

IN THE FINANCIAL SERVICES TRIBUNAL

CASE NUMBER: PFA 3/2018

In the matter between:

COMET NTIMANE

Applicant

And

PENSION FUND ADJUDICATOR

First Respondent

SENTINEL RETIREMENT FUND

Second Respondent

BUSISIWE GLORIA PETROS

Third Respondent

Tribunal: Mr. JM Damons (chair), Mrs N Dongwana and Adv N Nxumalo

For the Applicant: No appearance

For the First Respondent: No appearance

For the Second Respondent: Gary Meyer

For the Third Respondent: No appearance

Hearing: 14 March 2019

Decision: 27 March 2019

Summary: Application for reconsideration of a decision in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 ("FSRA") – application to reconsider the allocation of a death benefit – investigations prior allocating death benefits – duty to place the information relied upon before a deciding Tribunal.

DECISION

1. INTRODUCTION

1.1 This is an application for reconsideration of a decision in terms of section 230(1) of FSRA. The Applicant in this matter is Mr C Ntimane. The Applicant is a son to the late Mr SR Mboweni who was a contributing member to the Second Respondent, the Sentinel Retirement Fund ("the Fund").

1.2 The Applicant filed a complaint¹ with the First Respondent, the Pension Fund Adjudicator ("the Adjudicator"), on 16th March 2018 against the decision taken by the Fund to award him 0% of the death benefit due to the beneficiaries of the late Mr SR Mboweni.

1.3 The Fund was afforded an opportunity to respond to the complaint which it accordingly did². A determination was issued by the Adjudicator wherein the complaint was dismissed³. The Applicant not satisfied with the Adjudicator's determination filed a reconsideration application⁴. The application was filed with this tribunal on the 10th October 2018 hence the current proceedings.

2. FACTUAL BACKGROUND AND COMPLAINT

2.1 As stated by the Adjudicator in her determination, Mr SR Mboweni was a contributing member of the Fund when he passed away on the 30th September 2016. The Applicant in these proceedings is a son to the late SR Mboweni.

2.2 Upon the death of Mr Mboweni, a death benefit in the amount of R312 526,42 became available for distribution to the beneficiaries of the deceased. The

¹ See record of the proceedings at pages 47, 48, 49 and 50

² See record of proceedings at page 18 to 38

³ See record of the proceedings at page 59 to 74

⁴ See record of the proceedings at page 57 and 58

Fund Board resolved in terms of section 37C of the Pension Funds Act 24 of 1956 (“the Act”) to award the benefit as follows:

Beneficiary	Relationship	Age	Allocation
BG Petros	Customary spouse	40	27%
SN Mboweni (Surprise)	Minor Son	2	21%
FM Mboweni (Freedom)	Minor son	5	19%
LB Petros (Lehlongolo)	Minor stepson	8	10%
N Mnguni	Minor son	10	13%
AM Ngwenya	Major daughter	20	5%
C Ntimane (Complaint)	Major son	26	0%
KJ Mahlangu	Mother	59	5%

2.3 After being advised of the Fund’s decision the Applicant lodged a complaint against the Fund’s decision to exclude him from receiving a portion of the death benefit. In his complaint⁵ the Applicant stated amongst other the following:

2.3.1 Although he was not staying with the deceased, he was still the deceased’s dependent;

2.3.2 As a major son to the deceased he deserved a portion of the benefit;
and

⁵ See record of the proceedings at 49 and 50

2.3.3 The deceased had promised to finance his education as well as paying for his driver's license.

2.4 The Applicant also stated that he has been supported by his paternal grandmother, one, KJ Mahlangu. On the basis of the above reasons he requested that the Adjudicator investigate the matter and order the Fund to allocate him a portion of the death benefit.

2.5 Ms BG Petros who was a customary spouse to the deceased applied to be joined in this matter. Her application was granted⁶ and she submitted to the Tribunal that the Applicant was not financially dependent on the deceased. She further stated that the Applicant advised her that he was employed and able to support himself financially.

