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Breaking the Chains: the Case of Ndwandwe v Trustees of Transnet Retirement Fund and others – A not-so-friendly reminder that a pension fund is not bound by a nomination form

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The recent decision of *Ndwandwe v Trustees of Transnet Retirement Fund and others* ***[1]*** (the ***Ndwandwe*** **decision**) concerned the review of a pension fund's decision to award and apportion a member's death benefits contrary to his nomination form. The decision is relevant to pension fund members in general because this fund's rules and section 37C(1)(*bA)* of the Pension Funds Act[2] (the **PFA**) are almost identical with regards to death benefits. Section 37C applies to most pension funds. This article explores the *Ndwandwe* decision as a caution to pension fund members.

The Facts

Mr Mkhwauleni Paulus Ndwandwe died on 19 September 2018. At the time of his death he was a Transnet employee and a member of the Transnet Retirement Fund (the **Fund**). Mr Ndwandwe had completed a beneficiary nomination form where he nominated the following persons to receive a death benefit in the following proportions:

- his customary law wife, Mrs Xoshwaphi Ndwandwe (60 percent);
- two of his children with Mrs Ndwandwe (10 percent each); and
- two of his adult children with his common law wife, Ms Thowi Alvinhah Ngcobo (the **adult children**) (10 percent each).[3]

Ms Ngcobo was not named in the nomination form. Mr Ndwandwe also had one further minor child with another of the respondents (the **minor child**), who was similarly left off of the nomination form. Notwithstanding the nomination form, the Fund resolved to apportion Mr Ndwandwe's death benefit as follows:

- Mrs Ndwandwe and Ms Ngcobo (40 percent each);
- the adult children (3.66 percent each); and
- the minor child (12.69 percent).

Mrs Ndwandwe instituted a review application against the Fund's decision with the KwaZulu-Natal High Court (the **Court**).[4]

The applicable rules and provisions of the PFA

Although the Transnet Pension Fund Act[5] applied to the Fund (and not the PFA), the provisions in the Fund's rules (the **Rules**) and section 37C(1)(*bA)* of the PFA regarding the awarding of death benefits, are almost identical.[6] Section 37C applies to most pension funds and governs how a pension fund has to deal with death benefits.

Rule 10.4(iii) of the Rules provided as follows in relation to death benefits:

> *"If a Member has a Dependant and the Member has also designated in writing to the Fund a Nominee to receive the benefit or such portion of the benefit as is specified by the Member in writing to the Fund, the Fund shall within 12 (twelve) months of the death of such Member pay the benefit or such portion thereof to such Dependant or Nominee in such proportions as the Trustees may deem equitable: Provided that this paragraph shall not prohibit the Fund from paying the benefit, either to a Dependant or Nominee contemplated in this paragraph or, if there is more than 1 (one) such Dependant or Nominee, in proportions to any or all of those Dependants and Nominees".*

The definition of "dependent" in the Rules differs slightly to that contained in the PFA but nothing turns on that for present purposes.

Suffice to say that the PFA casts the net widely and includes as a dependent:

- a person who the member is legally liable to for maintenance;
- a person who is not legally liable for maintenance, but is determined to be liable in the opinion of the trustees;
- a spouse of the member or the member's child (including posthumous and adopted children and those born out of wedlock); and
- a person who the member would have become legally liable to for maintenance had they not died.[7]

The non-binding nature of a nomination form

Mrs Ndwandwe argued that the Fund's decision fell to be set aside, amongst others, because the trustees ignored the nominees and their benefits as stipulated in the nomination form, and the trustees were not legally permitted to do so as they were bound by the form.[8] The Fund argued that the nomination form was nothing more than a "*non-binding guide*" and "*that the deceased's wishes are but one factor to be considered in the exercise of the discretion expressly conferred on it*".[9]

The Court held that not only may the Fund look further than the nomination form but it must do so to properly exercise the wide discretionary power granted to it (the same as it would be were section 37C applicable to it).[10] Indeed, the Pension Funds Adjudicator (the **Adjudicator**) has on a number of occasions held that the first thing a fund is required to do in terms of section 37C of the PFA is to identity potential beneficiaries, comprised of both nominees and dependants.[11] As held by the Supreme Court of Appeal (**SCA**), once a fund has identified the potential beneficiaries, "*the board of the fund is vested with a large discretion to determine how the death benefit is to be apportioned between them*".[12] On a separate occasion the SCA held that a fund's duties in terms of section 37C are irrespective of anything said in its rules.[13]

The Court held that Mrs Ndwandwe's argument on this ground failed: section 37C of the PFA was intended to serve a social function and protect dependants from being left without the support: "*A fund is expressly not bound by a will, nor is it bound by the nomination form, whose contents are merely a guide to the trustees*".[14]

When will a reviewing body step in?

