REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED TO CORRECT HEADER.

6/2/19
05 February 2019 SIGNATURE

Case No: 2017/47543

In the matter between:

JEMANE MERRISA KIM	Applicant
And	
AFGRI STAFF PENSION FUND	First Respondent
SANLAM LIFE INSURANCE LIMITED	Second Respondent
AFGRI OPERATIONS (PTY) LTD T/A DAYBREAK FARMS	Third Respondent
ARRIES, GEORGE DAVID	Fourth Respondent
ARRIES NO, GEORGE DAVID	Fifth Respondent
LUKHAIMANE MA NO	Sixth Respondent

JUDGMENT

COWEN AJ:

1. The applicants, Merissa Jemane and Whitney Adams, seek to set aside a decision of the Board of the Afgri Staff Pension Fund ('the Fund') to distribute the death benefit of their mother, the late Florence Arries ('the deceased'). The deceased was a member of the Fund, which is a pension fund organisation registered in terms of the Pension Funds Act 24 of 1956 ('the Act').

2. The Fund and the fourth respondent oppose the proceedings. The fourth respondent is Mr George Arries, who was married to the deceased at the time of her death. Mr Arries had a daughter from a prior relationship, Ms Catelynn Arries. He is also cited as the fifth respondent in his official capacity as Ms Arries' guardian as she was a minor when the proceedings were instituted. Ms Arries has not been substituted as a party in her own name notwithstanding that she reached the age of majority in February 2018. The sixth respondent is the Pension Funds Adjudicator ('the Adjudicator'). The Adjudicator filed a short affidavit explaining that it is abiding the Court's decision. The second and third respondents have not participated in the proceedings. The second respondent is insurer Sanlam Life Insurance Limited and the third respondent is Afgri Operations (Pty) Ltd, the deceased's former employer.

3. The deceased passed away on 13 August 2014. Her benefit with the Fund fell to be disposed of in terms of section 37C of the Act.[1] In terms of section 37C, lump

[1] Section 37C(1) provides as follows (with emphasis added to highlight relevant portions):

sum benefits that fall under the section do not form part of the member's deceased estate. They are dealt with under section 37C.[2] This Court held in *Mashazi*[3] that the section was intended to serve a 'social function': 'It was enacted to protect dependency, even over the clear wishes of the deceased. The section specifically restricts freedom of testation in order that no dependants are left without support.' The Supreme Court of Appeal has held that a fund is not bound by a member's nomination form when distributing the benefit under section 37C.[4]

4. On 9 January 2015, the Board of the Fund, acting in terms of section 37C, allocated the deceased's death benefit to the applicants (15% each), the fourth respondent (35%), Ms Arries (30%) and the deceased's mother (5%) ('the January 2015 decision').

5. The allocation was not consistent with the deceased's nomination form, in which the deceased nominated the applicants each to receive 40% of the benefit and

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(1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit (other than a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules) payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19 (5) *(b)* (i) and subject to the provisions of sections 37A (3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:
a) ...
(b) ...
*(b*A) 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.
(c) ...

[2] Kaplan and another v Professional and Executive Retirement Fund and another [1999] 3 All SA 1 (A)

[3] Mashazi v African Products Retirement Benefit Provident Fund 2003(1) SA 629 at 632H-J

[4] Kaplan, supra

the fourth respondent and her mother each to receive 10% of the benefit. The deceased did not nominate Ms Arries as a beneficiary in her nomination form. According to the affidavits, the nomination form recorded further that in the event of the deceased not having any dependants, then the applicants should receive the benefit. The content of the nomination form, though not in dispute, is not in the applicants' possession nor on the record.

6. In making the January 2015 decision, the Board accepted that the fourth respondent and Ms Arries were both financially dependent on the deceased at the time of her death.

7. On 26 November 2015, the applicants lodged a complaint against the January 2015 decision with the Adjudicator in terms of section 30A(3) of the Act.[5] The main ground of complaint was that Ms Arries was neither a nominated beneficiary nor, as a matter of fact, a dependant of the deceased. The applicants also disputed that the fourth respondent was factually dependent on the deceased and claimed that they had separated several months before her death.[6] In their complaint, the applicants placed various information before the Adjudicator in this regard.

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[5] Section 30A is entitled ' **Submission and consideration of complaints' and provides as follows.**
(1) Notwithstanding the rules of any fund, a complainant may lodge a written complaint with a fund for consideration by the board of the fund.
(2) A complaint so lodged shall be properly considered and replied to in writing by the fund or the employer who participates in a fund within 30 days after the receipt thereof.
(3) If the complainant is not satisfied with the reply contemplated in subsection (2), or if the fund or the employer who participates in a fund fails to reply within 30 days after the receipt of the complaint the complainant may lodge the complaint with the Adjudicator.
(4) Subject to section 30I, the Adjudicator may on good cause shown by any affected party-
(a) extend a period specified in subsection (2) or (3) before or after expiry of that period; or
(b) condone non-compliance with any time limit specified in subsection (2) or (3).

[6] It should be noted upfront that the fourth respondent, as a spouse of the deceased, is in any event a dependant under the Act.

8. On 25 April 2016, the Adjudicator set aside the January 2015 decision and ordered the Board of the Fund to reconsider its decision, and to investigate the fourth respondent's and Ms Arries' dependency on the deceased within eight weeks of the determination. In conducting the investigation, the Board was to consider the submissions made by the applicants disputing dependency. The Board was to pay the death benefit to the deceased's beneficiaries within two weeks of completion of the investigation.

