



Pension Lawyers Association Conference 2021: Key OPFA determinations



13 May 2021

**T GRIFFIN v DISCOVERY RETIREMENT ANNUITY FUND
and DISCOVERY GROUP LIMITED**



T GRIFFIN v DISCOVERY RETIREMENT ANNUITY FUND and DISCOVERY GROUP LIMITED

- Section 37C distribution of death benefit.
- Pending decision by the Financial Services Tribunal in respect of reconsideration application.
- Complainant claimed to have been in a permanent life partnership with the deceased and was dissatisfied with the board's decision to allocate 25% of the benefit to herself and 75% to the deceased's daughter. The total benefit from two RAs amounted to R1,278,780.16.

T GRIFFIN v DISCOVERY RETIREMENT ANNUITY FUND and DISCOVERY GROUP LIMITED

- The complainant showed that she was 100% financially dependent on the deceased:
 - lived in the deceased's house;
 - drove a vehicle owned by the deceased;
 - deceased was the sole investor in her business that was running at a loss.
 - since the death of the deceased, had accumulated debt of approximately R400k.

T GRIFFIN v DISCOVERY RETIREMENT ANNUITY FUND and DISCOVERY GROUP LIMITED

- The deceased had three children from former marriages and nominated them to each receive an amount of R6,435m from his life policy worth R19,305,436.
- Two children were self-sufficient adults, and the third child was a minor in receipt of maintenance of R7,000.00 per month.
- The minor child would also benefit substantially from the deceased's estate as well as a trust set up by the deceased for the child's benefit.

T GRIFFIN v DISCOVERY RETIREMENT ANNUITY FUND and DISCOVERY GROUP LIMITED

- Submissions made by the deceased's former wife averred in detail that the relationship between the deceased and the complainant was strained. However, it also confirmed that the complainant was financially dependent on the deceased despite the alleged state of their relationship.

T GRIFFIN v DISCOVERY RETIREMENT ANNUITY FUND and DISCOVERY GROUP LIMITED

- The board made a preliminary decision to award 100% of the benefit to the complainant and communicated same to all the claimants.
- Objection received from ex-wife that the minor child should not be excluded from the allocation.

T GRIFFIN v DISCOVERY RETIREMENT ANNUITY FUND and DISCOVERY GROUP LIMITED

- The board reconsidered the allocation and requested further information from the complainant.
- Discovered that the complainant married in July 2019, thirteen months after the death of the deceased.
- Decided that the complainant's dependency *ended when she got married.*

T GRIFFIN v DISCOVERY RETIREMENT ANNUITY FUND and DISCOVERY GROUP LIMITED

- The board revisited its decision and decided to allocate 25% of the death benefit to the complainant to assist her with the debt she incurred from the date on which the deceased passed away until the date she remarried.
- The balance was allocated to the minor child.

T GRIFFIN v DISCOVERY RETIREMENT ANNUITY FUND and DISCOVERY GROUP LIMITED

PFA set aside the decision of the board and ordered it to reconsider:

- not satisfied that the issue regarding the life partnership was properly investigated;
- decision to hold that the complainant's dependency "ended the moment she got married" is somewhat perplexing in light of the fact that the board nevertheless proceeded to allocate 25%

T GRIFFIN v DISCOVERY RETIREMENT ANNUITY FUND and DISCOVERY GROUP LIMITED

- The board relied upon the principle set out in *Fundsatwork Umbrella Pension Fund v Guarnieri* [2019] JOL 42094 (SCA) which provides at paragraph [25], that the time at which to determine who is a dependant for the purpose of distributing a death benefit is when that determination is made, and furthermore, the person concerned must still be a beneficiary at the time when the distribution is made.

T GRIFFIN v DISCOVERY RETIREMENT ANNUITY FUND and DISCOVERY GROUP LIMITED

- It is true that the SCA in *Guarnieri* (supra) mentioned a spouse's remarriage as one of the factual circumstances that could change during the course of an investigation however this does not mean that such an event would automatically preclude the spouse from being a dependant. In this regard, the board of a fund is still required to exercise its discretion and should not fetter its discretion by simply relying on the occurrence of one event.

T GRIFFIN v DISCOVERY RETIREMENT ANNUITY FUND and DISCOVERY GROUP LIMITED

- It is clear that the only factor that weighed in favour of the fund's finding that the complainant was no longer a dependant was the fact that she had married. In this regard, the fund fettered its discretion. The complainant qualifies as a factual dependant and there was sufficient evidence before the fund to make such a finding.

