



**IN THE HIGH COURT OF SOUTH AFRICA  
KWAZULU-NATAL LOCAL DIVISION, DURBAN**

CASE NO: D7381/2020

D3438/2020

In the matter between:

**XOSHWAPHI NDWANDWE**

**APPLICANT**

and

**TRUSTEES OF TRANSNET RETIREMENT FUND**

**FIRST RESPONDENT**

**MOMENTUM RETIREMENT ADMINISTRATORS**

**SECOND RESPONDENT**

**THOWI ALVINAH NGCOBO**

**THIRD RESPONDENT**

**MUSAWAKHE SHOYISA**

**FOURTH RESPONDENT**

**MTHOKOZISI NDWANDWE**

**FIFTH RESPONDENT**

**PRISCA NOBUHLE MBAMBO**

**SIXTH RESPONDENT**

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**J U D G M E N T**

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**SHAPIRO AJ**

Introduction

[1] Mkhawuleni Paulus Ndwandwe (“the deceased”) died on 19 September 2018. He was survived by the applicant, Xoshwaphi Ndwandwe, who he married in terms of customary law in 1988, and his common law wife, Thowi Alvinah Ngcobo, with whom he had been in a relationship since 1983 and who is the third respondent.

[2] There were five surviving adult children born of the relationship between the deceased and Mrs. Ndwandwe at the time of his death, and two adult children born of his relationship with Ms. Ngcobo. The deceased also left two adult sons born of another prior relationship (the fourth and fifth respondents, Musawakhe Shoyise and Mthokozisi Innocent Ndwandwe) and Nosipho Andiswa Mbambo, a minor child born of a relationship with the sixth respondent.

[3] At the time of his death, the deceased was employed by Transnet and was a member of the Transnet Retirement Fund, the first respondent (“the Fund”). The death benefit payable arising out of his membership of the Fund was R3,940,673.55.

[4] The second respondent, who are the Fund’s administrators, abides the Court’s decision and the review is not opposed by the third to sixth respondents.

[5] On 27 October 2000, the deceased completed a Beneficiary Nomination Form in terms of which he nominated the following persons to receive a portion of the death benefit in the following percentages: Mrs. Ndwandwe (60 percent); two of his children with Ms. Ndwandwe (10 percent each), and two of his children with Ms. Ngcobo (10 percent each).

[6] Notwithstanding the nominees and percentages stipulated by the deceased in the Nomination Form, the Fund resolved on 18 March 2019 to apportion the death benefit as follows:

- (i) 40 percent each to Mrs. Ndwandwe and Ms. Ngcobo; and
- (ii) 3.66 percent each to the fourth and fifth respondents; and
- (iii) 12.69 percent to the minor child, Nosipho.

[7] It is this decision by the Fund that Mrs. Ndwandwe seeks to review and set aside.

[8] Mrs. Ndwandwe contends that the Fund committed a reviewable irregularity in ignoring the contents and stipulations contained in the Nomination Form. She argues that the Fund failed to comply with its own Rules and did not apply the proper weight either to her circumstances, or to those of her adult children, whilst simultaneously placing too much weight on the interests of Ms. Ngcobo and the fourth and fifth respondents. Mrs. Ndwandwe does not appear to challenge the apportionment of the benefit to Nosipho.

[9] The Fund disagrees: it argues that it was not bound by the Nomination Form and was entitled to make an independent apportionment of the deceased's death benefit to his qualifying dependents as defined in the Fund's Rules. The Fund defends its decision as being compliant with its Rules (specifically Rule 10.4(iii)) as well as being reasonable and rational.

[10] The review was instituted outside the 180-day period contemplated in the Promotion of Administrative Justice Act 3 of 2000 and Mrs. Ndwandwe's application for condonation in this regard is not opposed by the Fund.

[11] The Fund has instituted a conditional counterapplication in which it seeks an order directing Ms. Ngcobo and Nosipho's mother, the sixth respondent, to repay the funds that they have already received as part of the deceased's death benefit.

[12] On 4 September 2020, this Court granted interim interdicts under case number D3438/2021 restraining Ms. Ngcobo from disposing of the portion of the death benefit that had been paid to her and that she had invested with Sanlam and directing her to disclose on oath the exact amount of money that she received from the Fund and its Trustees. Those orders remain in operation.

#### The issues in the application

[13] Although the Record is lengthy and Mrs. Ndwandwe has raised several grounds of review, there are two core issues that require determination.

