IN THE FINANCIAL SERVICES TRIBUNAL

CASE: PFA 58/2019

In the matter between:

DALIEN PRETORIUS	**APPLICANT**
and	
THE PENSION FUNDS' ADJUDICATOR	**1ST RESPONDENT**
MELANIE DE LA RAY	**2ND RESPONDENT**
LIZA PENSION FUND	**3RD RESPONDENT**
ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD	**4TH RESPONDENT**

DECISION

Appearances

Coram : Adv. Mocheodi Elias Phiyega

Ms. Neo Phakama Dongwana

	:	Mr. Gugulethu Madlanga
For the Applicant	:	Adv. A Basson
For 2nd Respondent	:	Adv. B.J. Basson
For 3rd & 4th Respondent:		Not represented
Date of hearing	:	15/11/2019
Date of decision	:	21/01/2020

Application in terms of section 230 of the FSRA- reconsideration of death benefit allocation - whether PFA has power to substitute board of trustee's decision with her own - effect of section 30E(1)(a) on power of PFA to substitute.

INTRODUCTION

1.

The application is brought in terms of section 230 of the Financial Sector Regulation Act, No 7 of 2017 (FSRA). We are asked to reconsider the decision of the Pension Funds Adjudicator dated 11 March 2029, in terms of which the Pension Funds Adjudicator reversed the decision of the board of trustees of the Leza Pension Fund

(the pension fund) to allocate the death benefit proportions which the pension fund had made.

2.

The death benefit became available on the death of Mr Theron(the deceased) .The deceased had nominated the three beneficiaries, namely Ms Pretorius and his two adult daughters and had instructed in his pension nomination form that the benefits be allocated in proportions of 33% to each of his beneficiaries.

3.

However, the pension fund, after making investigations, allocated 70% to the Applicant and 15% each to the two daughters of the deceased. This allocation was contrary to the instructions of the deceased who, as can be seen above, had indicated in his pension nomination form that the allocation should be in equal proportion to his three nominees.

4.

The issue that we are called upon to decide is whether the Pension Funds

Adjudicator was vested with the power to reverse the allocation made by the pension fund and replace it with her own.

5.

The Pension Funds Adjudicator justified her decision to intervene and substitute the decision of the board of trustees of Leza Pension Fund (the board of trustees) on basis that the board of trustees had failed to conduct a proper investigation in terms of section 37C of the Pension Funds Act in coming to its decision.

6.

NON - JOINDER

At the commencement of the hearing we first had to deal with the issue of non-joinder of the Applicant in the application that served before the Pension Funds Adjudicator. In short, the Applicant complained that she had not been a party to the Pension Funds Adjudicators proceedings which resulted in the her reversing the allocation made by the board of trustees of Leza .She indicated in her affidavit that she had a direct and substantial interest in the matter that served before the Pension Funds Adjudicator and that as such she should have been joined as a party to her proceedings so that she would have been in a position to make inputs into the investigations which the Pension Funds Adjudicator undertook and which led to the

decision by the Pension Funds Adjudicator reversing the decision of the board of trustees and substituting it with her own.

7.

After submission by both sides, agreement was reached that the issue of non-joinder would not be preceded with and that the matter be deal with on the merits only.

8.

The Tribunal thanked the parties for the agreement and reminded them that the Tribunal is enjoined to dispose of disputes expeditiously and cheaply .The Tribunal emphasized that the agreement reached would ensure that the application is dealt with as expeditiously as possible without the necessity to have the proceedings postponed in order for the Pension Funds Adjudicator to join the Applicant.

FACTS

9.

The deceased, Mr Theron, was the father of two adult women, Ms Melanie de la Rey and Ms Lucille Holmes (the daughters).He was also a life partner of Ms Dalien Pretorius, the current Applicant. The deceased was divorced from mother of the daughters referred to above.

10.

Mr Theron and the Applicant, as part of their life partnership moved in together. They first occupied an apartment with effect from 2004. Two years later they purchased a property known as Villa Verona and stayed there until 2016 when the deceased passed on. The above property was purchased by both the deceased and Ms Pretorius combining their resources to effect the purchase.

11.

