she was under the impression that the distribution of the benefits will be in terms of the Trustees' initial decision.

[13] On the 6th of November 2020, applicant submitted her formal complaint in terms of s. 30A of the Act. This is the complaint wherein the applicant intends to object to the content of the letter dated the 19th October 2020

¹² Record: Application page 12 para 8.24.

which letter spells out the distribution of benefits in the revised terms.¹³ In paragraph 8.20 of the application we note that she states the following:

"I submit that, in view of the additional information referred to above that had been brought to the fourth respondent's attention, the amended distribution is not just and equitable."

[14] On the 9th of November 2020, applicant received the PFA's reply to her complaint. In that response, applicant was informed that the first respondent 'will no longer entertain further submissions from the parties'. Any person aggrieved by the decision of the Pension Fund Adjudicator, so the letter went further, has the right to apply to the Financial Services Tribunal for a reconsideration of the decision. Without engaging the applicant any further about her predicament, she was referred to the Tribunal.

[15] On the other hand, in paragraph 8.24 of the application, the following is stated:

"As stated above, I was not a party to the proceedings before the first respondent that culminated in the first respondent's decision (determination). I only became aware of the nature and grounds of the second respondent's complain to the first respondent, which complain was apparently received by the first respondent on 15 March 2020..."

[16] It is explicit that this matter has its own peculiar short history which seems to become clearer by what is stated in sub-paragraphs 8.29 and 8.30 of the application.¹⁴ In those two sub-paragraphs, the applicant highlight the fact

¹³ See: The Record, Application page 11 para 8.20, page 68 Annexure "N" and page 69 Annexure "O".

¹⁴ A letter that informed the applicant that the only decision made by the PFA in her matter was the determination of September 2020, page 14 – record paras 8.29 and 8.30.

that apart from the letter of the fifth respondent there is no determination by the PFA attached to the fourth respondent's email of the 19 October 2020. Owing to this position, applicant enquired from the first respondent and requested a copy of the determination referred to in the email. A response received from the first respondent was that, "*the letter is in fact the first respondent's determination dated the 15th September 2020.*" In parenthesis, we should state that we notice that the applicant was informed by the first respondent in a letter of the 9th of November 2020 that a decision was made by the PFA in respect of the second respondent's complaint and the office of the PFA "*will no longer entertain further submissions on the matter.*"¹⁵

[17] It therefore follows, as it appears from the application, that the applicant is not only aggrieved by the determination of the PFA dated the 15th September 2020 but also by the fact that PFA has failed, alternatively refused, to consider her complaint against the amended allocation or the '*new decision*' by the fourth respondent's Board of Trustees dated the 19th October 2020. In short, the applicant's case, discernible from the papers and from the submissions made by Mr Malan during the hearing, is firstly for the reconsideration of the decision of the PFA, dated the 15th September 2020, in terms of which the PFA found the allocation of 90% of the death benefit to the applicant and the 5% to the two deceased's major sons, not to be just and equitable and consequently the PFA set aside that allocation and ordered the Trustees to re-exercise their discretion in the allocation of

See also: Annexures V and W, pages 76 to 77.

¹⁵ Application page 4, para 7.1 and page 41 Annexure B, PFA letter dated the 9th of November 2020.

the death benefit in respect of the applicant and the deceased's major two sons.

[18] Secondly, the reconsideration of the first respondent's refusal to consider, alternatively, his/her failure to consider, the applicant's complaint, dated the 6th of November 2020 in relation to the revised decision made by the fourth respondent alternatively the fifth respondent as per annexures "M",¹⁶ "N" and annexure "O" of the record.

THE ISSUES RELEVANT FOR DETERMINATION

[19] The issues in this application are whether:

[19.1] the Board of the Trustees of the fourth respondent had correctly exercised their discretion in terms of s. 37C of the Act, based on the available facts to it, when deciding on the allocation to the available death benefit amongst the dependants of the deceased member, and whether;

[19.2] the first respondent was correct in deciding that *"the Board ... should re-exercise its discretion and consider an equitable allocation of the death benefit"* after the Board had resolved to allocate 90% of the death benefit to the applicant and 5% each to the second and the third respondents, and whether;

¹⁶ See: Annexure "M", email from MIFBA, pg 67 of the record.
See also: Annexure "O", from MIFBA, page 69 of the record.

[19.3] the trustees had correctly exercised their discretion, in reconsidering their initial allocation of the death benefit pursuant to the decision by the PFA, and decided to alter the allocation of the death benefit so that the applicant would receive 75%, and the second and the third respondents would receive 12.5% each, based on the facts available to it at the time, when the reconsidered resolution was taken.

