



In the matter between:

**THE COMPLAINANT**

and

**THE EMPLOYER FUND**

**Respondent**

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**STATEMENT OF DETERMINATION OF COMPLAINT GIVEN IN TERMS OF SECTIONS 74 AND 75 OF THE FINANCIAL SERVICES REGULATORY AUTHORITY ACT NO. 2 OF 2010 (THE FSRA ACT)**

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**INTRODUCTION**

1. This complaint relates to the death benefits of the late Mrs. X ("the Deceased"). The Deceased was a member of the Respondent, the Employer Fund ("the Fund"). The Respondent is an authorised financial services provider in terms of the Financial Services Regulatory Authority Act, 2010 (the "FSRA Act"). The Ombudsman has jurisdiction to hear this matter in terms of Section 74 & 75 of the FSRA Act.
2. After her death, the Respondent carried out its investigations. From the submissions, the Respondent resolved to distribute the death benefits in the manner set out below.

<b>NAME AND AGE</b>	<b>RELATION</b>	<b>SHARE (%)</b>	<b>AMOUNT (E)</b>
1. Son 1 (36)	Son	22	451 909.12
2. Son 2 (26)	Son	37	760 028.97
3. The Complainant (63)	Husband	11	225 954.56
4. Son1 child (10)	Grandchild	05	102 706.62
5. Son 1 child (07)	Grandchild	05	102 706.62
6. Son 2 child (03)	Grandchild	05	102 706.62
7. Daughter-in-Law (32)	Daughter-in-Law	05	102 706.62
8. Deceased's sister (40)	Sister	10	205 413.22
<b>TOTAL</b>			<b>2 054 132.35</b>

**THE COMPLAINT /MAIN FACTS**

3. On 18 September 2020, the Complainant submitted a complaint. The complaint had several supporting documents, including the following:

Document	Dated
<b>Annexure 1 – Distribution of Death Benefits</b>	Annexure 1
<b>Complaint to the Respondent</b>	19 August 2020
<b>Letter retracting first letter or complaint</b>	20 August 2020
<b>Letter of Complaint</b>	1 September 2020
<b>Response from Fund</b>	14 September 2020
<b>Letter from Complainant to Respondent</b>	15 September 2020

- 3.1. On 18 September 2020, the Complainant submitted a complaint to the Office of the Ombudsman.
- 3.2. This complaint relates to the distribution of the death benefit.
- 3.3. The Complainant is not happy with the distribution of the benefits that saw him getting a lesser amount as he thought was legally entitled.
- 3.4. He is further not happy about the Board's failure to disclose the interviewed persons.
- 3.5. The Complainant is also not happy about the appointment of one of his sons as guardian over the minor children.
- 3.6. The Complainant has therefore requested the Ombudsman to investigate and determine whether the distribution was fair and in accordance with the Retirement Funds Act, 2005. He has also requested the Ombudsman to investigate and determine whether the interview process conducted by the Respondent was fair and those interviewed by the Respondent's Board provided adequate information to enable the Respondent to reach a fair decision.

#### **RESPONSE**

4. On 21 October 2020, the Respondent submitted a response to the complaint. The response had several supporting documents, including the following:

Document	Dated
<b>Complaint to the Respondent</b>	19 August 2020
<b>Letter retracting first letter or complaint</b>	20 August 2020
<b>Letter of Complaint</b>	1 September 2020
<b>Response from Fund</b>	14 September 2020
<b>Letter from Complainant to Respondent</b>	15 September 2020

The Respondent in its response on 21 of October 2020, explained as follows:

- 4.1. The award allocated to the Complainant was a fair share based on the notion of determining dependants and their levels of dependence, in line with the Act:
- 4.2. The Board lacks the authority to involve itself in family issues and/or removing any person as a surviving head of his or her family:
- 4.3. A retirement fund benefit is not equivalent or like an estate and therefore there are no executors:
- 4.4. That a beneficiary meeting was held and attempts to invite the Complainant were made:
- 4.5. The fund denies that distribution was made under the influence of external or improper forces:

- 4.6. The Board (Respondent) conducted the beneficiary tracing exercise and interviewed persons whom it considered relevant and necessary to assist it in the determination of the deceased member's dependants as well as their level of dependency:
- 4.7. The Board (Respondent) maintains strict confidentiality and was unable to disclose the individuals who were part of the beneficiary tracing and/or death investigation exercise:
- 4.8. Lastly, that the Board (Respondent) believes that the amount allocated to Complainant and all dependants in the matter is commensurate with their level of dependency.

### **COMPLAINANT'S REPLY**

5. The Complainant expressed his dissatisfaction at the response and highlighted that the response was vague as other correspondences previously exchanged. The reply is summarised as below:
  - 5.1.1. The Respondent has dismally failed to explain how its decision was arrived at, i.e., the factors that were considered relevant and those that were irrelevant as well as the policy that was adhered to:
  - 5.1.2. The Respondent keeps using blanket terms like fair share, level of dependency, judiciously exercised discretion, beneficiary tracing exercise, which has no meaning in the absence of the facts on what was established from the interviews:
  - 5.1.3. The Respondent has also failed to explain why and how they came to the decision to appoint his elder son as guardian, yet he was still alive as a father and was the rightful person vested with the custody of the child:
  - 5.1.4. The Respondent has failed to explain how they arrived at the decision to give him such a very limited allocation, notwithstanding that he is a legal dependant by virtue of being the surviving spouse.