It appears that the relationship between Mr. Pretorius the deceased and Ms Pretorius was a loving and caring one. They cared so much for each other that they made arrangements for what would happen to the survivor in the event of the death of the other. The deceased instructed his attorneys to draft his will in such a way as to ensure that on his death Ms Pretorius would have a usufruct giving her the right to stay in Villa Verona for the rest of her life. Furthermore, the deceased instructed

that 50% of the cash remaining in his estate be allocated to Ms Pretorius while the other 50% was to be made available to his daughters.

12.

The deceased also made arrangements that on his retirement from his employment, he would purchase an annuity with the pension that he would receive from his employers. He further indicated in his will that on his death 100% of the annuity that he would have purchased should with his pension money be made available to Ms Pretorius for her to enjoy until her death.

13.

The annuity that Mr. Thron had in mind was never purchased because he died before his retirement date. Instead, the amount of R5 354 438.19 became available for distribution by the pension fund.

14.

The Applicant states further that she and the deceased also shared their household expenses equally.

15.

The deceased was a member of the Leza Pension Fund. He had completed a benefit nomination form in which he indicated that his death benefits should be

distributed in proportions of 33% to each of his three beneficiaries, namely the Applicant and his two daughters.

16.

Mr Theron passed away on 21 October 2016.

17.

As stated in the previous paragraphs, after Mr Theron's death, a death benefit in the amount of R5 354 438.19 became available for distribution by Leza Pension Fund.

18.

It appears that after Mr Theron's death Leza Pension Fund was approached to distribute the aforementioned death benefit. Leza Pension Fund was on the verge of allocating the whole amount of **R5 354 438.19** to the Applicant. When Mr Theron's daughters got wind of this they made an application to the pension fund in order to ensure that the distribution as intended by the pension fund is halted as it would have excluded them from benefitting from it.

19.

In their application to the pension fund, the daughters submitted that the pension fund adhere to their father's instructions that the death benefit be distributed equally among them and Ms Pretorius. They further argued that Ms Pretorius was in fact not contractually married to their father. They also brought to the fore that in fact Ms Pretorius, apart from not being married to their father was also living independently from him and was not dependent on him for support, emphasizing, in our view, that no special position should be given to Ms Pretorius.

20.

The daughters argued that regard being had to their argument referred to above, it would be just and equitable that the distribution of the death benefit be effected in accordance with their father's instructions to the pension fund. The board of trustees was amenable to this proposal and indicated their intention to follow it. However, this was vehemently opposed by Ms Pretorius.

21.

Finding themselves in a conundrum that as a result of the objections from both the daughters and Ms Pretorius they could not make a distribution, the board of trustees decided to undertake their own investigations which would enable them to break the lockjam that confronted them.

22.

In order to resolve the difficulty they faced, the board of trustees embarked on an investigation to determine two things: (1) whether any of the nominees was factually dependent on Mr. Theron for maintenance and, if so, what the level of such dependence was, and (2) whether any of the three was a dependant as contemplated in section 1 of the Pension Funds Act.

23.

A report of the investigation, dated 7 December 2018, was produced. It concluded that while Ms Pretorius could provide proof of her dependence on Mr. Theron, none of the daughters was able to provide the requisite proof of dependency. The report further found that the as adults the daughters could not be regarded as the deceased's dependants. Presumably, according to the report, adulthood of a child of a pension fund member disqualifies such a child from being a dependant of a member of a pension fund.

24.

Portions of the report are reproduced below in order to illustrate the reasoning that the board of trustees relied on in order to justify their conclusion that the daughters were ineligible to benefit from the deceased's death benefit.

25.

Regarding the daughters' disqualification on the basis that they were being regarded as disqualified on the basis that they could not provide proof of (factual) dependency the following was stated:

" *Ms Lucille Holmes and Ms De La Rey could not furnish the Board with proof of dependency rather vague assertions that the deceased, in an erratic and ad hoc manner when he saw them. This is borne out in Ms Melanie de La Rey's statement in the complaint of 7 August 2018,"I gave examples of times where he, as most fathers would, gave me money Then had to provide proof of this*" (sic). and further;

"*The Board considered the submission by Ms De la Rey and Ms Lucelle Holmes regarding their level of dependence on the deceased prior to his death. At best this was of an ad hoc nature which they struggled to prove absolutely*".

26.