2.6 The Fund response to the complaint was in a form of written arguments setting out the facts and legal arguments in support of its decision, and stated amongst others the following:

2.6.1 They identified potential beneficiaries as per the table in paragraph 2.2 above;

2.6.2 The Fund conducted its investigations and its claims sub-committee considered the issue of dependency and resolved as it did; and

2.6.3 The sub-committee allocated the benefit in terms of section 37C of the Act and the Applicant is the only beneficiaries who complained about the allocation.

2.7 Of importance the Fund stated that as part of the investigations the Applicant completed various forms, including a questionnaire requesting information such as the Applicant's financial situation, level of financial dependency on the deceased, relationship with the deceased, reasons why he feels a portion

⁶ See record of the proceedings at page 89

should be allocated to him etc. Respondent advised that the form stated that the said information was required to enable the Board to make a decision on the allocation of the benefit. The Fund submitted before the Adjudicator that the Applicant left the forms virtually blank and signed same. The Fund alleged that the Applicant chose not to disclose information which he was privy to.

2.8 The Fund also submitted that there was an affidavit from the Applicant's mother confirming that she was forced to raise the Applicant alone. The Fund further stated that the Applicant was employed by FNB and he did not advise that he was supported by the deceased nor that the deceased had promised to pay for his further studies and the driver's license. The Fund submitted that its claims committee applied its mind to the information it considered relevant and thus the decision it came to is reasonable.

2.9 The copies of these apparently crucial documents did not form part of the record before this Tribunal. This Tribunal is also not certain whether the documents were provided to the Adjudicator because Mr Meyer, who represented the Fund in the proceedings before this Tribunal, conceded that these crucial documents were not provided to the Adjudicator.

3. DETERMINATION BY THE PENSION FUND ADJUDICATOR

3.1 In dealing with this matter it is important to consider the determination by the Adjudicator. The Adjudicator correctly stated that *"the issue that falls for determination by this Tribunal is whether the respondent conducted a proper investigation in terms of section 37C of the Act and made an equitable allocation of the death benefit⁷."* This Tribunal is also of the view that the crucial issue to determine is whether there were proper investigations conducted prior the claims sub-committee taking a decision on the allocation of the benefit. Moreover, was the said information properly placed before the sub-committee and subsequently before the Adjudicator to determine whether the decision taken was a reasonable decision.

⁷ See record of proceedings at page 8 par 5.1

3.2 Having considered the questions stated above, the Adjudicator was satisfied that the Fund conducted proper investigations in terms of section 37C of the Act and the decision thereto was an equitable allocation of the benefit⁸. Applicant's complaint was dismissed.

4. SUBMISSIONS AND ARGUMENTS BEFORE THE APPEALS TRIBUNAL

4.1 It is important to note that the Applicant is a 27-year-old male who was unrepresented in these proceedings. Moreover, a day prior to the hearing he advised the FSCA that he will not be able to make it for the hearing and thus the hearing proceeded in his absence and dealt with on what was contained in the papers filed with this Tribunal.

4.2 The Applicant stated as a ground for reconsideration that "the deceased is my biological father and I have a right to be compensated⁹". The Fund referred this Tribunal to its submissions made before the Adjudicator. The Adjudicator representative attended the hearing but decided not to make any representations. The Third Respondent came when the hearing of the matter was concluded. An attempt was made before the start of the hearing to contact her, but she was not available on her mobile telephone. Therefore, for purposes of this matter it will be deemed that the Third Respondent was absent and did not file any opposing papers and/or arguments.

4.3 As stated in the preceding paragraphs, the Applicant's ground before this Tribunal is that he has a right to be compensated. Fund disputes this argument on the ground that there was no evidence before its claim sub-committee to show that the Applicant was financially dependent on the deceased. The Fund forwarded the following reasons to justify its decision:

"a. The Fund cannot investigate or take into account information of which it was not made aware;

⁸ See record of proceedings at page 15 par 5.13

⁹ See record of proceedings at page 58

- b. The complainant did not, as he implies, inform the fund that the deceased supported him. To the contrary, his affidavit stated that his mother her parents has to support him throughout;**
- c. He did not, as he implies, inform the Fund that the deceased promised to pay for his licence or finance his education;**
- d. He implies that he has been self-supporting since taking up his internship at FNB.”¹⁰**

4.4 It is clear from the arguments submitted by the Fund that the information it relied on were based on information contained in the Applicant’s affidavit and that of his mother. I will deal with the issue of the affidavit later. The Fund also relies on the forms and questionnaire provided to the Applicant for him to complete and forward back to the Fund. According to the Fund, the Applicant chose not to provide information requested in those documents which information was required to take a decision in terms of section 37C of the Act. I will also address the issue of the forms later in this decision.

