

THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: PFA47/2021

In the matter between

MOMENTUM RETIREMENT ANNUITY FUND

APPLICANT

and

LH BOTHA

1st respondent

EV BOTHA

2nd respondent

MS JABLOWSKI

3rd respondent

Q GROESBEEK

4th respondent

T BOTHA

5th respondent

THE PENSION FUNDS ADJUDICATOR

6th respondent

A fund is generally not a person aggrieved by a decision of the PFA instructing the Fund to reconsider an allocation under sec 37C of the Pension Funds Act.

DECISION

[1] This is an application for the reconsideration of a decision of the PFA relating to the distribution of a death benefit in terms of sec 37C of the Pension Funds Act 24 of 1956 by the Fund following the death of its member, the late Mr D Botha. The complainant was Mrs LH Botha, his widow, and the essence of the complaint was that that she was dissatisfied with the decision of the Fund to allocate the benefit between her, his ex-wife (second respondent), and his daughters (third, fourth and fifth

respondents) from his first marriage on an equal basis. She holds the unedifying the view that she should be entitled to all because of her nomination.

[2] The case began as a difference of opinion between the Fund and PFA of whether sect 37C(1)(a) or sec 37C(1)(bA) of the Act applied to the facts of the case. Because the Fund initially applied the former, the PFA set its allocation aside and ordered the Fund to reconsider and supply reasons for its new allocation.

[3] The Fund disagreed with the PFA's reasoning, and this led to the PFA to conclude that Fund had ignored her decision, which she set aside and referred the matter back again to the Fund. The Fund applied for reconsideration of this decision. The parties waived their rights to a formal hearing of this application which is under sec 230 of the Financial Sector Regulation Act 9 of 2017.

[4] That the Fund ignored her first decision, with respect to the PFA, is incorrect and unfair to the Fund. I quote part of the Fund's response:

The Fund's response: Paragraph 5.10 of the determination refers to the Deceased's ex-spouse and not to his children who are the second to fourth respondents. We confirm that the Trustees were satisfied that the Deceased's ex-spouse and his children (second to fourth respondents) qualified as dependants as defined in section 1 of the Act. The Deputy Adjudicator concurred with the Board on this at paragraphs 5.6 to 5.8 of the determination.

With regards to the matter of an equitable distribution, we confirm that the allocation of a portion of the benefit to the Deceased's children is based on the following:

They qualify as dependants under the definition of "dependant" in section 1(1) of the Pension Funds Act;

Although they were not financially dependent on him, they are struggling financially as confirmed in the emails which they sent directly to the OPFA;

The Deceased's ex-spouse stood to receive R6 011 783.81 from the Deceased's estate;

The Complainant, although nominated by the Deceased to receive the entire death benefit in the amount of R935 587.24, stood to receive R30 253 855.70 from the Deceased's estate, and

In the matters of Momentum Retirement Annuity Fund vs VR KRZUS and Another (PFA53/2019) (20201 Financial Services Tribunal (09 March 2020)) and Kelly & Anita Wilkinson vs Pension Funds Adjudicator & Others (PFA73/2019) (20201 Financial Services Tribunal (10 March 2020)), the Financial Services Tribunal found that the non-financially dependent children of a deceased member qualify as dependants and should not be excluded from the death benefit on the basis of their lack of evidence of financial dependency.

4.4. Question: Whether, in applying the basket of factors set out in Sithole, the first respondent took into account the wishes of the deceased? If so, explain the manner in which it did so.

The Fund's response: The Board of Trustees of the Fund considered the wishes of the Deceased which are not limited to what is contained in the nomination of beneficiary form but can be further extrapolated from his will. The Deceased nominated the Complainant to receive the entire death benefit in terms of the beneficiary nomination form. He also nominated his ex-spouse and his children, together with the Complainant, to receive portions of his estate in terms of his will. The Complainant received the lion's share of the Deceased's estate. Given that the Complainant was nominated to receive the largest part of the Deceased's estate and considering what his ex-spouse and children would receive, the Trustees decided to distribute the death benefit in equal portions to all the identified dependants. The fact that the Trustees allocated a portion of the death benefit to the Complainant indicates that her nomination to receive the death benefit was taken into account by the Trustees as her portion of the estate is substantially large and substantially larger than what the other dependants will receive from the estate.

[3] The fact that the second allocation was the same is neither here nor there. The application of either sect 37C(1)(a) or sec 37C(1)(bA) could lead to the same result. The question the PFA had to decide was whether the Fund had failed to exercise its discretion properly and legally. If the PFA believes that the discretion was wrongly exercised for a second time, the PFA must exercise the discretion. She has all the facts. A pin-pong match is not what the Act expects.

[4] One can fairly ask what will happen if a different allocation is made. Th ex-wife will not be satisfied unless she receives all as appears from the heads of argument filed on her behalf. Her approach is and was that her nomination trumps all - something that is clearly incorrect.

[5] It is inconceivable that in a case such as this all the identified dependants should not share in the benefit. The percentages are a matter for discretion.

[6] The Fund stated:

The Complainant alleges that the Board of Trustees only considered her nomination after the fact. This cannot be true as the Board's report of 3 July 2020 to the Complainant and the OPFA, at paragraph 10, clearly states that the Trustees sought to make an equitable distribution of the benefit and that the Trustees considered the factors set out in the Sithole case. The said factors include the wishes of the deceased member which are found in his beneficiary nomination form and in his will.

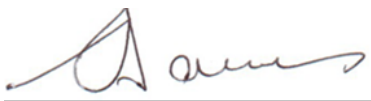
[7] This requires another point to be made. The courts have repeatedly held in the context of the exercise of discretion that the fact that a factor is not mentioned does not mean that it was not considered and the fact that it is mentioned does not necessarily mean that it was appropriately considered.

[8] The problem though is that the Fund is not a person aggrieved as required by sec 230 of the Financial Sector Regulation Act 9 of 2017. The misunderstanding is not only that of the Fund but shared by the PFA and the first respondent and not appreciated in some Tribunal decisions. The decision

affects the Fund in the sense that it must reconsider the matter and exercise its discretion again, but it has no legal interest in the allocation. Reference is made to the cases of Hollenbach¹, Aon,² and Fundsatwork (para 6).³ It is unnecessary to restate the legal principles.

Order: The application is dismissed.

Signed on behalf of the Tribunal on 16 July 2021.

A handwritten signature in dark ink, appearing to read 'LTC Harms', is written on a white background.

LTC Harms (deputy chair)

¹ Hollenbach and FSCA: <https://www.fsca.co.za/Enforcement-Matters/Publications%20and%20Documents/Decision%20-%20M%20Hollenbach%20and%20FSCA.pdf>.

² [AON SA v FSCA and Others](https://www.fsca.co.za/Enforcement-Matters/Publications%20and%20Documents/Decision%20-%20AON%20SA%20v%20FSCA%20and%20Others.pdf) <https://www.fsca.co.za/Enforcement-Matters/Publications%20and%20Documents/Decision%20-%20AON%20SA%20v%20FSCA%20and%20Others.pdf>.

³ [Fundsatwork Umbrella Pension Fund and E E Ngobeni and PFA](https://www.fsca.co.za/Enforcement-Matters/Publications%20and%20Documents/Decision%20-%20Fundsatwork%20Umbrella%20Pension%20Fund%20and%20E%20E%20Ngobeni%20and%20PFA.pdf) <https://www.fsca.co.za/Enforcement-Matters/Publications%20and%20Documents/Decision%20-%20Fundsatwork%20Umbrella%20Pension%20Fund%20and%20E%20E%20Ngobeni%20and%20PFA.pdf>.