Regarding the disqualification of the daughters on the basis that they were adults the following was stated in the report:

" *The Board was aware of their unemployment but dismissed that they were dependents in terms of Section 1(b)(111) of dependents, as the deceased cannot have become legally liable for maintenance for his major children, had he not died* " (sic).

27.

The following conclusions arise from the above:

Ms Pretorius was able to prove her dependence on Mr Theron; neither of the two daughters managed to prove their dependence on Mr Theron based on their inability to provide concrete proof of factual support to them by the deceased; at best the daughters could only provide assertions of the deceased giving them money on an erratic and ad hoc basis; although the Board was aware of the fact that the daughters were unemployed, this fact was dismissed as a factor in determining their dependence on their father because as adults, they do not qualify as dependants in terms of the definition of dependant as contemplated in section 1(b) (111) of the Pension Funds Act.

28.

From a logical consideration of the conclusion reached in the report of 1 December 2018, it would have been expected that no allocation would have been made to the daughters, because, as per the report, the daughters failed the test for dependence relied on by the board of trustees; there was no evidence of their factual dependence on the deceased, and due to their status as adults, they could not be regarded as the deceased's dependants in terms of section 1(b)(111) of the Pension Funds Act.

29.

One would have expected that, if the board of trustees had acted consistently with the findings of their investigation report, that the daughters, as a result of their alleged inability to prove factual dependence on Mr. Theron, or dependence on the basis of what a dependant is in terms of section (1)(b)(111)of the Pension Funds Act, they would not have been considered when the distribution of the death benefit was made.

30.

However, and somewhat surprisingly, the board of trustees decided to allocate the death benefit 70% to the Applicant and 15% to each of the daughters.

This would have resonated with their findings and argument that the daughters were neither factually dependent on the deceased for support nor dependants as understood in terms of section 1(b)(111) of the Pension Funds Act.

31.

The allocation that the board of trustees made, namely 70% to the Applicant and 15% each to the two daughters is puzzling in the face of the indicators that the board of trustees relied on relied on to come to the conclusion that the two daughters are not eligible to share in their father's death benefit. The rationale for this puzzling decision is not provided.

32.

In our view, the allocation appears like a cop out by the board of trustees and is indicative of an inability to make decisions based on the law and simple logic. It also smells of a desire to bend over backwards to advantage Ms Pretorius and disadvantage the daughters. We are of the view that the allocation is tantamount to the board acting incompetently in their decision making process. We are also of view that the decision smacks of bias against the daughters in favour of the Applicant.

The board's haste to allocate 100% to one nominee even before ensuring that they had considered all the nominees is suspiciously indicative of bias against other nominees. For the board, at a later stage and without proffering any explanation or justification to allocate 70% of the benefit to the same beneficiary who was favoured when the board first attempted to make its allocation strengthens the suspicion that bias was at the forefront of the board of trustee's decision making process.

LEGAL FRAMEWORK AND DISCUSSION

33.

As discussed above, one of the grounds relied on by the board of trustees to in excluding the daughters from eligibility to benefit from their father's death benefit is that as major children of the deceased, they do not qualify as dependants in terms of section 1(b)(111) of the Pension Funds Act. However, this reasoning is contrary to the provisions of section 1(b) (111) which provides as follows:

" Dependant" in relation to a 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 dependant 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 an illegitimate child;

c) *a person in respect of whom the member would have become legally liable for maintenance, had the member not died..."*

34.

The word "child" in the subsection is not qualified and must be understood in its ordinary meaning. A child in terms of this subsection, given its ordinary meaning, refers to someone's offspring, irrespective of such offspring's age. The conclusion reached in the report of 7 December 2018 that the two daughters are not the deceased's dependants because of their status as majors is obviously wrong. One becomes a dependant of a member of a pension fund by the mere fact that one is such member's child. Age is not a required in order for a child of a pension fund member to qualify as a dependant.

35.

It follows therefore that for the board of trustees' to attempt to exclude the deceased the daughters from sharing on their father's death benefit on the basis that as adult children, they were not the deceased's dependants is based on a wrong legal

premise.

36.

The daughters, apart from the fact that they are dependants of the deceased, are also his nominees. As nominees they do not have to prove that they were depended on the deceased for support. In other words, both Ms Holmes and Ms de la Rey did not have to prove any dependence on Mr. Theron for them to share in the allocation of his death benefit.