- (i) Did the Fund comply with the provisions of Rule 10.4(iii) of its Rules when deciding how to apportion the deceased's death benefit? and
- (ii) Did the Fund act reasonably and rationally in arriving at its decision?

## The regulatory scheme

[14] The Fund is a retirement fund established in terms of the Transnet Pension Fund Act (the TPFA)<sup>1</sup>.

[15] In terms of section 13 of the TPFA, the Fund was entitled to apply to the Registrar of Pension Funds for registration in terms of section 4 of the Pension Funds Act<sup>2</sup> (“the PFA”) and upon such registration, the whole of the PFA would become applicable to the Fund<sup>3</sup>.

[16] The Fund has not applied for registration under the PFA and its Rules<sup>4</sup> were published in the Government Gazette 21817 of 1 December 2000, as provided for in section 14A(5) of the TPFA.

[17] The Fund’s Rules are binding on each employer which employs or employed members of the Fund, members, pensioners, beneficiaries of the Fund and the Fund itself<sup>5</sup>. Conversely, the provisions of the PFA do not apply to the Fund.

[18] Rule 10 of the Fund’s Rules<sup>6</sup> regulates the manner of distribution of benefits upon the death of a member and, again, Rule 10.4(iii) deals with the Fund’s powers when confronted with a member who has nominated beneficiaries to be paid all or part of the death benefit but where the member also had dependants, as defined in Rule 1.

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<sup>1</sup> Act 62 of 1990

<sup>2</sup> Act 24 of 1956

<sup>3</sup> Section 4 of the PFA requires every pension fund to apply for registration prior to commencing any pension fund business.

<sup>4</sup> which appear at pages 1 to 56 of the Record

<sup>5</sup> Section 14A(6) of the TPFA

<sup>6</sup> read together with the definitions appearing in Rule 1

[19] According to Rule 1, “dependant” means a qualifying spouse, a qualifying child, any other person in respect of whom the member was legally liable for maintenance including if such person was, in the opinion of the Trustees of the Fund, upon the death of the member in fact dependant on the member for maintenance or was a person in respect of whom the member would have become liable to maintain had he not died.

[20] A “qualifying spouse” is defined to mean the surviving spouse(s) of a member in a Recognised Marital Union existing at the time of the death of the member and a recognised marital union is defined as “a legal marriage or a union according to Customary Law, Common Law or a union recognised by the Trustees in their sole discretion to be a recognised marital union”.

[21] A “qualifying child” means a child legally adopted or a stepchild of a member at the time of the member's death and a child whom the Trustees believe would have been dependant upon the member had the member not died. Where the Trustees of the Fund so direct, any other child may be included as qualifying child on terms and conditions agreed to by the Trustees.

[22] In terms of Rule 10.4(iii):

‘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.'

[23] Rule 10.4(iii) is similar in its terms to section 37C(1)(bA) of the PFA, which holds that:

'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 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 board may deem equitable: Provided that this paragraph shall only apply to the designation of a nominee made on or after 30 June 1989: Provided further that, in respect of a designation made on or after the said date, this paragraph shall not prohibit a fund from paying the benefit, either to a dependant or nominee contemplated in this paragraph or, if there is more than one such dependant or nominee, in proportions to any or all of those dependants and nominees.'

[24] Given these similarities, I will be guided by the jurisprudence developed by the Courts relating to the exercise of the discretion afforded to pension funds such as the Fund and the circumstances in which I am permitted to interfere with that discretion.

#### The factual circumstances of the deceased's dependants

[25] I will refer to the deceased's dependants in the wide sense, including Mrs. Ndwandwe and Ms. Ngcobo.

[26] Mrs. Ndwandwe was 53 at the time of the deceased's death. Their five surviving adult children (Nonhlanhla, Nokwazi, Bongisani, Busani and Nkululeko) were born between 1981 and 1998. The deceased paid Mrs. Ndwandwe R2,000 per month as maintenance. Nonhlanhla, Busani (who lived with their mother) and Nkululeko were unemployed when their father died. Nokwazi and Bongisani were employed, earning R9,000 and R10,000 per month respectively.

[27] Ms. Ngcobo was 63 when the deceased died. She received an old age pension of R1,600 per month and R400 per month from an investment. Her two surviving children with the deceased (Thembelihle and Sthandile) were born in 1983 and 1989 respectively. Thembelihle was unemployed and lived with her parents, whilst Sthandile was employed by Transnet and earned a monthly income of R20,000.