T GRIFFIN v DISCOVERY RETIREMENT ANNUITY FUND and DISCOVERY GROUP LIMITED

- The fund must also consider which of the minor's financial needs have been met by her mother, her inheritance from the deceased's estate, the benefit that she received from the deceased's life policies as well as any other factor that the first respondent deems relevant. The submissions made to the Adjudicator indicate that the fund did not investigate the minor's financial affairs properly and the Adjudicator is not satisfied that the fund complied with its duty to conduct a thorough investigation.

T GRIFFIN v DISCOVERY RETIREMENT ANNUITY FUND and DISCOVERY GROUP LIMITED

- The complainant requested the Adjudicator to make an order allocating 80% or 100% of the death benefits to her. It is trite law that where a discretion has been improperly exercised, our Courts are reluctant to substitute their own decision for another functionary. As a general rule, our Courts tend to refer the decision back to the functionary unless there are exceptional circumstances. The Adjudicator finds that there are no such exceptional circumstances in the present matter that justify a departure from the general rule.

**ME MOISI v MUNICIPAL GRATUITY FUND and SANLAM
EMPLOYEE BENEFITS (PTY) LTD**



ME MOISI v MUNICIPAL GRATUITY FUND and SANLAM EMPLOYEE BENEFITS (PTY) LTD

- Section 37C distribution of death benefit.
- The deceased member passed away on 23 September 2014 and was survived by seven siblings amongst whom was the complainant's husband.
- The complainant's husband passed away on 30 December 2014 and was survived by the complainant and a minor child.

ME MOISI v MUNICIPAL GRATUITY FUND and SANLAM EMPLOYEE BENEFITS (PTY) LTD

- The board resolved to allocate the deceased's death benefit to her siblings that were still alive at the time of making its decision.
- The complainant was aggrieved with the allocation of the death benefit in the amount of R1 059 014.90 to the deceased's siblings to the exclusion of her and her minor child.

***ME MOISI v MUNICIPAL GRATUITY FUND and SANLAM EMPLOYEE
BENEFITS (PTY) LTD***

- The complainant claimed that there was a nomination form, which she failed to produce, that nominated her husband to receive 100% of the benefit.
- An application form submitted by the complainant's husband to the fund prior to his death indicated that he was not factually dependant on the deceased.

ME MOISI v MUNICIPAL GRATUITY FUND and SANLAM EMPLOYEE BENEFITS (PTY) LTD

- The fund submitted that the deceased's siblings submitted the requested affidavits and confirmed their willingness to do polygraph testing to clarify conflicting information *inter alia* the existence of a nomination form.
- The fund submitted that the complainant turned reneged on her undertaking to do polygraph testing and submit an affidavit.

ME MOISI v MUNICIPAL GRATUITY FUND and SANLAM EMPLOYEE BENEFITS (PTY) LTD

- The fund submitted that when the conflicting evidence was weighed, the same weight could not be attached to the evidence given by the complainant vis-à-vis that of the other stakeholders.
- The board found that there was no evidence that the deceased supported the complainant's husband and further he passed away prior to the distribution of the death benefit.
- There was also no evidence that the complainant and her children were dependent on the deceased.

ME MOISI v MUNICIPAL GRATUITY FUND and SANLAM EMPLOYEE BENEFITS (PTY) LTD

PFA dismissed the complaint:

- The SCA in *Guarnieri* found that that the time at which to determine who is a dependant for the purpose of distributing a death benefit is when that determination is made, and furthermore, the person concerned must still be a beneficiary at the time when the distribution is made.
- The complainant's husband could not have qualified as a dependant since he had already passed away before the decision and distribution in respect of the deceased's death benefit had taken place.

***ME MOISI v MUNICIPAL GRATUITY FUND and SANLAM EMPLOYEE
BENEFITS (PTY) LTD***

- The complainant's husband stated under oath that he was employed, indicated his monthly income and that he owned assets in the form of a house and a car. He left the amount blank where he was required to declare the rate per month that the deceased used to support him thereby indicating that he did not receive financial support from the deceased.

ME MOISI v MUNICIPAL GRATUITY FUND and SANLAM EMPLOYEE BENEFITS (PTY) LTD

- The fund was entitled to rely on this declaration made under oath and there was no duty on it to require further information from the complainant's husband.
- Even if there was a nomination form, a nomination form is not binding and acts merely as a guide to the board of a fund.
- There were six other siblings of the deceased who qualified as factual dependants having been financially dependant on the deceased during her lifetime. Based on that scenario, the board could not have lawfully made an equitable allocation of one hundred percent of the benefit awarded to the complainant and her two children, who did not qualify as beneficiaries of the deceased.

