IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

22/12/2017
DATE

SIGNATURE

CASE NUMBER 96666/15

22/12/17

In the matter between:

MAHLOHONOLO FORTUNATE MOROPANE APPLICANT

And

ERGO MINING RESPONDENT

JUDGMENT

TLHAPI J

INTRODUCTION

[1] Mr Mputing Syneki Makofane ("the deceased") was employed by the respondent and he died on 9 June 2015. In terms of a group life policy underwritten by Capital Alliance Life Limited and issued to the respondent a death benefit amounting to R381 701.00 became payable. This is an application seeking an order confirming that the applicant is entitled to payment of the death benefit from the Fund as a result of the death of her late husband; that her two minor children, Kamogelo Thanks Moropane born during 2004 and Sechaba Matsarane Moropane born during 2014, were also entitled to payment from the Fund and that their benefit

be paid over to her. Furthermore, that the allocation of 10% benefit amount for the applicant to be reviewed and set aside.

[2] The applicant averred that the deceased's benefits payable by the respondent were due to the deceased's estate. She then approached the respondent to claim the said benefits which she contended were payable to her as surviving spouse and on behalf of her children. She was informed by the respondent's that only 10% of the benefit would be paid to her and the rest would accrue to the minor dependent's payable to them on their reaching 18 years of age. The 10% according to her was not sufficient for her and for the maintenance of the children. A letter dated 13 August 2015, setting out her needs was addressed to the respondent, in which she requested that she be paid out 50% of the benefit. The applicant's needs were repeated in the founding affidavit and these related to issues for maintenance for herself and her children which included accommodation, to pay for their education needs and medical expenses.

[3] Mr Ngakane who was in the employ of the respondent confirmed to her the policy regarding the 10% payment to the surviving spouse and that the balance would be deposited into trust for the children till they reached 18 years of age. She requested a copy of the policy document which was never provided. Furthermore, she contended that it was 'unreasonable and illogical' for the benefit to be paid out only when the children had attained the age of majority. In response to the respondent's rule 35 (12) notice the applicant annexed an email from Mr Ngakane dated 17 August 2015:

"The company has its own rules to distribute death benefits (Risk Benefits). We do not understand as a company that your basic needs are beyond your control. We have in the past distributed death benefits to all our employees who passed away as stipulated below:

- 10% will be paid to his wife in cash.
- The remaining balance will be paid to FedTrust to set up a trust fund for minor children until they reach 18 years and the money will then be paid directly into their accounts, but if the children are still at school the money will be kept in the fund.
- The guardian will receive monthly payment from the trust and also the guardian will have communication with the trustees.
- Ages of the children is also put into consideration by the Principal Officer."

[4] The respondent applied for condonation for the late filing of the answering affidavit and this was not opposed. The lateness was caused by the delay in seeking further information in terms of rule 35(12) from the applicant relating the deceased's affairs and a request for the marriage certificate between the deceased and the applicant. The deceased had not nominated any beneficiary and there were other minor children of the deceased. The respondent sourced information of the other beneficiaries from the brother and mother of the deceased and from (i) records from the maintenance court relating to minor child Ubenam Mayeki born during 2013 and (ii) an affidavit by the mother of minor Sabelo Kleinboy Manyisa born during 2004. On 29 October 2015 the respondent addressed a memorandum to the underwriter and administrator of the group life policy recommending the following allocation:

4.1 R38 170.80 to the applicant representing 10% of the benefit amount;

4.2 R103 061.16 to Ubenam Mayeki born 2013;

4.3 R103 061.16 to Sechaba Morapane born 2014;

4.4 R68 707.44 to Kamogelo Morapane born 2004; and

4.5 R68 707.44 to Sabelo Manyisa born 2004;

The respondent denied that it had not communicated the respondent's policy relating to the benefit payouts and copies of annexure AN11 and AN11(a) being the distribution policy were annexed. Annexure AN11 is the same letter as communicated to the applicant's attorneys and quoted in paragraph 3 above.

[5] The respondent averred that the applicant did not accept that the other minor children of the deceased Ubenam and Sabelo were entitled to benefit, that since they had a direct and substantial interest in the outcome of these proceedings, this application was fatally defective in as far as their mothers had not been joined as parties. The relief sought could only be granted if the court determined that they were not entitled to receive a portion of the benefit amount and that a dispute of fact which could not be resolved on the papers arose in as far as it concerned the determination whether these minor children were the legitimate children of the deceased.

[6] The respondent averred that the benefit amounts paid on behalf of the applicant's minor children would be held in trust for their benefit and that it was in their best interests that there was independent oversight to ensure availability when they reach majority. The applicant had not explained why it would not be in the interests of the minor children to hold the benefit in trust. Furthermore, the applicant was entitled on an *ad hoc* basis to access the proceeds held in trust for their maintenance.

[7] It was submitted for the respondent that the material disputes of fact present were not resolvable on papers and this related to the alleged customary marriage between the applicant and the deceased. The applicant responded to a notice by the respondent in terms of rule 35(12) and she provided among other documents, a Lobola Receipt dated 31 August 2013, a letter from the Traditional Council and marriage certificate. The customary marriage was registered by the Department of Home Affairs after date of death which was on 9 June 2015. I am of the view that the respondent recognized its existence as evidenced by the purported allocation by respondent to the applicant of a 10% benefit amount and the fact that the respondent had consulted with the deceased's mother and brother in order to establish who the minor beneficiaries were. If there was doubt as to existence of a marriage the issue would have been raised with these individuals. Besides, the applicant had already reported the deceased estate and was as surviving spouse appointed executrix, a Letter of Authority is annexed to the papers. It is not in the interests of justice to prolong and postpone further finalization of this matter.

