



Legal Services

FINANCIAL SERVICES

  
**ALEXANDERFORBES**  
Securing your financial well-being

## ON THE SCALES 1 of 2018

### Trustees are reminded about their Section 37C duties

In the matter of T v University of KwaZulu-Natal Pension Fund ('the Fund') and ABSA Consultants & Actuaries ('the Administrator'), the Pension Funds Adjudicator ('the Adjudicator') dealt with the extent of investigations to be done by trustees in the distribution of a death benefit.

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#### Summary

- The trustees allocated the entire death benefit to R, who was the deceased's elderly mother, to the exclusion of the complainant.
- The complainant was the sole nominee of the deceased and argued that the death benefit should have been allocated to him.
- When the trustees investigated the relationship between the deceased and the complainant, the complainant stated that he was the deceased's partner.
- The trustees resolved not to allocate the benefit to the complainant as he had failed to prove a relationship of mutual dependence with the deceased. The Fund further found that the complainant had failed to prove that he was the deceased's spouse and did not qualify to receive the spouse's benefit in terms of the Fund rules.
- The trustees resolved to allocate the benefit to R as she would have been dependent on the deceased in the future.
- The Adjudicator held that the complainant did not have to prove financial dependency on the deceased nor had to prove the existence of a relationship with the deceased as he was noted as a nominee.
- The Adjudicator also said that the trustees failed to sufficiently investigate R's financial situation and could not conclude she would have been dependent on the deceased in the future.
- The Adjudicator held that the trustees erred in allocating the entire benefit to R and ordered the trustees to re-exercise their discretion in terms of section 37C.

## Facts of the complaint

The trustees of the Fund allocated the entire death benefit to R, the deceased's mother, to the exclusion of the complainant.

### The Complainant's arguments:

The complainant, who was the deceased's friend, submitted he was the sole nominee in terms of a beneficiary form signed by the deceased prior to his passing. The complainant argued that the trustees should have respected the wishes of the deceased and allocated the death benefit to him.

He stated that he had been friends with the deceased for a long time, took care of the deceased when he was ill and the deceased made him next of kin when the deceased was hospitalized. The complainant further described himself as being the partner of the deceased when investigations were conducted by the trustees into the relationship he had with the deceased.

The complainant argued that R was not a dependent<sup>1</sup> of the deceased and should not have been allocated the death benefit. He requested the Adjudicator to reverse the allocation made to R.

### The Fund's response:

In compliance with section 37C of the Act, the trustees conducted investigations and found that the deceased had completed a beneficiary nomination form wherein the complainant was made the sole nominee. They further found that the deceased was not married and did not have any children.

The complainant also informed the employer that he was the deceased's partner.

Upon interviewing close friends and family, it was established that the complainant was not the deceased's partner and did not live with the deceased. R informed the trustees that the complainant lived with someone else in Gauteng and the deceased lived in KwaZulu-Natal.

It was also established that the complainant was not financially dependent on the deceased and did not rely on him for any support. Further, the trustees found that the complainant had also failed to prove that he was the deceased's partner and so he did not qualify to receive the spouse's benefit in terms of the rules of the Fund.

Whilst the trustees considered the beneficiary form completed by the deceased, they noted that they were not bound by it. The trustees resolved not to allocate a share of the deceased's death benefit to the complainant as he had failed to prove a relationship of mutual dependence on the deceased and did not live with the deceased.

The trustees also considered that the deceased was survived by two siblings and R who resided in an old-age home. The trustees noted that R was of poor health.

In resolving to allocate the entire benefit to R, the trustees considered the following:

- The definition of a dependent in terms of the Act and found that the objective of section 37C was

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<sup>1</sup> in relation to a member, means-

a) a person in respect of whom the member is 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, an adopted child and a child born out of wedlock.

c) a person in respect of whom the member would have become legally liable, had the member not died;

to ensure that all those were dependent on the deceased member are not left destitute when he/she dies;

- From the interviews and statements obtained, R would have been dependent on the deceased had he not died as a result of the rising costs of health care and that her savings were running out;
- R does not have any future earning potential;
- The deceased's siblings live overseas and had their own families to take care of.

### **The Adjudicator's Determination**

The issue to be determined was whether or not the trustees considered all the relevant factors in distributing the deceased's death benefit.

When making an "equitable distribution" amongst dependents, the trustees have to consider the following:

- The age of the dependents;
- The relationship with the deceased;
- The extent of dependency;
- The wishes of the deceased placed in either a will and/or nomination form; and
- The financial affairs of the dependents including their future earning capital.

The Adjudicator rejected the complainant's argument that R was not a dependent of the deceased. The Adjudicator considered that R could not take care of herself and would have resorted to the deceased for support and, as a result, was a dependent of the deceased in terms s1(c) of the Act.

The Adjudicator further re-iterated that the trustees were not bound to follow the deceased's wishes in terms of the beneficiary nomination form where the complainant was noted as the sole nominee.

The Adjudicator agreed that the objective of section 37C is to ensure that all those who were financially dependent on the deceased member are not left destitute when he/she dies however the Adjudicator found that this matter was unique as the complainant was a nominee and did not have to prove financial dependency on the deceased nor was there a duty placed on him to prove that he had a relationship with the deceased in order to be allocated a share of the death benefit, contrary to the Fund's argument above. The Adjudicator found that it may have been as a result of the trustees questions which led the complainant to believe that he had to "concoct unnecessary tales of his dependence" on the deceased.

The Adjudicator found that the trustees failed to prove that R was financially dependent on the deceased during his lifetime. The Adjudicator found that the trustees had also failed to submit any evidence relating to R's current savings and the tools used to determine that she may not be able to take care of herself in future. The Adjudicator held that the findings made by the trustees into R's financial affairs were purely speculative.

The Adjudicator also noted with concern, the failure by the trustees to consider R's children responsibility to care for their mother should she experience any financial problems, despite them having their own families to look after. The Adjudicator held that the trustee had failed to investigate whether or not the children would be able to discharge of this responsibility.

The Adjudicator stated that all of the children shared an equal duty to care for R and the trustees' reasoning in this matter was flawed (i.e. the trustees had considered that the deceased did not have children and his siblings had their own families to take care of).

As a result, the Adjudicator ordered the trustees to re-exercise its discretion in terms of s37C of the Act.

*Comment: It is important that trustees get corroborating information (instead of relying solely on the results gathered from statements and interviews), when conducting investigations into the financial affairs of all dependents so as to ensure that an equitable distribution of the death benefit is made. Whilst gathering statements and conducting interviews is important, this is not a deciding factor.*

*In view of this determination, funds are also alerted to the Adjudicator's findings that there is no onus on nominees to prove their financial dependency on the deceased or the existence of a relationship.*

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*If you need more information, please contact your consultant.*

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