4.5 It is important to state outright that the information referred to and relied upon by the Second Respond were not placed before this Tribunal. This Tribunal is also not in a position to determine if the said information was placed before the Adjudicator prior to her determination. The Fund representative also conceded that the said information i.e. Applicant’s affidavit and that of his mother, the forms and questionnaire provided to the Applicant was not part of the record. The Fund wanted to hand up these documents which request was denied.

5. ANALYSIS OF THE ARGUMENTS

5.1 For this Tribunal to reconsider this matter, its powers are set out in section 234 of the FSR Act. A proper approach in dealing with these types of matters

¹⁰ See record of proceedings at page 35

will be a comprehensive revisit of the circumstances as they are presented at the time of this hearing¹¹. The grounds for reconsideration filed by the Applicant and the response thereto are additional matters which have to be considered.

5.2 As correctly pointed out by the Adjudicator, the main issue in this application is whether there was a proper investigation which enabled the Fund to take a proper decision in terms of section 37C of the Act. The Fund submitted that its decision was proper. Moreover, it submitted that in view of the Applicant's failure to provide requested information which according to the Fund he was privy to, left the Fund's claims sub-committee without an alternative but to decide based on the information before it.

5.3 It is trite that prior distribution of a death benefit there should be an investigation which investigation should enable the deciding body to take a proper decision. These investigations goes as far as getting information regarding dependency of beneficiaries on the deceased together with other factors. In this matter the Fund submitted that it could not take into account information which was never brought to its attention. The Fund contended that the Applicant was given forms to complete and basically left the forms blank but signed same and returned them. It is thus important to analyse the reasons provided by the Fund to justify its decision to exclude the Applicant in the allocation.

5.3.1 The Fund cannot investigate or take into account information of which it was not made aware

5.3.1.1 It is trite that the trustees of a fund must investigate a matter to determine if a particular beneficiary was dependent on a deceased member. After these investigations the trustees will be in a better position to distribute the benefits in terms of section 37C of the Act. The fund must consider the information obtained

¹¹ South Africa Airways Soc v BDFM Publishers (Pty) Ltd 2016(2) SA 561 (GJ) at Fn 1 and the authorities cited there.

from the investigations prior to taking a decision in terms of section 37C of the Act.

5.3.1.2 In this matter, this Tribunal has not been provided with all the alleged information which the Fund's claims sub-committee considered prior to taking a decision to distribute the death benefit. Therefore, this Tribunal is not in a position to determine if the Fund took into consideration all the relevant information. It is the duty of the Fund to show that its decision was rational. To show that, one must look at the information placed before its claims sub-committee. Such information was not placed before this Tribunal hence this Tribunal cannot determine if the decision taken was rational.

5.3.1.3 The Fund argues that it cannot investigate or take into consideration information it was never made aware of. To sustain such an argument, firstly the Fund must furnish all the information disclosed before it. Thereafter one will be placed in a better position to determine whether there was any information not brought to the attention of the Fund, which information could have been availed. As stated above, this Tribunal was not favoured with all the information to enable it to determine if there was indeed information which was outstanding and/or not provided. It is the duty of the party to produce and place documents before a deciding Tribunal if that party will rely on such documents.

5.3.1.4 Therefore, in view of the Fund's failure to placed all the information before this Tribunal, this Tribunal cannot determine if there was any information not disclosed by the Applicant as alleged.

5.3.2 The complainant did not, as he implies, inform the fund that the deceased supported him. To the contrary, his affidavit stated that his mother and her parents has to support him throughout;

5.3.2.1 The Fund alleges that the Applicant stated in his affidavit that he is self-supporting. The Fund further stated that an affidavit from the Applicant's mother stated that she was supporting the Applicant. The Fund submitted that it considered such information prior to resolving as it did.