To consider Mrs Ndwandwe's argument that the Fund acted irrationally and that this led to an unfair result, the Court had to opine on when it could – as reviewing body – step in and set aside or otherwise interfere with the Fund's decision. The court, citing precedent, held that it could not do so simply because it may not agree with the Fund's decision. The test has often been applied by the Adjudicator as follows:

"*The duty of this Tribunal* [the Adjudicator] *is not to decide what is the fairest or most generous distribution, but rather to determine* ***whether the board has acted rationally and arrived at a proper and lawful decision***" (our emphasis).[15]

A fund is therefore required to take into account relevant considerations and ignore irrelevant considerations – only if it does not do so will the reviewing body have grounds to intervene.[16]

Although a fund can be guided on what to consider and what to not, it should not slavishly apply a policy that will fetter its discretion.[17] The Adjudicator has held that the following factors are relevant to considering a death benefit award and apportionment –

- 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.[18]

In the *Ndwandwe* decision, the Court held that the Fund took into account relevant factors, which included not only the financial circumstances of Mrs Ndwandwe and her children, but also the financial circumstances of Ms Ngcobo, the adult children and the prospects of the minor child. The court could not point to the consideration of any irrelevant factors by the Fund. The court accordingly held that the Fund's decision was rational and reasonable and that it had acted equitably in making it.[19]

Conclusion and guidance

The *Ndwandwe* decision reaffirms our court's approach to the awarding of death benefits and their apportionment. Front of mind for pension fund members must be that although their nomination form should indicate their intended death benefit beneficiaries, the form is not binding on a fund and instead a fund is required by virtue of section 37C of the PFA to look wider and apportion the death benefit equitably amongst the deceased member's dependents in terms of its wide discretionary powers.

Furthermore, the Adjudicator or a court faced with a review of the Fund's decision can only interfere in such decision on the very limited grounds of it not meeting the test of being a rational or lawful decision.

Pension fund members should therefore be mindful of who qualifies as their dependants and to the extent that a member wishes to protect certain dependants (or other persons) by ensuring they accrue benefits if the member dies, rather than relying solely on their nomination form, the member should ensure that such persons are adequately provided for by another estate planning mechanism, such as by making provision for a beneficiary in a life insurance policy, in a will or by way of an inter-vivos or testamentary trust.

Two pots of gold: What you should know about the "two-pot" retirement system

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Footnotes

[1] [2023] ZAKZDHC (22 February 2023).

[2] No 24 of 1956.

[3] [2023] ZAKZDHC (22 February 2023).

[4] No 24 of 1956.

[5] *Ndwandwe* decision, paragraphs 1 to 5.

No 62 of 1990. Because the Fund was not registered in terms of section 4 of the Pension Funds Act No 24 of 1956, not all of the sections of the Act were applicable to it.

[6] *Ndwandwe* decision, paragraphs 6 to 7.

[7] No 62 of 1990. Because the Fund was not registered in terms of section 4 of the Pension Funds Act No 24 of 1956, not all of the sections of the Act were applicable to it.

[8] Section 37C(1)(*bA)* only applies to nominations made on or after 30 June 1989.

[9] PFA, section 1 *s.v.* "dependent".

[10] *Ndwandwe* decision, paragraphs 31(i) and 32.

[11] *Ndwandwe* decision, paragraphs 36 and 37.

[12] *Ndwandwe* decision, paragraphs 51.

[13] See *Van Schalkwyk v Mine Employees' Pension Fund and Another* [2003] 8 BPLR (PFA) and *Mukhungo v Trentyre Provident Fund and others* [2018] JOL 39898 (PFA) (the "***Mukhungo* decision**").

[14] *Fundstwork Umbrella Pension Fund v Guarnieri* 2019 (5) SA 68 (SCA) at paragraph 8.

[15] *Kaplan NNO v Professional and Executive Retirement Fund* 1999(3) SA 798 (SCA) at paragraph 803B-C/D.

[16] *Ndwandwe* decision, paragraph 57.

[17] *Cillie v Lifestyle Retirement Annuity Fund and another* [2019] JOL 42006 (PFA) at paragraph 5.9.

[18] *Mukhungo* decision at paragraph 5.2.

[19] *Nel v Netcare 1999 Pension Fund and another* [2018] JOL 40371 (PFA) at paragraph 4.2.

[20] See *Sithole v ICS Provident Fund* [2000] 4 BPLR 430 (PFA) at paragraph 27.

[21] *Ndwandwe* decision, paragraphs 60 to 78.



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