



moment OF TRUTH

Legal update 8 of 2020: Case law on distribution of death benefits

Introduction

There are recent cases relating to the distribution of death benefits payable by retirement funds. Below are summaries of these cases and insight into how we handle these matters should they come across in claims on the Momentum Retirement Annuity Fund, the Momentum Pension Preservation Fund and the Momentum Provident Preservation Fund. We have also included more detail on the cases in the document.

Summaries

Case 1: Momentum Retirement Annuity Fund vs VR KRZUS and Another (PFA53/2019) [2020] Financial Services Tribunal (09 March 2020)

Allocation of total death benefit to an estranged spouse

- **The finding:** An estranged spouse qualifies as a dependant as defined in the Pension Funds Act (Act). The spouse may receive the death benefit even if there was no financial dependency on the deceased member, and the benefit does not have to be paid to the estate of the deceased.
- **How we deal with this:** When a deceased member only has an estranged spouse and no other dependant or nominated non-dependant beneficiary, we have to allocate the death benefit to the estranged spouse.

Case 2: Kelly & Anita Wilkinson vs Pension Funds Adjudicator & Others (PFA73/2019) [2020] Financial Services Tribunal (10 March 2020)

Exclusion of major children who are not financially dependent and the Pension Funds Adjudicator's (PFA) power to substitute a board of trustees decision with her own

- **The finding:** A person who qualifies as a dependant as defined in the Act is not disqualified by virtue of not being financially dependent on the deceased member. If the PFA is not of the view that the board of trustees (the Board) acted improperly to a point where the PFA has to intervene, the PFA cannot substitute the decision of the Board with her own decision.
- **How we deal with this:** We ensure that we consider all the relevant information and ignore the irrelevant information. If a person qualifies as a dependant but no portion of the benefit is allocated to that person, we ensure that the exclusion of that person from the benefit is supported by cogent reasons sound in law.

Case 3: Sanlam Umbrella Provident Fund vs Pension Funds Adjudicator, A Wolmarans and Sanlam Employee Benefits (PFA16/2020) [2020] Financial Services Tribunal (24 April 2020)

The definition of 'dependant' in the Act and the rights of heirs in terms of a will

- **The finding:** The deceased member's estranged

children qualify as his dependants as defined in the Act. The children may receive the death benefit even if there was no financial dependency on the deceased member, and the benefit does not have to be paid to the estate of the deceased.

- **How we deal with this:** When a deceased member

only has one or more estranged children and no other dependant or nominated non-dependant beneficiary, we have to allocate the death benefit to the estranged child(ren).

More detail of the cases

Case 1: Momentum Retirement Annuity Fund vs VR KRZUS and Another (PFA53/2019) [2020] Financial Services Tribunal (9 March 2020)

Allocation of total death benefit to an estranged spouse

The deceased was a member of the Momentum Retirement Annuity Fund until his death on 14 September 2016. He was married but had been separated from his spouse since November 2006. The deceased member had instituted divorce proceedings at the time of his death. He had no children, no nominated beneficiary, and no other person who was financially dependent on him for support.

The Board decided to allocate the total death benefit to the spouse because even though they were estranged, they had not divorced and she still qualified as a dependant as she was his spouse.

The deceased member's sister was dissatisfied with the decision of the Board and lodged a complaint with the PFA. The PFA set aside the decision of the Board and ordered the Board to pay the full benefit into the deceased member's estate, as if there were no dependants and no nominees identified by the Board. The PFA's main contention was that the deceased member's spouse was not financially dependent on him at the time of his death.

The Board did not agree with the PFA's determination and referred it to the Financial Services Tribunal (FST).

The FST set aside the decision of the PFA for the following reasons:

- The definition of 'dependant' in the Act specifically includes a spouse;
- The definition of 'spouse' in the Act qualified the deceased member's spouse as their marriage had not been dissolved by a court as at the date of his death, even though they had been estranged for many years;

- The distinction between legal dependants and factual dependants in the Act indicates that financial dependency is not the only qualifying criteria for one to qualify as a dependant;
- The PFA incorrectly disqualified the deceased member's spouse as a dependant solely on the basis of her lack of evidence of financial dependency and resorted to the default position of paying the benefit to the estate where there are no dependants and no non-dependant nominees.