***ME MOISI v MUNICIPAL GRATUITY FUND and SANLAM EMPLOYEE
BENEFITS (PTY) LTD***

- The fund complied with its duty to conduct a thorough investigation. It held several meetings with the complainant and her representative. It invited the complainant to conduct a polygraph test and supply an affidavit confirming her allegations. It took into account the weight of the evidence supporting conflicting versions that was presented to it. This was all done well after the distribution had been made and the beneficiaries paid.

***ME MOISI v MUNICIPAL GRATUITY FUND and SANLAM EMPLOYEE
BENEFITS (PTY) LTD***

- The board did not fetter its discretion and had discharged its duties in terms of the Act.

**NS MALINDI v FUNDSATWORK UMBRELLA PROVIDENT FUND; MMI
GROUP LIMITED and SA CALCIUM CARBIDE (PTY) LTD**

NS MALINDI v FUNDSATWORK UMBRELLA PROVIDENT FUND; MMI GROUP LIMITED and SA CALCIUM CARBIDE (PTY) LTD

- Section 37C distribution of death benefit.
- The complainant lodged a complaint on behalf of her minor child.
- The deceased passed away on 22 March 2014 and a death benefit in the amount of R896 790.26 (before tax) became payable.
- The fund identified nine potential beneficiaries including the complainant's minor child.

NS MALINDI v FUNDSATWORK UMBRELLA PROVIDENT FUND; MMI GROUP LIMITED and SA CALCIUM CARBIDE (PTY) LTD

- On 3 September 2015 the board resolved to allocate 35% of the benefit to the complainant's minor child on condition that the complainant provided proof that the minor child was in fact the biological child of the deceased.
- The board submitted that it did not receive the proof from the complainant that the minor child was the biological child of the deceased for more than 2 years and on 16 February 2018 decided to redistribute the amount initially allocated to the minor child to other identified dependants. On 25 October 2018, the fund paid the redistributed amount to the other beneficiaries.

NS MALINDI v FUNDSATWORK UMBRELLA PROVIDENT FUND; MMI GROUP LIMITED and SA CALCIUM CARBIDE (PTY) LTD

- On 26 November 2018, more than 3 years after the request, the complainant produced the paternity test results reflecting the minor child as the biological child of the deceased.
- On 18 July 2019, the board took a third resolution where it recorded that *“Although Nozindaba Sellina Malinda did provide the Fund with a copy of a bank statement reflecting amounts deposited into her account there was insufficient proof that these amounts were in fact from the deceased. Hence, the Fund requested Helloluhle attend a paternity test to prove that he was in fact the biological child of the deceased.”*

NS MALINDI v FUNDSATWORK UMBRELLA PROVIDENT FUND; MMI GROUP LIMITED and SA CALCIUM CARBIDE (PTY) LTD

The complainant submitted that:

- she was unemployed and requested assistance with the tests. The complainant submitted that she was never informed that there was a deadline for the submission of the tests.
- she was requested to use her own money for the tests despite the fact that she was unemployed.
- she tried all avenues to obtain the DNA tests as she was certain that the minor child is the biological child of the deceased. The complainant submitted that she was advised the tests will costs her R4 000.00, which she did not have.

NS MALINDI v FUNDSATWORK UMBRELLA PROVIDENT FUND; MMI GROUP LIMITED and SA CALCIUM CARBIDE (PTY) LTD

- In 2018 she went to the police station where she was provided with a letter addressed to the Newcastle Court to assist her with the tests. The complainant submitted that she paid R2 000.00 for the test, which she borrowed and was still struggling to pay back.

NS MALINDI v FUNDSATWORK UMBRELLA PROVIDENT FUND; MMI GROUP LIMITED and SA CALCIUM CARBIDE (PTY) LTD

The PFA set aside the decision of the board and ordered it to pay the benefit allocated to the minor child together with interest:

- It is the board's responsibility when dealing with the payment of death benefits to conduct a thorough investigation to determine the beneficiaries, to thereafter decide on an equitable distribution and finally to decide on the most appropriate mode of payment of the benefit payable.
- The fund cannot rely on the 12-month period referred to in section 37C to reject the complainant's claim when it had not itself adhered to same and in circumstances where it failed to conduct a proper investigation.