[8] It is submitted that in as far as the applicant seeks the allocation of 10% which was made in terms of the policy of the respondent to be reviewed and set aside, that such order would impact on the allocation to all the deceased's minor children and that this necessitated the joinder of the guardians of the deceased's other minor children, Ubenam and Sabelo. It was submitted for the applicant that since it had become evident that the allocation was in terms of the respondent's policy, the prayer to review and set aside the allocation was being abandoned. The reason being that the applicant had initially requested a copy of the policy document from the respondent when Mr Ngakane had communicated this allocation to the applicant and that

this was not provided. The applicant only gained this knowledge after perusing the policy document attached to the answering affidavit. I therefore do not deem it necessary in these circumstances to order a joinder of the said guardians.

[9] Section 37C of the Pension Fund Act 24 of 1956 was incorporated into the policy document and it was argued for the respondent that the benefit amount payable to the minor dependents was administered in terms of clause 7 of the policy document (sections 37C(1) and (3) and that this policy was communicated to the applicant in AN11. Furthermore, that where a beneficiary was not in a position to manage its affairs (like minors), it was appropriate for their benefit to be deposited into trust until he/she reaches majority.

[10] It is contended in the Heads of Argument for the applicant that the respondent acted contrary to its rules and policies in refusing to make payment to the applicant being guardian of the children, more so that the applicant had brought it to the attention of the respondent that she was not able to fully provide for the maintenance of the minor children. It was further argued that the respondent had breached its policy and rules in as far as it had failed to engage the process provided in their policy document in as far as it related to the payment mode which provided as follows:

"Directly to the minor:	This is not advisable because as a general rule minors are incapable of managing their own affairs.
To the minor's guardian:	This is the default position, which arises from the guardian's legal duty to manage the child's financial affairs. This should be resorted to in the ordinary course of events and if it is deviated from, the following factors must be considered:

- The amount of the benefit.
- The ability and qualifications of the guardian to administer the monies.

- The need to ensure that the benefit will be utilized in such a manner that it can provide for the minor until he attains the age of majority.

Payment to trust: Payment to a trust may not be automatically done without considering the default mode (payment to the guardian) and other modes of payment. The cost implications must also be considered)"

[11] The applicant had not addressed the above in the founding affidavit because as submitted, the policy document had not been availed to the applicant despite a request. It only came to the knowledge of the applicant after the answering affidavit was filed. No replying affidavit was filed to address this policy. While it is trite that a replying affidavit may not deviate from the founding affidavit, it is my view that this could have been dealt with on application to file an further affidavit.

[12] Section 37C(1) provides to whom and how the benefit is payable. The benefit does not form part of the deceased's estate. The purpose of the section is that the benefit is meant to cater for a deceased's dependents and that it has to be equitably distributed among the identified beneficiaries. The applicant having abandoned prayer 3, meant there was no objection to the allocation of benefits recommended by the respondent.

[13] What is clear is that the respondent executed its first function, which was its duty to investigate the existence of all beneficiaries. This function exists even where there would have been a nomination of beneficiaries by the deceased. We know that in this instance there were no nominee beneficiaries. It is apparent from the answering affidavit that the applicant was aware of the other beneficiaries, being the other minor children of the deceased. The applicant has not responded to the allegation that she did not wish them to benefit at all.

[14] The question now arises whether there is a duty on the respondent to have consulted with the applicant before payment and depositing the benefit into trust. It is clear that the policy document demands such consultation and cautions that consideration be given to the administrative costs involved in the management of a trust. The email from Mr Ngakane of the

17 August 2015 seems to suggest that it is a forgone conclusion that in all similar cases, the benefit amounts due to minor children are deposited into a trust, and he did not understand or was surprised why the applicant sought to intervene on basis that her needs were beyond her control.

[15] While Capital Alliance Life Limited administers the Scheme of the policy, there is always a risk attached to the mode of payments whether it be into the trust which manages the investment on behalf of the minor children or to the guardian. The risk has been seen in trusts which are nowadays fraught with mismanagement and fraudulent conduct which has resulted in thousands of people losing their investments in these trust entities. On the other hand if payment is made direct to the parent or guardian there is always risk that such monies would be mismanaged. Whatever the rules of the policy, there is a need for transparency; a need for consultation with beneficiaries or their guardians to do a needs analysis; and an investigation into the appropriate investment vehicle in the intereats of the minor beneficiaries.

[16] The applicant has not joined the administrator of the benefit amount, Capital Alliance Life Limited/ FedTrust to these proceedings and on a general reading of the policy document there is not much that the respondent can do on how the benefit amount is to be administered after payment. The applicant has also failed to show how she has been prejudiced by the allocation of the benefit amount and the payment into trust. Even if she had succeeded to show prejudice she has recourse against the trustees and not the respondent. According to the respondent the applicant is at liberty to approach the trustees of the fund to revisit the payment of her minor children's benefit, in particular on the determination of the amount to be released to her for their maintenance. It is my view that this application must fail.

[17] In the result the following order is given:

'The application is dismissed with costs'

TLHAPI VV

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	28 NOVEMBER 2017
JUDGMENT RESERVED ON	:	28 NOVEMBER 2017
ATTORNEYS FOR THE APPLICANT	:	BOTHMA MASSYN & THOBEJANE
ATTORNEYS FOR THE RESPONDENT	:	MENDELOW-JACOBS ATT