### **DETERMINATION AND THE REASONS THEREOF**

6. The Ombudsman is vested with the role to determine whether or not the Respondent acted fairly and equitably in determining the distribution of the death benefit and whether such distribution was in terms of the law.

### **COMMON CAUSE AND CONTENTIOUS ISSUES**

7. From the above submissions it is clear that there are common cause facts and contentious facts. It is not disputed that the deceased was a member of the Respondent and whether the beneficiaries are entitled to receive a benefit. Further, the beneficiaries are all entitled to receive a benefit. The following issues are in contest:
  - 7.1. Whether the Board (of the Respondent) acted within the confines of the law in distributing the death benefits to the beneficiaries:
  - 7.2. Whether the Board (of the Respondent) acted within the law in not revealing to him all those who were interviewed during the beneficiary tracing exercise:
  - 7.3. Whether the appointment of Son 1 as a guardian to the minor children by the Board is in line with the law and does not amount to him being removed as the head of the family and handler of his family affairs.

### **APPLICABLE LAW**

8. By its nature, the matter at hand is a retirement fund matter or a death benefit and is thus governed by the Retirement Funds Act, 2005. Death benefits are governed by *s 33* of the Act. The section regulates the payment of any benefit payable upon the death of a member of a retirement

fund and further places the responsibility on the trustees to distribute the death benefit in a manner they deem equitable.

### **Management Board in Distribution of Death Benefits**

9. *S33(2)* of the Act provides that, "...the benefit shall be paid to such dependant or dependants in a manner that is deemed equitable, by the management board." The Act places upon the management board or trustees the duty to distribute death benefits and they are required to do such in an equitable manner. The management board are given the discretion in terms of the Law to distribute death benefits. This duty must be done in a manner that is fair and equitable. An equitable distribution can be defined as follows as a fair and impartial distribution of the death benefits, considering all relevant personal circumstances of all the beneficiaries.

10. One should note from the above definition that the distribution of the death benefits must be fair and impartial and must consider all relevant personal circumstances of the beneficiaries. It is upon the board to consider all personal circumstances of the beneficiaries as they distribute the death benefits. *S10* of the Act places the fiduciary responsibility upon the management board. The act states that,

"The management board shall ensure that the interest of members is protected at all times by:

- a) Acting with care, diligence and good faith;
- b) Avoiding conflict of interest;
- c) Acting impartially."

11. Now that it has been established that the duty of trustees is to distribute the death benefits, the Act in *s33* provides that in doing so, trustees have the following duties:

1. "Identify the beneficiaries of the member. Tracing/locating the dependants:
2. Distribute the benefit equitably amongst beneficiaries:
3. Determine an appropriate mode of payment."

12. It is very important for trustees to perform these main duties as they distribute the benefit. They should identify the beneficiaries and upon locating or tracing these beneficiaries they must distribute the benefit equitably and fairly amongst the rightful beneficiaries. They must then ensure that the equitable benefit is paid to the beneficiaries in an appropriate mode. In terms of the law, the management board has a discretion to act in the manner stipulated.

### **APPLICATION OF THE LAW TO THE FACTS**

13. In the present case, it should be noted that the management board did identify the beneficiaries of the member and further distributed the benefit amongst the beneficiaries, as reflected in the resolution of the Board, marked annexure 1 in the complaint form. The management board then determined the appropriate mode of payment. This is evident from the resolution, where the minor children's benefits were said to have been earmarked for deposit to the beneficiary fund and the adults were paid. In this complaint there is no contest concerning the beneficiaries, which means the beneficiaries are the rightful ones.

In terms of the guidelines, "s33 carries a social function of ensuring that those who were dependant on the deceased member are not left destitute without any support and thus

becoming a burden on the State.” The emphasis here is placed on the equity, as the dependants with deeper financial needs and those that were solely dependent on the deceased should not be gravely disadvantaged, by the demise of the of the member.

14. The management board in this present case identified the dependants of the deceased member and allocated their benefits and this does not place them in a disadvantaged position, following the death of the member. At least they have a fall back, even though it shall never be enough. The management board has the discretion, and such was exercised judiciously. The management board acted within the powers allocated to it, in identifying the dependants and allocating the benefits. The management board further complied with the principles of natural justice in that it distributed the benefit to all dependants that were known to them, following the investigations that were conducted.

### **Who Should Benefit?**

15. Now that we have established that the law places the duty of distribution of a deceased members’ benefit to trustees, it is crucial that we investigate who should benefit. In terms of the law dependants and nominees should benefit from the distribution. A dependant is defined in terms of s2 which states that a dependant is, “a person in respect of whom the member is legally liable for maintenance...”. The Act further classifies dependants into legal and factual dependants. Factual dependants being, “a person in respect of whom the member is not legally liable for maintenance if such person:

- (i) Was in the opinion of the management board dependant on the member for maintenance;
- (iv) A person in respect of whom the member would have become legally liable for maintenance, had the member not died.” The Ombudsman will not in this determination deal with dependants and nominees in detail as such a matter is not contentious.