[28] The deceased paid the sixth respondent R1,000 per month for Nosipho's maintenance.

[29] Musawakhe and Mthokozisi, who are both adults, were unemployed when the deceased died. The deceased assisted them financially when the need arose.

#### The applicant's grounds of review and the Fund's defences

[30] The parties' contentions are set out at length in the papers, and I will not repeat them here. What follows is a summary of the competing arguments.

[31] Mrs. Ndwandwe advances several separate grounds of review, which in



summary are the following:

- (i) the Fund contravened Rule 10.4(iii) by ignoring the nominees on the Nomination Form and the stipulated allocation of benefits;
- (ii) the Defendant did not apply its mind to the evidence before it, i.e. that the Fund knew that Mrs. Ndwandwe had five dependents as opposed to Ms. Ngcobo who only had one and therefore awarding the same percentage of the benefit was irrational and unreasonable;
- (iii) the Fund demonstrated its bias against Mrs. Ndwandwe when it decided to pay Ms. Ngcobo and the sixth respondent despite Mrs. Ndwandwe disputing that decision;
- (iv) the Fund did not give it valid reasons for the “selective distribution” to Ms. Ngcobo in the sixth respondent;
- (v) the Fund did not take the deceased’s wishes as expressed in the Nomination Form into account;
- (vi) the Fund’s decision to deviate from the Nomination Form was irrational, unreasonable and lacked objectivity because it was made without any valid reasons;
- (vii) the Fund’s decision to allocate the same percentage of the benefits to Mrs. Ndwandwe and Ms. Ngcobo amounts to over providing for Ms. Ngcobo’s maintenance and under providing for Mrs. Ndwandwe and her children;
- (viii) the Fund failed to exercise its discretion to make the distributions in a fair and equitable manner.

[32] Although these grounds of review are advanced separately, they are variations on the following themes:

- (i) the Fund had no grounds in fact or in law to ignore the Nomination Form and the percentages allocated by the deceased;
- (ii) the Fund's decision to do so is irrational, ignored relevant evidence and led to an unfair result;
- (iii) the Fund demonstrated bias by making certain payments when it knew that there was a dispute pending.

[33] Whilst Mrs. Ndwandwe accepts that Ms. Ngcobo was a life partner of the deceased, she disputed that Ms. Ngcobo was a "qualifying spouse" as defined in the Fund's Rules.

[34] I will deal with the Fund's response to these grounds thematically.

*The Fund was not permitted to ignore the Nomination Form or the deceased's wishes.*

[35] The Fund argues that it is not bound to follow the contents or percentages in the Nomination Form.

[36] It says that Rule 10.4(iii) endows the Fund's Trustees with a discretion to make

an equitable distribution to a member's nominees or qualifying dependents and that, in effect, the Nomination Form is a non-binding guide.

[37] The Fund argues that the deceased's wishes are but one factor to be considered in the exercise of the discretion expressly conferred upon it, and that the Court should not interfere in the exercise of this discretion if the decision made is reasonable and rational.

*The Fund ignored relevant evidence and arrived at an irrational and unfair decision.*

[38] The Fund denies that it ignored relevant evidence or arrived at a decision that was either irrational or unfair.

[39] The Fund's reasoning is set out at length in the report submitted by its investigator and in the answering affidavit.

[40] Both Mrs. Ndwandwe and Ms. Ngcobo were financially dependent on the deceased, and both had been involved in long-term relationships with him.

[41] Whilst the Fund accepts that Ms. Ngcobo receives an old age pension, it points out that Mrs. Ndwandwe is ten years younger than her and will also qualify for a pension in due course. Ms. Ngcobo has no future prospects of employment and has an adult child that is still dependent on her.

[42] Whilst the Fund accepts that Mrs. Ndwandwe has three adult unemployed

children, it argues that Bongisani passed grade 12 and has the capacity to earn at least a salary of R10 000 per month. Whilst Nkululeko had to withdraw from university, she qualified for tertiary education and could also search for work with her grade 12 qualification. Busani was partially dependent on the deceased and received money only when required.

[43] The Fund defends its decision to make apportionments to Mrs. Ndwandwe and Ms. Ngcobo to the exclusion of their adult children. It argues that both the ladies will be able to utilize the money for their own financial needs first and will be capable of supporting their children if they can then afford it and they require that support. The Fund says that the payment of 40% of the benefit to each also insures against changing circumstances in the future.