See:

A **Marais v Sasol Pension Fund and the Adjudicator (PFA /WC/0025499/2016** paragraph 5.6) where it was held as follows:

"*The deceased's children were his nominated beneficiaries and not financially dependent on him. The board considered their ages and future earning potential and resolved to allocate them a portion of the death benefit. However, the deceased's children were majors and his nominees. This is a case in point where a board has misdirected its investigation efforts and seeks to prejudice nominees by not limiting the extent of a beneficiary not nominated by the deceased to their actual loss of maintenance.* "and

Damoense v Absa Pension Fund and the Adjudicator (PFA /NC/00042103/2018:

.....the board should have considered the complaint on the basis that she was a nominee. The complainant did not have to prove that she was financially dependent on the deceased for her to be considered; the mere status of being a nominee compelled the fund to consider her situation together with the totality of other relevant factors. "

37.

We were also referred to the matter of **Makhubela v Rand Water Provident Fund and Another [2018] JOL 39853 (PFA)** where the facts were that a major child who had not been nominated need not be considered in the allocation of a deceased's death benefit where a deceased had appointed nominees.

38.

Our view is that the above case is on all fours with the above cases. If a child of a member of a pension fund has not been nominated by the member, he will of course not be eligible to share in the allocation of the deceased's death benefit where there are nominees, unless he can demonstrate that he has suffered damages in respect of his maintenance. In *casu* the daughters were nominees and as such qualified for allocation of the death benefit on this ground also.

39.

In the present proceedings the daughters are not only the children of the deceased and therefore his dependants, they have also been nominated by him to share in his death benefit.

40.

From the preceding it is clear that the board of trustees misdirected itself in dealing with the matter. The first mistake resulted when the board found that the two daughters were not dependants of Mr. Theron because of their status as adults. The other mistake eventuated when the board found that the two daughters could not prove their level of dependence on the deceased on the basis that they could not prove factual dependence on Mr. Theron. This latter finding was made even though the two daughters had been nominated as beneficiaries by the deceased.

41.

The actions of the board in finding that the two daughters were not eligible to share in the allocation of their father's death benefit but proceeding to make allocations in

their favour cannot be explained on any rational basis. At best the conclusion can be made that the board did not take time to consider the consequences of their actions. At worst the actions of the board amount to extreme incompetence and bias against the daughters. The incompetence arises, firstly, from the report's misstatements of the law, and, secondly, from not acting in accordance with the findings of their own investigation report. If the board of trustees was acting in terms of the findings of their investigation report which stated that the daughters were not eligible to share in the allocation, based both on their purported disqualification on the basis of their being adults and failure to prove factual dependence, a logical result would have been for them to allocate 100% of the death benefit to the Applicant and nothing to the daughters(which would have been wrong).As indicated above, the board decided to make an unexplained allocation of 70% and 15% of the death benefit to the Applicant and the daughters respectively.

42.

The Pension Funds Adjudicator, when she reversed the allocation made by the board relied on what she regarded as the board's failure to conduct a proper investi

gation in terms of section 37C of the Pension Funds Act. The conclusion of the Pension Funds Adjudicator that the board failed to conduct a proper investigation in terms of section 37C of the Pension Funds Act cannot be faulted. The board of trustees based its decision on wrong legal conclusions.

43.

The question whether the Pension Funds Adjudicator had the power, on finding that the board of trustees did not conduct a proper investigation enabling them to make the allocations of 70 % and 15% respectively to the Applicant and the daughters is to be answered with respect to the powers that the Pension Funds Adjudicator possess.

44.

Section 30E(1)(a) of the Pension Funds Act empowers the Pension Funds Adjudicator, after investigating a complaint, to make any order which a court of law may make. The section provides:

30E *Disposal of Complaints*

"(1). In order to achieve his or her object, the Adjudicator _

(a) shall, subject to subparagraph (b) investigate any complaint and may make the order which any court of law may make";

(b) ....."

45.

A high court has the power to reverse the decision of a decision maker and substitute it with its own decision where the decision of the decision maker is impugned, among other things, by bias or incompetence. The rational for this power is because it would be unfair to subject a party to the decision of the person who has displayed incompetence or bias which led to the vitiated decision in the first place.

46.