### **Factors for Consideration during Distribution**

16. The Management Board in exercising its discretion should ensure that it acts within the confines of the law and constitutive rules of the Respondent. They should not just exercise their discretion as they please. The following factors should be considered by the management board as they exercise their discretion:

- 16.1. The ages of the dependants:
- 16.2. The dependant’s financial standing:
- 16.3. The dependant’s level of dependency:
- 16.4. The wishes of the deceased member:
- 16.5. The amount available for distribution:
- 16.6. Future earning potential and capacity.

17. These factors guide the management board in determining the measure of the benefit to be given to a dependant or nominee. The management board in distributing the benefit should consider how old is the beneficiary, because the younger the beneficiary the greater the level of dependency to the deceased member and such should be compensated in monetary terms.

Further, trustees should also ascertain whether the member had submitted a nomination form, which acts as a guide to trustees as they distribute the benefit.

18. In issuing his determination *Ngalwana V.* in the matter between *Sakildien v. Cape Municipal Pension Fund WE/6642/05*, stated in affirmation the factors that the management board should consider. He stated as follows:

“Among the factors that have been regarded as relevant are the respective ages of the dependants, the extent of their dependency, their relationship with the deceased, the financial circumstances of the dependants, their future earning capacity or potential, the wishes of the deceased and the amount that is available for distribution.”

19. In affirming the above determination *Lukhaimane M.* in the matter between *Hlatshwayo v. ISCOR Umbrella Provident Fund & Alexander Forbes Financial Services/KN/00009400/2014*, stated that:

“When making an equitable distribution amongst dependants of the deceased, the board of management has to consider the following factors:

- The age of the dependants
- The relationship with the deceased;
- The extent of dependency;
- The wishes of the deceased placed either in the nomination and/or his last will; and
- Financial affairs of the dependants including their future earning capacity potential.”

20. Distribution of death benefits in the retirement space is governed by s33 of the Act. S33 (1) of the Act states that,

“... any benefit payable by such a fund in respect of a deceased member...shall not form part of the assets in the estate of such a member but shall be dealt with as in this section.”

21. The Act excludes death benefits from the deceased members’ estate and grants the management board the authority and discretion to deal in such issues. Therefore, succession law does not apply in this regard. In affirming the above position of our law, *Ngalwana* stated that:

“it must be borne in mind that because section 37C(1) protects dependency over the freedom of testation....”

22. It should be noted that in our law a similar section is section 33 of the Act. This then makes South African law expositions and interpretations highly persuasive in our jurisdiction.

23. Besides death benefits, the estate of a deceased person is dealt with under the law of succession. The estate, upon death of a person, is dealt with under the office of the Master of High Court. The Master will in fact be guided by whether the member had a will or not, in distributing the deceased’s estate.

24. From the above discussion of the facts and the law, one should conclude that the Management Board did exercise its discretion fairly and equitably. They identified the beneficiaries, conducted the necessary tracings and investigations. In issuing a determination, Lukhaimane M. in the matter of *Mongale v. Metropolitan Retirement Annuity Fund*, [2010] 2 BPLR 192, stated that:

“It is only in cases where it (management board) has exercised its powers unreasonably and improperly or unduly fettered the exercise thereof, that its decision can be reviewed.”

It should be noted from the above determination that for a decision of the management board to be reviewed they must have exercised the powers in an unreasonable, improper and unduly manner.

25. They further did the allocation and considered all the factors as discussed above. A conclusion is made that the Management Board acted within the scope of the law in coming to their decision and distributing the benefit. The discretion was applied fairly and equitably given the circumstances. Further they acted within their powers in appointing Son 1 as the financial guardian of the minor children.

#### **FINDINGS**

26. The Ombudsman finds that the Management Board of the Respondent Fund did consider all the relevant factors relating to the dependency of the Complainant and other potential beneficiaries when exercising its discretion in terms of Section 33 of the RFA.

27. In the circumstances, the Ombudsman finds that the Management Board did exercise its discretion properly in the distribution of the death benefit and in accordance with the provisions of Section 33 of the Act. Also, the Ombudsman finds that there are no exceptional circumstances that merit an interference with the exercise of discretion by the Management Board.

28. The Ombudsman further finds that the Management Board of the Respondent did consider all the relevant factors in appointing the financial guardian of the minor children.

#### **ORDER**

1. The complaint is not upheld.
2. No order is made against the Respondent.

**THUS, DONE AT MBABANE AND CERTIFIED A TRUE AND CORRECT DETERMINATION OF THE OMBUDSMAN OF FINANCIAL SERVICES IN TERMS OF SECTION 75(5) OF THE FINANCIAL SERVICES REGULATORY AUTHORITY ACT OF 2010.**

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**THE OMBUDSMAN OF FINANCIAL SERVICES**