[20] The answers to these questions, competently fall within the jurisdictional facts that must be determined by the first respondent.

LAW AND THE FACTS

[21] In this application, it is evident that the applicant is a “*dependant*”¹⁷. As defined in paragraph (a) and (b) (ii), of section 1 of the Act, as she is the spouse of the deceased member and was entirely factually dependant upon him at the date of his death. The second and the third respondents are “*dependants*” as defined in paragraph (b)(iii) of the definition as they are children of the deceased member.

¹⁷ The definition of “*dependant*” in s. 1 of the Act reads as follows:
“*‘Dependant’ in relation to member, 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 not legally liable for maintenance, if such person – (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 a member would have become legally liable for maintenance had the member not died...*”

[22] In circumstances where the second and the third respondents are self-sufficient and were not factually dependent on the deceased member at the date of his death, it is highly probable that the deceased member was not legally liable for maintenance.

[23] The deceased has however, nominated the second and third respondents as beneficiaries by means of a beneficiary nomination form. In this regard, the second and third respondents, persisted with their claim for the death benefit based solely upon them being the nominees in terms of the retirement fund beneficiary nomination form.

[23.1] The disposition of a death benefit is regulated in terms of s. 37(C) of the Act, which in short, provides that a person's benefit upon the death of a member does not form part of the assets in the estate of such a member but shall be paid to the dependant or dependants in proportion to all of such dependants and in accordance with the discretion of the Board.¹⁸

[23.2] It is trite that s. 37 (C) provides limitation on the person's freedom of testation. The Act makes it clear that the members '*will*' or '*beneficiary nomination*' cannot override the provisions of s. 37C of the Act, and the distribution of the members' death benefit remains the responsibility of the Fund's Board of Trustees.

¹⁸ "*Section 37C – Dispossession of Pension Benefits upon death of member – See footnote 6 supra*

[23.3] The State allows measured tax concessions to a member when saving for retirement, with the intention that such savings be used to provide for the member's surviving spouse, children and other financial dependants in the event of his or her death, thereby reducing the burden on the State. In the determination, the first respondent correctly points out that s. 37 (C) of the Act serves that social purpose.¹⁹ It remains the responsibility of the Trustees to identify and trace the deceased members' dependants, and to allocate the death benefit according to their respective financial needs. The Trustees have a fiduciary duty to investigate the circumstances of every possible dependant and in so doing they are required to undertake a thorough investigation, to apply their mind, exercise discretion and act in good faith with the view to reaching a fair and equitable determination.

[24] In dealing with the powers of the PFA and instances when it can interfere with the discretion of the Board of Trustees of EIPF, this Tribunal draws guidance from the fact that:

[24.1] The Trustees are required to apportion the death benefit amongst the dependants and/or nominees, with the primary goal of ensuring that no one who was financially dependent on the member is left without adequate support. The extent to which a dependant was dependent on the deceased is a significant factor to consider by the Trustees and

¹⁹ Matlakane v Royal Parrafin Provident Fund [2003] 6 BPLR 4785 (PFA), referred to in the determination, page A51, sub-paragraph 5.10.

of course it depends on the amount of the benefit available for distribution.

[24.2] To meet the qualification to benefit, either as a legal dependant or a factual dependant, will not automatically give that person a right to receive a portion of a death benefit.²⁰ When making an “*equitable distribution*” amongst dependants, the Trustees of EIPF have to consider the following factors: (a) age of parties; (b) their relationship to the deceased; (c) the extent of dependency. The Trustees of EIPF must consider whether a beneficiary was totally or partially dependent on the deceased. The beneficiary’s dependency in relation to other beneficiaries should be compared. Those who were more dependent would probably need greater assistance and consequently a greater benefit.²¹ (d) the wishes of the deceased placed either in the nomination form completed during his lifetime and/or in his will. (e) the financial affairs of the dependants including their future earning potential. (f) the value of the death benefit available for apportionment.

[24.3] Accordingly, where the deceased has nominated a beneficiary by means of a beneficiary nomination form as it is the case in this matter in respect of the second and the third respondents, such nomination will have to be considered by the Trustees, but only, to the extent that the nominee was financially dependent on the deceased member at the time of his death. Implicitly, the nomination form serves merely as

²⁰ See: The Record, the determination A50, para 5.5.