In this application the complainant which was brought for the attention of the Pension Funds Adjudicator is that board of trustees was not rational, in the manner in which it made its allocation. Irrationally in decision making by a decision maker is a ground for a court to intervene and substitute the decision by a decision –maker with its own. Irrationally combined with bias and incompetence in decision making should entitle the Pension Funds Adjudicator to substitute the impugned decision with her own.

47.

In **Trencon Construction (Pty) Ltd v Industrial Corporation [2915](5)SA 245(CC)** at paragraph 54 the Constitutional Court stated as follows :

"*If the administrator is found to have been biased or grossly incompetent it may be unfair to ask a party to resubmit itself to the administrator's jurisdiction. In those instances bias or incompetence would weigh heavily in favour of a substitution order. However, having regard to the notion of fairness, a court may still substitute even where there is no instance of bias or incompetence.* "

48.

The above Constitutional Court decision, read with section 30E (1)(a) of the Pension Funds Act, gives the Pension Funds Adjudicator the power to intervene and substitute the decision of the board of trustees with her own where, as in this case, there is a complaint which the Pension Funds Adjudicator investigated and found legitimate .

49.

It is our view, regard being had to the manner in which the board reached its conclusions and made the distribution of the death benefits, there is sufficient justification to conclude that the board was both incompetent and biased against the daughters. The allocations of 70% to the Applicant and 15% each to the daughters is unexplained and is thus also irrational.

50.

The decision of the board of trustees is in our view, indicative of a failure to make a proper investigation in terms section 37C of the Pension Funds Act. This failure to make a proper investigation is the result of the board of trustees going out of its way to advantage the Applicant at all costs and to disadvantage the daughters. The board of trustees at first tried to allocate 100% of the death benefit to the Applicant without regard to the interests of the two daughters. Later, and faced with an objection from the daughters, tried to distribute 70% to the Applicant and a puny 15 percent each to the daughters. In both situations no plausible explanation was provided for the decisions. It is our view that the above is indicative of a desire to favour the Applicant and disadvantage the daughters.

CONCLUSION

51.

Both the bias and incompetence displayed by the board of trustees entitle the Pension Funds Adjudicator ,after making her own investigations, to intervene and substitute the board's decision with her own. In our view the Pension Funds Adjudicator, exercising a power which she has in terms of section 30E (1)(a) of the Pension Funds Act, which power is akin to that of a court, was correct to intervene and reverse the impugned decision of the board of trustees and replace it with her own.

52.

It would be in the interest of justice and would have been unfair to the daughters to remit the application to the board of trustees. The board of trustees had already shown themselves to be egregiously incompetent, biased and irrational in the manner in which they dealt with their statutory duties. It is expected of pension fund trustees to act without bias against any the party. Furthermore, pension funds have to be able to interpret the law so that justice can be done to all the parties in respect of whom they have to make decisions. The board of trustees failed on every level on which they based their decision in this matter, thus opening the door for the Pension Funds Adjudicator to intervene.

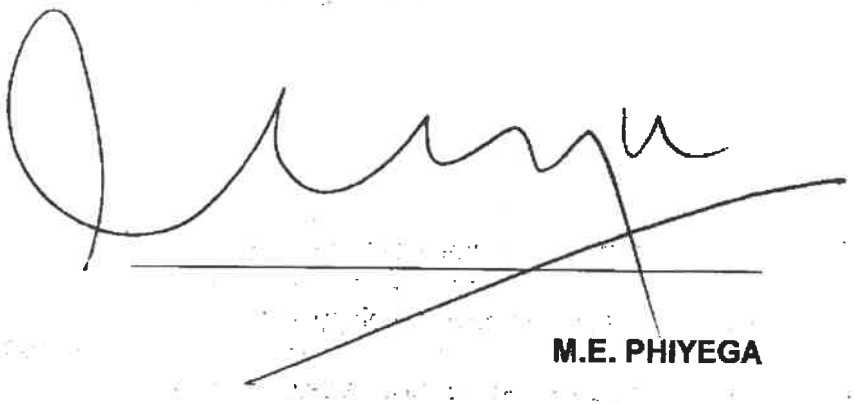
ORDER

53.

We make the following order:

1. The application is dismissed
2. The is no order as to costs

DATED AT PRETORIA ON THE DAY OF 21 JANUARY 2020



M.E. PHIYEGA

ON BEHALF OF THE PANEL