[44] The Fund points out that the fourth and fourth respondents do not have the surviving parents and live on their own. They were both unemployed when the deceased died.

[45] The Fund argues that it was entitled to recognize Musawakhe and Mthokozisi as “dependents” because they were in financial need and that it was appropriate for the Fund to consider factors such as their relationship with the deceased, their financial position, their future earning capacities and employment prospects as well as the amount available for distribution.

[46] This is why a small portion of the death benefit was allocated to each man.

[47] The Fund says that it did not ignore the contents of the deceased's Nomination Form – but that an allocation of 60% to Mrs. Ndwandwe and 20% to two of her adult children, with only 20% allocated to two of Ms. Ngcobo's children (with no provision made for Ms. Ngcobo, Musawakhe, Mthokozisi or Nosipho) was not equitable.

[48] The Fund asserts that its decision was reasonable and rational and was based on a consideration of all the relevant material.

*The Fund was biased against Mrs. Ndwandwe.*

[49] The Fund denies that it was biased against Mrs. Ndwandwe. It says that it was entitled to make payments to Ms. Ngcobo and the sixth respondent even if Mrs. Ndwandwe disagreed as it was acting in terms of its Rules and in the exercise of the discretion conferred upon it.

#### The legal position

[50] Rule 10.4(iii) permits the Fund to make any distribution to nominees or dependents that it deems equitable. The Fund's Rules amount to its constitution and are binding upon it<sup>7</sup>.

[51] The Fund's obligation (which is analogous to a qualifying fund's obligations under section 37C(1)(bA) of the PFA) has been expressed by the Supreme Court of Appeal to

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<sup>7</sup> *Gerson v Mondi Pension Fund and Others* 2013 (6) SA 162 (GSJ) at para [9]

be the following:

'The effect of s 37C(1)(a), as read with the definition of 'dependant', is to require a fund, within a period of 12 months from the death of the member, to identify the dependants of the deceased who may potentially qualify for an equitable distribution from the deceased's death benefit in terms of s 37C. Having once identified the potential class of dependants, the board of the fund is vested with a large discretion to determine, in the light of its assessment of their respective needs, in what proportions the death benefit will be distributed among the class of dependants.'<sup>8</sup>.

[52] That discretion has also been described as a "wide discretion"<sup>9</sup>, meaning that the discretion is not unfettered but that if the Fund honestly applied its collective mind to the facts placed before it and neither took into account irrelevant, improper or irrational factors nor reached a decision that no reasonable decision maker properly directing itself could have reached<sup>10</sup>, there is no legal basis on which to set aside or otherwise interfere in its decision.

[53] The last-mentioned point was expressed in the following way in the oft-cited determination of the Pension Funds Adjudicator in the matter of *Stacey (Koevort) v Old Mutual Protektor Pension Fund and Another*<sup>11</sup>:

'It should be noted that even if I may not necessarily agree with the decision of the Board, that in itself is not a ground for setting aside the board's decision. This is because

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<sup>8</sup> *Fundsatwork Umbrella Pension Fund v Guanieri and Others* 2019 (5) SA 68 (SCA) at para [8]

<sup>9</sup> *Gerson*, at paras [12] and [13]

<sup>10</sup> *Jansen Van Vuuren and Another v Momentum Provident Preservation Fund and Others* (28160/2020) [2022] ZAGPJHC 620 (30 August 2022) at para [21]

<sup>11</sup> [2005] 1 BPLR 73 (PFA) at para [15]; cited with approval in, among others, *Gerson* at para [15]

it is not my role as a reviewing tribunal to decide on what is the fairest and most generous distribution. The test in law is whether the board has acted rationally and arrived at a proper and lawful decision.'

[54] Obviously, and notwithstanding the wide discretion conferred upon the Fund, the decision must still be one that is rational and equitable as required by Rule 10(4)(iii).

*Was the Fund entitled to ignore the deceased's wishes and allocate the death benefit other than as nominated by him?*

[55] The answer to both questions must be yes.

[56] Rule 10(4)(iii) plainly endowed the Fund with a discretion to make distributions to nominees or dependents that were equitable. It is settled law that the provisions of the Rule (or, in analogous situations, section 37C of the PFA) takes precedence over any nomination by a member of a fund<sup>12</sup>.