NS MALINDI v FUNDSATWORK UMBRELLA PROVIDENT FUND; MMI GROUP LIMITED and SA CALCIUM CARBIDE (PTY) LTD

- The fund did not provide the Adjudicator with clarity on why it failed to assist the complainant with the paternity tests or let alone follow up on its request. The only explanation that was conveyed to the Adjudicator was that it had been waiting for the complainant. The first respondent in its decision to redistribute the death benefit did not follow up with the complainant regarding the paternity tests or inform the complainant of its intentions to have the death benefit redistributed.
- The complainant was not consulted even though the fund was aware that any decision taken will affect the financial interests of the minor child. The least the fund could have done is to contact the complainant prior to deciding to redistribute.

NS MALINDI v FUNDSATWORK UMBRELLA PROVIDENT FUND; MMI GROUP LIMITED and SA CALCIUM CARBIDE (PTY) LTD

- The fund did not provide the Adjudicator with reasons that prevented it from assisting the complainant with the paternity tests. The complainant is unemployed. The question is how the complainant was reasonably expected to have the tests conducted if she is unemployed.
- Section 37C of the Act places a duty to conduct a diligent investigation on the board alone. Even if the board can rely on the complainant to furnish it with information, that does not mean that the board can abdicate its duty (see *Itumeleng v SALA Pension Fund and Another* [2007] 3 BPLR 311 (PFA)).

NS MALINDI v FUNDSATWORK UMBRELLA PROVIDENT FUND; MMI GROUP LIMITED and SA CALCIUM CARBIDE (PTY) LTD

- It is the duty of the board to conduct an independent investigation. The duty is not on eligible dependants to come forward and prove their dependency (see *Mthiyane v Fedsure Life Assurance Ltd and Others (2)* [2002] 5 BPLR 3460 (PFA)).
- The fund evidently abdicated its responsibility of conducting a thorough investigation as envisaged in terms of section 37C of the Act as it made no effort to confirm the minor child's paternity. It is also questionable that the fund would wait so long without taking any positive action to obtain the paternity tests.

NS MALINDI v FUNDSATWORK UMBRELLA PROVIDENT FUND; MMI GROUP LIMITED and SA CALCIUM CARBIDE (PTY) LTD

- It is clear that the fund accepted that the minor child was factually supported by the deceased. It is not clear what purpose a DNA test could have served to prove that the minor child was a dependant as defined in the Act. Withholding the payment in respect of minor child, after it had accepted him as a factual dependant, based on the production of DNA test results was an act of irrationality on the part of the board.
- The board caused the complainant to undergo undue emotional and financial hardship in producing a DNA test report which she could not afford. The fund provided the complainant with no assistance in this regard.

NS MALINDI v FUNDSATWORK UMBRELLA PROVIDENT FUND; MMI GROUP LIMITED and SA CALCIUM CARBIDE (PTY) LTD

- The fact that the fund had made payment in terms of its redistribution decision does not alter the position. See *Fundsatwork Umbrella Pension Fund v Guarnieri and others* [2019] 2 BPLR 321 (SCA) at paragraph [30].
- The Adjudicator was not satisfied that the board acted rationally and arrived at a proper and lawful decision in redistributing the death benefit allocated to the minor child. The decision to redistribute the death benefit was set aside.

NS MALINDI v FUNDSATWORK UMBRELLA PROVIDENT FUND; MMI GROUP LIMITED and SA CALCIUM CARBIDE (PTY) LTD

Interest awarded:

- The board withheld payment in respect of the minor child's benefit for a reason that was irrelevant, it failed to uphold the best interests of the minor child, it failed to conduct a proper investigation where it was duty-bound to do so, it caused the mother of the minor child to suffer undue hardship in having to obtain a DNA paternity test without any assistance.
- The severity of fund's conduct is aggravated by the fact that it sought to justify its actions by passing a resolution on 18 July 2019, well after the benefit had been paid, in order to submerge the incorrect basis on which it had decided to redistribute the minor child's benefit.

**HE BEZUIDENHOUT v GTC UMBRELLA PENSION FUND; GTC EMPLOYEE
BENEFITS ADMINISTRATION (PTY) LTD and STERKLEWIES (PTY) LTD -
WOLWEHOEK**

HE BEZUIDENHOUT v GTC UMBRELLA PENSION FUND; GTC EMPLOYEE BENEFITS ADMINISTRATION (PTY) LTD and STERKLEWIES (PTY) LTD - WOLWEHOEK

- Withholding of the complainant's withdrawal benefit pursuant to section 37D(1)(b)(ii) of the Act.
- Upon exiting the fund, a withdrawal benefit became due and payable to the complainant. The complainant's fund credit as at 27 July 2020 was in the amount of R367 431.19 The fund withheld the complainant's withdrawal benefit at the instance of the third respondent pursuant to section 37D(1)(b)(ii) of the Act.