²¹ *Sithole v ICS Provident Fund and Another* 2000 (4) BPLR 430 (PFA) at para 24 and 25.

a guide to assist the Board in the exercise of its discretion.²² If the available death benefit is not sufficient to provide in the needs of the factual dependants of the deceased, nominees who are not financially dependent may be excluded in the allocation of the death benefit. The Trustees are vested with the discretionary power to decide on what an equitable distribution of the death benefit would be.

[24.4] The jurisdiction of the PFA, and that applies to this Tribunal, is limited to the question whether the Trustees of the Fund had acted rationally and arrived at a proper and lawful decision, considering all the material facts put before them. The Trustee's decision can only be interfered with where it can be shown that the Trustees have taken irrelevant, improper, and irrational factors into consideration or where it can be shown that no reasonable Board of Trustees, properly directing itself could have reached such a decision.

[24.5] The PFA shall investigation any complaint and "*may make an order which any court of law may make*"²³ since a court of law cannot substitute its discretion for that of the Board, neither could the PFA.²⁴

The facts available to the Trustees of the fourth respondent when making a decision for the initial allocation.

²² See: Mashazi v African Products Retirement Benefit Provident Fund 2002 (8) BPLR3703 (W) at 3705 (i) to 3706 (c).

²³ Referring to S. 30E (1)(a) of Act 24 of 1956.

²⁴ Kelly and Anita Wilkinson v PFA and Others case number: PFA 73/2019.

[25.1] When the Trustees decided to allocate 90% of the death benefit to the applicant and 5% to the second and third respondents respectively, they considered,

the relevant facts relating to the applicant's financial position and factual dependence on the deceased, which appears to be that:

- the applicant was 63 years of age and the spouse of the late Joaquim Fernando Moutinho Ferreira, who was, at the time of his death, a member of the fourth respondent.²⁵ The applicant and the deceased were married in community of property.
- the communal home was the property of which the applicant was the owner when they met and started living together as husband and wife in November 1996.²⁶
- she stopped working on 13 May 1997 at the insistence of the deceased to run the household.²⁷
- their sole source of income was derived from the deceased's employment.²⁸
- the deceased suffered from cancer and during the deterioration of his terminal illness, the applicant was his only support and sole personal carer until he passed away on 24 August 2019.²⁹

²⁵ Application for Reconsideration, subparagraph 8.1, A/5, 8.2, A/5 and sub-para 1.1, A/2

²⁶ Application for Reconsideration, subparagraph 8.2, A/5.

²⁷ Application for Reconsideration, subparagraph 8.2, A/5.

²⁸ Application for Reconsideration, subparagraph 8.2, A/5.

- the applicant was, in terms of the deceased's last will and Testament, dated 18 September 2017, appointed as sole beneficiary. In terms of the will the second respondent would have inherited the deceased's entire estate in the event of the applicant having predeceased him. The third respondent was not mentioned in the will at all.³⁰

- the applicant was completely financially dependent on the deceased.³¹

[25.2] The relevant facts relating to the second respondent as nominee in terms of the deceased's retirement fund beneficiary nomination form,³²

- is that the second respondent was not factually dependent on the deceased at the time of his death.³³ There is no evidence that the second respondent would have been factually dependent on the deceased and there is no indication whatsoever that he would have become so dependent on the deceased in future. This is common cause.

²⁹ Application for Reconsideration, subparagraph 8.3, A/5.

³⁰ Will, A/55-56.

³¹ Application for Reconsideration, subparagraph 8.5, A/6.

³² Letter A/87-88, B/5-6. See also Determination, subparagraph 5.7, A/50.

³³ Submissions, subparagraph 8.13, A/83 and subparagraph 8.18, A/84. See also Determination, subparagraph 5.8, A/50.

- the second defendant has, despite having been invited to do so, failed to make a full disclosure of his financial position.³⁴ Apart from stating his monthly income, he has failed to make use of the opportunity availed to him to disclose his net assets and his spouse's monthly income and net assets.³⁵
- the claim to a share of the death benefit is based solely upon him being a nominee in terms of the retirement fund beneficiary nomination form.³⁶

[25.3] The facts relating to the third respondent as nominee in terms of the deceased's retirement fund beneficiary nomination form are,³⁷

- similarly, there is also no evidence that the third respondent was factually dependent on the deceased at the time of his death and there is no indication whatsoever that he would have become so dependent on the deceased in future.³⁸ This is also common cause.
- despite having been invited, to make a full disclosure of his financial position, ³⁹ the third respondent has also not done so,

³⁴ Determination, subparagraph 5.9, A/51.

³⁵ Submissions, A/84.

³⁶ Submissions, A/18. See also letter second respondent to fifth respondent, A/86.