[57] It has been held that the section 37C of the PFA<sup>13</sup> was intended to serve a social function and was enacted to protect dependency even over the wishes of the deceased. The section specifically restricts freedom of testation in order that no dependants are left without support. A Fund is expressly not bound by a will, nor is it bound by the

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<sup>12</sup> *Kaplan and Another NNO v Professional and Executive Retirement Fund and Others* 1999 (3) SA 798 (SCA) at 802C-803C

<sup>13</sup> and, by parity of reasoning, Rule 10(4)(iii)

nomination form, whose contents are merely a guide to the trustees<sup>14</sup>.

[58] It is therefore not a sustainable ground of review that the Fund applied its own discretion in making the allocations to the deceased's dependants and ignored the Nomination Form. It was obliged to do so.

[59] In this regard, I have no difficulty in accepting that Ms. Ngcobo was a "qualifying spouse" as defined in Rules 1.1.40 and 1.1.41. She and the deceased were in a permanent relationship for over three decades and she was his common-law wife. They lived together during the week, and they had children together. He maintained her. The Fund was entitled to recognise that union as a "recognised marital union"<sup>15</sup>.

*Did the Fund ignore relevant information, rely on irrelevant information, and come to an unreasonable and irrational decision?*

[60] I accept that Mrs. Ndwandwe disagrees with the Fund's decision. I also accept that the Fund could have reached a different decision on the allocations and could have apportioned the death benefit completely or partially in accordance with the Nomination Form. These decisions could also have been rational and defensible.

[61] That the Fund reached a different decision does not mean that relevant information was ignored or that irrelevant information was relied upon.

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<sup>14</sup> *Mashazi v African Retirement Benefit Provident Fund* 2003 (1) SA 629 (W) at 632I-633A, cited with approval in *Mbatha v Transport Sector Retirement Fund and Another* (0016223/19) [2020] ZAGPJHC 18 (19 February 2020) at para [3]

<sup>15</sup> The Fund's recognition of Ms. Ngcobo as a "spouse" is also consistent with the Constitutional Court's decision in *Bwayna v Master of the High Court and Others* 2022 (3) SA 250 (CC) (see the factors set out at paras [76] and [77])



[62] The Fund did not ignore Mrs. Ndwandwe's financial circumstances, or those of her surviving children. The Fund concluded, correctly, that Mrs. Ndwandwe would in due course, qualify for an old age pension and that she was entitled to the payment of a sizable benefit to contribute towards her maintenance and, if required, to assist in the maintenance of her adult children.

[63] The Fund was entitled to consider the educational levels reached by Bongisani and Nkululeko as relevant factors, and that Bongisani had been employed by Transnet, albeit in a temporary capacity.

[64] However, the Fund could not ignore the existing financial circumstances or future needs of Ms. Ngcobo and her adult children, or Musawakhe and Mthokozisi<sup>16</sup>.

[65] That Mrs. Ndwandwe does not challenge the allocation to Nosipho demonstrates that, at some level, she accepts that the Fund was obliged to look wider than the four corners of the Nomination Form, not only in the exercise of its discretion but in the discharge of its duties in terms of its Rules.

[66] Ms. Ngcobo is ten years older than Mrs. Ndwandwe and was also in need of financial assistance.

[67] The Fund was confronted with a situation where the deceased effectively had two spouses, both of whom required financial assistance and would do so in the future.

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<sup>16</sup> *Guarnieri*, above, at 76D

That was a material and relevant consideration that the fund not only considered but was obliged to apply.

[68] Musawakhe and Mthokozisi are adult, unemployed males with no other source of support. They cannot rely for any assistance on their mothers, as the children of Mrs. Ndwandwe and Mrs. Ngcobo can.

[69] This, too, is a relevant consideration that the Fund was justified in considering.

[70] The same principle applies to the apportionment to Nosipho<sup>17</sup>.

[71] The Fund did not reach its decision in a vacuum. Its investigators undertook a detailed investigation and spoke to a wide range of people.

[72] The decisions that the Fund took were based on the information that was provided and the circumstances that applied when the deceased died.

[73] I cannot identify any "irrelevant factor" that the Fund relied upon in reaching its decision.

[74] It was not irrelevant that Ms. Ngcobo was not only older than Mrs. Ndwandwe but that she also required maintenance. Certainly, Ms. Ngcobo has fewer unemployed dependants than Mrs. Ndwandwe but that in itself is not a reason to treat Mr.

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<sup>17</sup> The applicant's counsel conceded in argument that the allocations to Msawakhe, Mthokozisi and Nosipho were reasonable. The real complaint, according to Mr Dlamini, was the over-provision for Ms. Ngcobo's needs and the concomitant under-provision for Mrs. Ndwandwe's needs. Therefore, the focus was on one remaining factor of the Fund's decision. I deal with this below.

