

**THE FINANCIAL SERVICES TRIBUNAL**

Case No: **PFA48/2019**

In the matter between:

**KREAN NAIDOO**

Applicant

and

**COCA COLA SHANDUKA BEVERAGE PROVIDENT FUND**

First Respondent

**ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD**

Second Respondent

**PENSION FUNDS ADJUDICATOR**

Third Respondent

Tribunal: H Kooverjie (chair), A Jaffer and G Madlanga

Hearing: 30 August 2019

Decision: 23 September 2019

Summary: Whether the Fund exercised its discretion as envisaged in terms of section 37C(1)(c) of the Pension Funds Act.

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**DECISION**

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1. This application for reconsideration is against the determination of the Pension Funds Adjudicator ("**PFA**"). Mr Naidoo challenged the determination of the PFA which recommended that his late wife's death benefit be placed in her estate.

2. Mrs Naidoo, the deceased, was a member of the Coca Cola Shanduka Beverage Provident Fund ("**The Fund**"), until she passed away on 24 June 2016. At the time of her death, the parties were still married to each other.
3. The death benefit amounted to R3,829,618.42, and would become due to her beneficiary/ies in terms of section 37C of the Pension Funds Act ("**The Act**").
4. Mr Naidoo being aggrieved with the Board's decision to pay the death benefit into his late wife's estate's account lodged a complaint with the PFA. Mr Naidoo's primary contention remains that he is by virtue of the Act legally entitled to the death benefit.
5. It was not disputed that the deceased passed away due to unnatural causes and the matter was then placed under investigation by the South African Police ("**SAPS**"). For the purposes of this hearing nothing concrete has been placed before us concerning the said investigation. We are therefore confined to the evidence contained in the record. Mr Naidoo submitted that the evidence acquired in the police investigation is crucial to this matter. He had despite numerous follow ups been unsuccessful in receiving information from the police concerning the said investigation.
6. Mr Naidoo submitted that even though he was not financially dependent on his wife, he was in terms of the Act still a "spouse" and thereby entitled to her death benefit. He made reference to the definition of "dependant" in terms of section (b(ii)).
7. The issue before this Tribunal is whether the decision of the Fund to allocate of

the deceased death benefit into the estate (late) account is justified?

8. It is trite that the distribution of benefits payable on the death of a member of a pension fund is regulated by section 37C of the Pension Funds Act. This section was introduced primarily to ensure that death benefits are paid in accordance with the object of the Act and government policy. Its purpose is to make sure that the dependents of the deceased member are not left destitute by the member's death. Accordingly section 37C overrides the freedom of testation, and the board of management is not bound by the wishes of the deceased even if expressed in a nomination form. It is only one of the factors that need is considered for the distribution and allocation of the death benefit.
9. Therefore the Board of the Fund (Fund) is required to identify the beneficiaries of a deceased member, and exercise its discretionary powers on the proportion and manner of distributing the proceeds of the death benefit.
10. The Fund submitted that in exercising its discretion it was required to consider an equitable distribution. The Fund was required to give proper consideration to various relevant factors. In exercising its discretion therefore section 37C should not be applied rigidly. The personal circumstances of the beneficiary had to be considered as well.
11. The relevant definition in the Act of a "dependent" is defined as follows:

***"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 dependent on the member for maintenance;*

*(ii) Is the spouse of the member;*

*(iii) Is a child of the member, including a posthumous child and 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.”*

12. The Fund was guided by various factors when it made its decision. In this regard we were referred to **Sithole v ICS Provident Fund and Another 2004 BPLR 430 PFA at paragraph 24.** It was submitted that the following was considered namely:

- age of the dependent;
- the relationship with the deceased;
- the extent of dependency on the deceased;
- the wishes of the deceased;
- future earning potential/capacity of the beneficiaries.

13. The Fund advised that by virtue of section 37C(1)(c) of the Act it had exercised its discretion correctly it was entitled to pay the death benefit into the deceased's estate. In this instance the deceased had no dependents, had not nominated a beneficiary and the Fund was not aware of any dependants within twelve months of the death of the deceased.

14. We note that the Office of the PFA accepted the Fund's reasoning in applying

section 37C, more particularly section 37(1)(c) of the Act.

15. The Fund took into account in particular the following namely that:
  - the deceased and Mr Naidoo were estranged at the time of her death;
  - divorce proceedings had already commenced;
  - Mr Naidoo was not financially dependent on the deceased;
  - the deceased did not have any other dependants or nominees;
  - the deceased did not complete a beneficiary nomination form.
  
16. The PFA held the view that the Fund performed a reasonable investigation, followed the proper process, and furthermore exercised its discretion by considering all the relevant factors. On this basis therefore the PFA had no grounds interfere with the Fund's decision and therefore dismissed the complaint.
  
17. We however find that the PFA did not probe into the below-mentioned factor, which could have had an impact on the Fund's decision.
  