³⁷ Letter A/87-88, B/5-6.

³⁸ The third respondent has not raised factual dependency as a ground for his sharing in the death benefit and has contented himself and relying on the nomination form. See also Determination, subparagraph 5.8, A/50.

³⁹ Determination, subparagraph 5.9, A/51.

apart from stating his monthly income. His net assets and his spouse's monthly income and net assets are not disclosed.

- the third respondent's claim to a share of the death benefit is based solely upon him being a nominee in terms of the retirement fund beneficiary nomination form.⁴⁰

[26] Based on the facts set out above, the trustees of the fourth respondent resolved to allocate the after tax death benefit amounting to R4,149,347.63 on the 90% basis to the applicant and the 5% basis to the second and the third respondents, amounting to R207,347.63 being paid to each of the two deceased's major sons.

[27] The applicant contends that this allocation of the death benefit by the Trustees, in the circumstances of this case and taking into account the facts in issue, was just and equitable. The second respondent successfully challenged the allocation.

The facts available to the first respondent that led to the decision of the 15th September 2020

[28] It seems, subject to what is stated hereunder, that the first respondent had some of the facts relating to the applicant's financial position and factual dependence on the deceased, and also the relevant facts relating to the second and third respondents as nominees in terms of the deceased's

⁴⁰ Determination, subparagraph 5.9, A/51.

retirement fund beneficiary nomination form, when a determination of the 15th of September 2020 was made. The PFA overturned the decision of the Trustees on the grounds that it did not seem to be fair and equitable and remitted the matter back to the Trustees for reconsideration of the application.

[29] In providing credence to her version that she was not a party to the proceedings before the PFA that culminated in the determination of the 15th September 2020, the applicant argues that, had she been able to exercise her right to be heard by the PFA by allowing her to make submissions before the determination was made by the PFA, she would have ensured that all the other material facts and information which is referred to in paragraph 8.15, 8. 16, 8.17 and 8.18 of the applicant's application for reconsideration, was placed before the PFA. In short, the evidence that did not serve before PFA includes, the equal sharing of the proceeds from the investment account with PBI Bank in Portugal, between the applicant, the second and the third respondents, each receiving R 505 517.98. The information that her only monthly source of income was a SASSA pension of R1 780.00 and with no prospects of obtaining gainful employment and to generate a future income. That an amount of R96 000.00 making up a cash shortfall in the deceased estate had to be paid by her. That there is further information received by the MIBFA, from the second and the third respondents on the 9th October 2020 which requires objective consideration by the PFA. The applicant further contends that all of this information, which was not considered by the PFA, would have served as evidence that the

second and third respondents have received ample benefits, such that the initial allocation of death benefit by the Trustees would have been found by the FSP to be fair and equitable.⁴¹

[30] Mr Malan concluded his argument by contending that the fact that the deceased named the second and the third respondents in the nomination form is, at best, an indication that the deceased wished for them to share in the death benefit. Neither the second respondent nor the third respondent, so the argument goes, was financially dependent on the deceased at the time of the latter's death and there is no indication that anyone of them will in future have become so dependent on the deceased. Applicant contends that she was the only factual dependant of the deceased and, as such, she is totally reliant upon the portion of the death benefit allocated to her to provide for her financially for the rest of her life.

Facts available the trustees when they reconsidered their initial allocation (on or about October 2020)

[31] Pursuant to the first respondent's determination, the Trustees reconsidered their initial allocation⁴².

[32] All the relevant facts relating to the applicant's financial situation and factual dependence on the deceased as adumbrated in paragraph 25 above. In

⁴¹ The record, see application, paragraph 18.3, A/8-9.

⁴² See: undated email from fourth respondent Mr Du Chenne, A/67 dated 19 October 2020, A/68 email from the first respondent to applicant, dated 19 October 2020, A/69.

addition to that relevant information, the Trustees also had the information in relation to the fact that:

[32.1] The applicant was, in terms of deceased's last will and testament, dated the 18th September 2017, appointed as the sole beneficiary. The applicant received R 505 517.92 when the deceased investment with PBI Bank in Portugal was paid out and the investment was also paid out to the second and third respondents in equal shares.

[33] The revised decision of the Trustees regarding the allocation of the death benefit after complying with the first respondent's determination was that the second and the third respondents would receive a further 7.5% each of the available death benefit. If the reconsidered allocation is allowed to stand, it meant that the second and third respondents will each receive 12.5% of the death benefits while the applicant would receive 75%. In rand terms, these meant that the second and third respondents would each receive R487 548.26 and the applicant would receive R 3 037 819.31.