Ndwandwe and Ms. Ngcobo differently.

[75] The benefit allocated to Mrs. Ndwandwe was not as generous as she would have received under the Nomination Form. However, it is not for me to decide what is the fairest or most generous distribution.

[76] I accept that the Fund applied its mind honestly to the facts that were placed before it, and I conclude that its decision is reasonably supported by those facts. Given the competing financial demands of the deceased's dependents, the Fund's decision is one that a reasonable decisionmaker could have reached. The decision does not become irrational because one factor in the "basket" of factors which the Fund had to consider was not elevated above the others, or given the consideration, in the way that Mrs. Ndwandwe wished, or even that another decision maker may decide may have chosen. If it was based on existing facts and rationally linked to them, the decision cannot be disturbed on review.

[77] The decision that the Fund took recognized the position of both Mrs. Ndwandwe and Ms. Ngcobo as well as the deceased's other children. Given the full set of factors before the Fund, there were legitimate reasons to depart from the express terms of the Nomination Form which did not adequately cater for Ms. Ngcobo or the fourth to sixth respondents.

[78] I am satisfied that the Fund's decision was reasonable and rational and that it acted equitably in making the allocations that it did.

*Was the fund biased against Mrs. Ndwandwe?*

[79] In my view, Mrs. Ndwandwe has conflated cause and effect.

[80] The decision to make the allocations that are under review was rational and defensible, and the Fund was entitled to act in terms of its decision.

[81] In the absence of an interdict, the Fund was not obliged to withhold payment to the other beneficiaries and, to the contrary, was obliged to pay them.

[82] Doing so did not mean that the Fund exhibited any bias.

[83] Whilst Mrs. Ndwandwe may have disputed to the allocations, it was for her to seek relief either before the Pension Funds Adjudicator or this Court.

[84] It may be true that the Fund's non-payment of 60% of the death benefit to Mrs. Ndwandwe had an adverse impact upon her and upon her children. I do not seek to minimize this, but that effect does not mean that the Fund was biased or that it favoured one class of beneficiaries over another.

[85] In summary, the Fund's decision is not vitiated by any form of bias.

[86] Further, and whether the Fund explained why it made payments to the remaining respondents, its decision to make the payments themselves pursuant to its resolution to

do so is not under review. It is only the resolution of 18 of March 2019 that is.

[87] For the reasons set out above, I conclude that the applicant has not established any sustainable grounds of review as advanced or as contemplated in the Promotion of Administrative Justice Act 3 of 2000 and that, to the contrary, the Fund's decision is rational and reasonable and in compliance with Rule 10(4)(iii) of its Rules.

#### The Fund's conditional counter application

[88] Given the view that I have taken of the main application, the conditional counter application falls away and no more need be said about it.

#### The interim interdict granted on 4 September 2020

[89] In the same vein, the interim order granted by this Court under case number D3438/2020 must now be discharged.

#### Costs

[90] Mrs. Ndwandwe has been unsuccessful in the main application and none of her grounds of review are sustainable.

[91] However, it was not unreasonable for her to call in aid the Nomination Form completed by the deceased or to act in defence of her own interests and those of her children. It is undisputed that they are in challenging financial circumstances.

[92] The effect of my ruling is to deprive Mrs. Ndwandwe (and by extension, her

children) of a significant portion of the deceased's death benefit that would have been paid to them had the nominated allocations been applied by the Fund.

[93] To my mind, it would be neither just nor equitable to mulct Mrs. Ndwandwe with the costs of this application, which would have the predictable result of reducing even further the amounts that she receives from the Fund.

[94] It is appropriate that each party pay their own costs in respect of both the application under case number D7381/2020, and under D3438/2020

**I make the following orders:**

- 1. The applicant's application for orders reviewing and setting aside the resolution taken by the first respondent on 18 March 2019 regarding the distribution and allocation of the death benefits of Mkhawuleni Paulus Ndwandwe is dismissed.**
- 2. The interim order granted by this Court under case number D3438/2020 is discharged.**
- 3. Each party is to pay their own costs incurred in respect of the applications instituted under case number D3438/2020 and D7381/2020, including all reserved costs.**

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SHAPIRO AJ

## APPEARANCES

Date of Hearing: 17 February 2023

Date of Judgment : 22 February 2023

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