The PFA's decision was set aside and the matter was referred back to the PFA for further consideration.

Case 2: Kelly & Anita Wilkinson vs Pension Funds Adjudicator & Others (PFA/73/2019) [2020] Financial Services Tribunal (10 March 2020)

Exclusion of major children who are not financially dependent from the death benefit, and the PFA's power to substitute a Board's decision with her own

The deceased was a member of the South African Retirement Annuity Fund, administered by Old Mutual. The deceased member is survived by his spouse and two major children (the children) who were born from a previous marriage to his ex-spouse. The children were working and living in another country and the board decided to distribute the death benefit in the following portions:

- Spouse 50%
- Daughter 25%
- Daughter 25%

The deceased member's spouse was dissatisfied with the Board's decision and lodged a complaint with the PFA. The PFA relied heavily on the children's lack of evidence of financial dependency and the age and earning potential of

all three potential beneficiaries (i.e. the spouse's potential was limited due to age and ill-health). The PFA set aside the decision of the Board and ordered the fund to pay the full benefit to the spouse.

The children of the deceased member, being dissatisfied with the PFA's decision, referred the matter to the FST for a reconsideration of the PFA's decision and the fund joined the children as a co-applicant.

The children argued that the deceased's spouse has means to earn an income; she inflated her expenses to sustain her extravagant lifestyle; and although they are employed, they are struggling financially.

In supporting the application for reconsideration of the PFA's decision, the fund argued that if the PFA was of the view that the allocation made by the fund was improper, the PFA should have set the decision aside and remitted it back to the fund for reconsideration. The fund further argued that it was improper of the PFA to impose a decision on the distribution of the death benefit as the PFA did not have that jurisdiction in terms of its enabling legislation.

The FST referred to the High Court decision in the matter of *Sentinel Retirement Fund v C V Bold & Others* where the court held that the jurisdiction of the court is limited to the question of whether the Board had acted rationally and arrived at a proper and lawful decision. The court further held in that matter that the PFA had no power to substitute the decision of the Board with its own decision. The FST differed with the finding of the PFA that the deceased's spouse was the only dependant. The correct process of distributing a death benefit requires that all dependants and non-dependant nominees are identified. Thereafter factors such as the extent of dependency may be considered in the allocation of the benefit. The FST held that the children of the deceased are his legal dependants and they are not disqualified as such by virtue of not being financially dependent.

The FST further held that the PFA did not have equity jurisdiction at the time that it ruled on the matter, which would allow the PFA to substitute the decision of a Board. The PFA's equity jurisdiction, derived from the Financial Sector Regulation Act, only came into effect on 1 April 2020.

Case 3: Sanlam Umbrella Provident Fund vs Pension Funds Adjudicator, A Wolmarans and Sanlam Employee Benefits (PFA16/2020) [2020] Financial Services Tribunal (24 April 2020)

The definition of 'dependant' in the Act and the rights of heirs in terms of a will

The deceased was a member of the Sanlam Umbrella Provident Fund. His spouse passed away before him. He had two children with whom he had been estranged and he was taken care of by his sister-in-law's two children. The deceased member nominated his sister-in-law's children to receive his estate in terms of his will. Upon his death, the Board decided to distribute the death benefit in equal portions to his two estranged children.

One of the children of the deceased's sister-in-law was dissatisfied with the Board's decision and she lodged a complaint with the PFA. The PFA set aside the Board's decision on the basis that the deceased's children were not financially dependent on the deceased. The Board took the matter to the FST for reconsideration of the PFA's decision. The FST set aside the PFA's decision on the following grounds:

- The deceased's daughters fall within the definition of "dependant" even though they were not financially dependent on him;
- The PFA erred in holding that the deceased's daughters were not his legal dependants;
- A death benefit can only be paid into a deceased member's estate if there is no dependant and no non-dependant nominee identified;
- The question of a fair distribution of the benefit would have only arose if the split in two equal parts was in issue, which it was not, and
- Therefore, there is no need to go into an enquiry of whether the benefit became payable to the deceased's estate as the preconditions for that (i.e. no dependant and no non-dependant nominee identified) do not exist.

The matter was referred back to the PFA for reconsideration.

Andrew Mothibi

Legal counsel: Wealth & Retirement Fund Legal