5.3.2.2 As stated above, the Fund failed to place this information before this Tribunal. This Tribunal can therefore not determine if the alleged affidavits justify the allocation made by the Fund. The Fund had a duty to place the alleged information before this Tribunal to show that its decision was rational. The failure to place this information before this Tribunal weighs against the Fund.

5.3.2.3 This Tribunal is further of the view that it cannot determine if the said information was ever placed before the Fund's claims committee and/or placed before the Adjudicator.

5.3.2.4 The Fund went further to state that forms and a questionnaire were provided to the Applicant. It was submitted that the Applicant merely signed the forms without providing the requested information. Regrettably this information i.e. forms and questionnaire have also not been placed before this Tribunal. This Tribunal is not in a position to determine if the alleged questionnaire constitute proper investigations, because not all the relevant documentation has been placed before it. One would have considered the questions and determine if the information could have been easily provided by the Applicant. However, as it stands this Tribunal cannot determine if such

questionnaire constitute proper investigations. This further weighs against the Fund.

5.3.3 He did not, as he implies, inform the Fund that the deceased promised to pay for his licence or finance his education;

5.3.3.1 The Fund alleges that the Applicant never advised it that the deceased had made promises to him about his further studies and paying for his driver's licence.

5.3.3.2 To ascertain if this allegation is true, one will need to examine all the information provided to the Fund by the Applicant. Again, the alleged information has not been placed before this Tribunal. This Tribunal is therefore not in a position to determine if the Applicant failed to advise the Fund of the promises made by the deceased. This also weighs against the Fund.

5.3.4 He implies that he has been self-supporting since taking up his internship at FNB

5.3.4.1 Similarly, to the above, the Fund failed to place the information it relied upon before this Tribunal. This also should weigh against the Fund.

5.4 The Fund's failure to place the information it relies upon before this Tribunal should be weighed against it. In view of this failure, this Tribunal is not in a position to determine if there were proper investigations conducted prior the allocation. Moreover, this Tribunal is not in a position to determine if the decision taken by the Fund was rational.

5.5 The power, conferred by section 232(5) of the FSRA upon this Tribunal, to call for new and additional evidence is only to be exercised upon good cause shown and is clearly aimed at additional evidence that the Fund could not obtain. On this basis, this does not cover the evidence obtained and

considered by the Fund in making its decision but was not made available to the Adjudicator and this Tribunal. To enable the Adjudicator and this Tribunal to consider and evaluate the reasonableness of the the Fund's conclusion that the Applicant was "not in fact dependent on the deceased for maintenance" and that it did not unduly fetter its own discretion when it resolved to allocate 0% to the Applicant, the Fund should have provided the Adjudicator and this Tribunal with all the evidence it relied upon for its decisions.

5.6 There is a factual dispute regarding whether or not the Applicant was financially dependent on the deceased at the date of the deceased's death. According to the extracts of affidavits quoted in the Fund's response to the complaint (copies of which were not provided to the Adjudicator or this Tribunal) the Applicant was supported by his single mother since birth and is currently taking care of himself by doing an internship. According to the complaint, which was before the Adjudicator and formed part of the record before this Tribunal, the Applicant was dependent on the deceased and his paternal grandmother, Ms Mahlangu. It is not clear to us if the Adjudicator considered this factual dispute and how she resolved it, especially in the absence of affidavits relied upon by the Fund. Yet, she concluded that:

"based on the evidence placed before [the Adjudicator], it is found that the complainant is a major and was not financially dependent on the deceased at the date of his death"¹².

There is no evidence that the Adjudicator directed any investigation at establishing what the correct position is in this regard.

6. On the basis on the findings and reasoning above, this Tribunal is of the view that this matter should be referred back to the Fund for proper investigation, such investigation to cover specifically the above factual dispute. After the investigation the Fund's claim committee should be provided with all the information to enable it to take a proper decision having regard to all the information before it.

¹² See record of proceedings at page 14 first par

7. The following orders are made

7.1 The matter is remitted back to the Fund for re-investigation and decision;

7.2 No order as to costs

Signed at PRETORIA on the 27th day of March 2019 on behalf of the Tribunal


CHAIRPERSON
JM DAMONS