18. The PFA's determination was dated 6 April 2019. The complaint was lodged with the PFA on 7 September 2018. Subsequent to the complaint but before the PFA made its decision on 19 November 2018, Mr Naidoo responded to the Fund's decision. In particular, we quote:

***“that the response from the Fund wrongly contains several important factual inaccuracies that materially impact the submissions and the***

***request and the Fund's response which require correction...***"

19. Mr Naidoo submitted that although there was a signed agreement to annul the marriage with the deceased, the parties subsequently changed their minds after they had a telephonic discussion on 3 June 2016. At the time the deceased informed Mr Naidoo that she did not wish to continue with the divorce proceedings and would instruct her attorneys accordingly. Mr Naidoo also informed the deceased that he too did not wish to follow through with the divorce.
20. It was then that on 4 June 2016 they met in Sunninghill. He further submitted that the divorce proceedings with the deceased and himself was initiated due to family interference and not because they had an estranged marriage.<sup>1</sup>
21. Mr Naidoo further persisted with the submission that the evidence to the investigation would support the contentions raised. Mr Naidoo highlighted to the Tribunal that this factor was ignored. There exists evidence in the form of telephonic records that the parties were reconciling.
22. This aspect was not dealt with in the PFA's determination. Having considered the record and the determination, we note that the PFA did not deal with this correspondence and neither was this submitted to the Fund for further investigation.
23. During the submissions, the Fund particularly highlighted the fact that the main

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<sup>1</sup> Page 36 of the record

reason for placing the death benefit into the estate of the deceased, was due to the fact that Mr Naidoo was not financially dependent on the deceased. The PFA upheld such findings.

24. Mr Naidoo argued that a strict interpretation to the relevant provision of the PFA is necessary. If one has regard to the definition of “dependant”, he is entitled to the death benefit by virtue of him being a “spouse” of the deceased.

25. We note the definition of the word “spouse”, which means that:

***“a person who is the permanent life partner or spouse or civil unions partner of a member...”***

26. The Act now recognises three classes of spouses, namely permanent life partners, spouses and civil union partners. It is also evident that for a spouse to be recognised for the purposes of the Act, it must be proved that he or she is a spouse of a deceased member in accordance with the Marriage Act 68 of 1961, the Recognition of Customary Marriages Act 120 of 1998 or the tenets of a religion, or a civil union partner in terms of the Civil Union Act 17 of 2006.

27. In terms of section 37C(1), there is a duty on the Fund to take all reasonable steps to trace and locate the dependants of the deceased member. What constitutes a reasonable investigation by the Fund will differ from case to case. The mere fact that a person qualifies as a dependant does not entitle him to the entire benefit; it only entitles him to be considered by the board in the distribution phase.

28. Where the deceased was legally liable to maintain a person, such person will be regarded as a dependant. The duty to maintain may arise as a result of a legal obligation, the common law or a statutory obligation. Dependants in respect of whom the member is legally for maintenance include a spouse and children who rely on the member for the necessities of life.
29. There always exists a reciprocal duty of support between spouses as a direct consequence of marriage. Unlike in the case of a maintenance claim by a parent against children, a spouse's claim is not restricted to the bare necessities of life. The duty of support can continue after the marriage has ended in divorce.
30. We hold the view that the PFA had not fully investigated the circumstances regarding the said allegation by Mr Naidoo that the parties were to reconcile. Whether or not there is any merit on this aspect, this Tribunal cannot decide. The PFA should have considered this factor or could have referred it back to the Fund to consider.
31. The duty to trace and identify dependant's rests on the Fund. The Fund should take all reasonable steps to identify the dependants. There is no duty on the dependant to come formal and prove that he is a dependant.<sup>2</sup>
32. It may have a material bearing in the matter. *Ex facie* Mr Naidoo is still a "spouse". The Act makes provision for a spouse to benefit from the death benefit.

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<sup>2</sup> Mthiyane v Fedsure Life Assurance Ltd and Others 2 (2002) 5 BLPR 3640 (PFA)



33. The reasons *inter alia* upon which the Fund claimed to have made an equitable distribution, was based on factors set out above. We highlight the following that:

- Mr Naidoo was not financially dependent on the deceased;
- The parties were estranged and had already instituted divorce proceedings, and which proceedings would have been finalised during July 2016 (approximately a month before she died).
- The fact that the deceased bequeathed her entire estate to her parents in her will. (At this juncture it is necessary to note that this was made way back in 2010, long before the parties were estranged). However the Will was challenged in court where it was found that the Will was valid.
- The Fund at the time also noted that there was no written evidence that the deceased intended to reverse her decision as alleged by the complainant.

34. As alluded to above in exercising its discretion we are mindful of the fact that even though Mr Naidoo is a spouse, he is not automatically entitled to a percentage of the death benefit/full benefit. The starting point should have been to acknowledge that Mr Naidoo was a legal dependant. The Fund still has a discretion to determine whether Mr Naidoo was entitled to the benefits. The object of the Act is to ensure that dependants are not left destitute.

35. We therefore find that the matter be remitted to the Office of the Pension Fund Adjudicator for reconsideration.

36. The following order is therefore made:

- (1) this matter is remitted to the Pension Fund Adjudicator to reconsider its decision.

SIGNED at **PRETORIA** on this **23<sup>rd</sup>** day of **SEPTEMBER 2019** on behalf of the Panel.

A handwritten signature in blue ink, appearing to read 'H. Koooverjie', written in a cursive style.

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**ADV H KOOVERJIE SC**

With the Panel consisting also of:

G Madlanga

A Jaffer