[34] The applicant wishes to challenge this revised decision on the ground that it amounts to a material reduction in the portion of death benefit that was initially allocated to the applicant and these would have a significant impact on her ability to sustain herself financially for the rest of her life. What is therefore of relevance to be decided is whether the Trustees had properly exercised their discretion, based on the facts available to them at the time, in deciding how to allocate the death benefits between the applicant, the

second respondent and the third respondent. Secondly, whether the first respondent's decision (the determination dated the 15th September 2020) that the Trustees should "*re-exercise*" their (discretion and consider an equitable allocation of the death benefit) was, considering the circumstances of this case, correct or not.

[35] Mr Botha submitted that from the side of the third respondent, they had placed all the material facts before the PFA. He further submitted that the third respondent is satisfied with the decision of the PFA to refer the matter back to the Trustees. We re-emphasise the fact that the sons are claiming the benefit as nominees and the wishes of the deceased must be considered to the extent the law allows.

CONCLUSION

[36] It is so that the second and the third respondents elected to characterise the claims to the death benefit from a point of view of being nominated by the deceased. It is indeed correct that by virtue of the provisions s. 37(C), the second and third respondents are the legal dependants of the deceased. The difference between their position and that of the applicant is that the applicant, in addition from being a legal dependant is also a factual dependant to the deceased. From the record, after the PFA made his determination, further information became available and may have been considered, it seems to us, by the Trustees in making their revised determination.

[37] The applicant however, asserts that the PFA did not have the benefit of all the facts or further information including the information about the payment from the investment from the Bank of Portugal, to all the beneficiaries in equal shares. Applicant was not in a position to make submissions to the PFA regarding all the outstanding information that did not serve before the PFA, because she was not afforded the benefit to be heard. This resulted to the PFA interfering with the initial decision which the applicant accepts to have been a just and equitable decision even though it was reached on a very limited basis and only on two propositions, namely: the extent of benefit and the wishes of the deceased as set out in the nomination form. The new factors that became available and were not considered and evaluated by the first respondent could have persuaded the first respondent not to make the decision he reached in the determination. When the applicant objected to the making of payments to herself and to the second and third respondents as per the revised decision by the Trustees, the PFA did not consider, or failed to consider the applicant's objections dated the 6th of November 2020.

[38] In view of the limited powers of this Tribunal, it is only when we conclude that there has been a misdirection on the fairness of the procedure and the application of the law, that we can grant a reconsideration order. We cannot substitute the decision of the PFA in the circumstances of this matter but will have to remit the matter to the PFA and allow the PFA to consider the applicant's complaint holistically, in respect of both the determination of

the 15th of September 2020 and the decision made by the Trustees on the 19th October 2020.

[39] In order to arrive at a fair, just and equitable determination in accordance with the Act and the principles applicable, taking into account the varying interests of all the beneficiaries, the PFA has to consider the applicant's complaint lodged with her in relation to the determination of the 15th September 2020 as well as to the revised decision by the Trustees. In doing so, an opportunity must be afforded to the parties to make further submissions in order to augment where necessary, their respective cases so that the PFA can be able to deal with all the disputes that have been raised. This will result to the PFA to be in a position to consider all the relevant facts canvassed and serving before him/her and on that basis can decide what to do with the decision of the Board of Trustees. That is, whether to refer the matter in its entirety back to the Board for reconsideration or whether the PFA on applying his or her mind on the issues will still be satisfied with the decision made by the Board of Trustees.

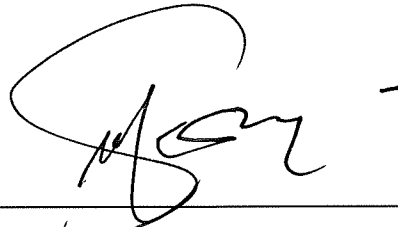
[40] All the parties, as we have established from their oral submissions, concede and are in acquiescence to the demand by the issues, of a need for reconsideration by the PFA.

ORDER

[41] In the result, the following order is made:

[41.1] The determination by the Pension Funds Adjudicator dated the 15 September 2020 is set aside in terms of section 234 (1) (a) of the FSR Act 9 of 2017 and is remitted to the first respondent, together with the decision of the Board of Trustees of the fourth respondent, dated the 19 October 2020, for further consideration.

[41.2] No order as to costs is made.



AT NCONGWANE SC, CHAIRPERSON

With the panel consisting of:

G. Madlanga, and

Zama Nkubungu-Shangisa

Date: 06 September 2021