HE BEZUIDENHOUT v GTC UMBRELLA PENSION FUND; GTC EMPLOYEE BENEFITS ADMINISTRATION (PTY) LTD and STERKLEWIES (PTY) LTD - WOLWEHOEK

- The complainant was employed by the third respondent for a period of twelve years until she was found guilty of fraud in June 2014. The complainant submitted that she was sentenced and sent to prison for seven years.
- The complainant submitted that she has not received payment of her withdrawal benefit. The complainant stated that she never signed an acknowledgement of debt in order for her withdrawal benefit to be withheld. The complainant submitted that she has resigned from employment and is entitled to her withdrawal benefit.

HE BEZUIDENHOUT v GTC UMBRELLA PENSION FUND; GTC EMPLOYEE BENEFITS ADMINISTRATION (PTY) LTD and STERKLEWIES (PTY) LTD - WOLWEHOEK

- The fund submitted that the complainant was convicted of defrauding the employer in the amount of R1.8 million and sentenced to imprisonment. The fund submitted that the employer suffered a loss due to the complainant's theft.
- The fund submitted that the facts underpinning the claim by the employer were:
 - the Pre-Sentence Report provides that the complainant had admitted to defrauding the third respondent in the amount of approximately R1.8 million. approximately R700 000 had been recovered. This left a net amount of damages of R1.1 million, which is what the magistrate took into account when considering sentencing

HE BEZUIDENHOUT v GTC UMBRELLA PENSION FUND; GTC EMPLOYEE BENEFITS ADMINISTRATION (PTY) LTD and STERKLEWIES (PTY) LTD - WOLWEHOEK

- the Pre-Sentence Report provides that the complainant had admitted to defrauding the third respondent in the amount of approximately R1.8 million. approximately R700 000 had been recovered. This left a net amount of damages of R1.1 million, which is what the magistrate took into account when considering sentencing.
- In a Confidential Psychological Report, the complainant accepted that her pension money had been diverted to the employer.
- In an e-mail to the employer, the complainant confirmed her liability and stated that maybe her pension value will be sufficient to cover the loss, which conveys a willingness for the complainant's pension value to be offset against the loss by the employer.

HE BEZUIDENHOUT v GTC UMBRELLA PENSION FUND; GTC EMPLOYEE BENEFITS ADMINISTRATION (PTY) LTD and STERKLEWIES (PTY) LTD - WOLWEHOEK

PFA upheld the complaint and ordered payment of the withdrawal benefit:

- Section 37D(1)(b)(ii) is unambiguous. It provides that in order for a deduction to be lawful, the member must have admitted liability to the employer in writing or that judgment must have been obtained against the member in respect of damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member.
- Neither the pre-sentence report nor the confidential psychological report were authored or signed by the complainant. Accordingly, they cannot be regarded as an admission of liability in writing by the member.

HE BEZUIDENHOUT v GTC UMBRELLA PENSION FUND; GTC EMPLOYEE BENEFITS ADMINISTRATION (PTY) LTD and STERKLEWIES (PTY) LTD - WOLWEHOEK

- The email dated contains the following statement:

“As julle ‘n bedrag het sal jy my asseblief laat weet, miskien sal my pens genoeg wees en dan bly daar dalk nog oor vir asem haal. Sodra ek die bedrag het sal ek my skrywe rig aan direksie”

- The email is not an admission of liability by the complainant to the employer. It conveys an intention by the complainant to consider giving instructions to the fund once she was in receipt of the amount claimed by the employer. There is no evidence that the amount was provided to the complainant, that she considered same, and that she subsequently agreed to the deduction in writing.

HE BEZUIDENHOUT v GTC UMBRELLA PENSION FUND; GTC EMPLOYEE BENEFITS ADMINISTRATION (PTY) LTD and STERKLEWIES (PTY) LTD - WOLWEHOEK

- The sentence handed down by the criminal court against the complainant does not contain a compensation order in terms of section 300 of the Criminal Procedure Act. Nor is there a civil court judgement or civil proceedings instituted against the complainant. If such proceedings were to be instituted now, it would likely not survive a defence of prescription since more than 3 (three) years have lapsed since the debt arose.
- In the circumstances, there is no lawful reason for the continued withholding of the complainant's withdrawal benefit and for any deduction to be made from same. Accordingly, the complaint must be upheld.

QUESTIONS