9. On 17 October 2016, the Board made a second decision distributing the death benefit ('the October 2016 decision'). In the October 2016 decision, the Board allocated 15% to the first applicant, 20% to the second applicant, 40% to the fourth respondent, 20% to Ms Arries and 5% to the deceased's mother. The Board remained of the opinion that both the fourth respondent and Ms Arries were dependents of the deceased when they were sharing a common household, which the Board found was for an extensive period leading to six months before her death. It is the October 2016 decision that is the subject of this review.

10. On 14 November 2016 the applicants lodged a further complaint against the October 2016 decision. A complaint was initially lodged with the Fund itself in terms of section 30A(1) of the Act.[7] In the absence of a response, on 21 April 2017, the applicants lodged a further complaint with the Adjudicator in terms of section 30A(3) of the Act both against the October 2016 decision and the Fund's failure to deal with the complaint. On 24 April 2017, the Adjudicator made a ruling finding that that tribunal 'is unable to investigate the matter twice on the same issue previously lodged.'

[7] See fn 5 above.

11. This application was instituted on 15 December 2017. The substantive relief sought in the notice of motion is, first, relief setting aside the October 2016 decision and secondly, relief ordering the Fund to pay the benefit in accordance with the nomination form.

12. At the hearing of the application, Mr Wilkins, who appeared for the applicants, informed the Court that the applicants' cause of action is a judicial review of the Board's October 2016 decision in terms of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). Both parties' representatives submitted that a decision of a Fund taken in terms of section 37C of the Act constitutes administrative action and the application was argued on that basis.[8] Mr Wilkins also informed the Court that the matter is not before the Court as a statutory appeal against the decision of the Adjudicator as contemplated by section 30P of the Act. Section 30P of the Act is titled 'Access to Court' and provides a right to any party who feels aggrieved by a determination of the Adjudicator to apply to the High Court for relief.[9] It is clear from the notice of motion that the application is not a statutory appeal under section 30P. From the bar, Mr Wilkins also confirmed that the applicants conceded that the Fund was not bound to distribute

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[8] I was referred to Titi v Funds at Work Umbrella Provident Fund (1728/2010) [2011] ZAECMHC 22 (10 March 2011) and Guarnieri v Funds at Work Umbrella Pension Fund and Others (47754/2016) [2018] ZAGPPHC 579 (24 May 2018).

[9] **30P Access to court**
(1) Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the High Court which has jurisdiction, for relief, and shall at the same time give written notice of his or her intention so to apply to the other parties to the complaint.
(2) The division of the High Court contemplated in subsection (1) may consider the merits of the complaint made to the Adjudicator under section 30A (3) and on which the Adjudicator's determination was based, and may make any order it deems fit.
(3) Subsection (2) shall not affect the court's power to decide that sufficient evidence has been adduced on which a decision can be arrived at, and to order that no further evidence shall be adduced.

the benefit in accordance with the deceased's nomination form and submitted that the proper relief would be to refer the matter back to the Fund for reconsideration.

13. Mr Van der Berg SC advanced three points *in limine* on behalf of the Fund. Although these were argued upfront, I requested and heard argument also on the merits of the case.

14. Mr Van der Berg submitted firstly, that the applicants had not exhausted their internal remedies as contemplated by PAJA as the applicants had not approached the Court to seek an order compelling the Adjudicator to determine their complaint against the October 2016 decision. Secondly, he submitted that the applicants were bound by both the January 2015 and October 2016 decisions of the Adjudicator which, in terms of section 30O of the Act, entitled 'Enforceability of determination' are deemed to be civil judgments of a court and had not been challenged. The issues were, so the argument went, *res judicata*. Thirdly, he submitted that the applicants were in any event, well out of time in prosecuting the review as the application was instituted only on 15 December 2017 whereas the Board's October 2016 decision was taken over a year before-hand and well over 180 days after the Adjudicator had indicated that she would not entertain the complaint.

15. PAJA imposes a strict duty to exhaust internal remedies before a court may review administrative action. An applicant may, however, apply for an exemption from the duty to exhaust internal remedies in terms of section 7(2)(c) of PAJA. An applicant for exemption must demonstrate that exceptional circumstances

exist and it is in the interests of justice to review a decision.[10] The Constitutional Court held in *Koyabe*[11] that courts must determine on a case by case basis whether the facts justify the grant of an exemption. Factors that may be taken into consideration include, amongst others, whether the internal remedy is effective and available and whether it is possible to pursue without obstruction, whether systemic or as a result of unwarranted administrative conduct. It would be open to a Court to grant an exemption where a party has in good faith attempted to exhaust internal remedies but was frustrated in his or her efforts to do so.

16. If it was necessary on the facts of this case for the applicants to have applied for an exemption from their duty to exhaust internal remedies in terms of section 7(2) of PAJA, that would be the end of the matter as the applicants have not made such an application.[12]

17. The applicants successfully lodged a complaint against the January 2015 decision and when aggrieved by the October 2016 decision, the applicants sought again to utilise internal remedies to obtain relief but were met with silence from the Fund and a decision from the Adjudicator that it would not consider what it considered to be the same complaint a second time. The question is whether they were obliged, in order to 'exhaust' the remedies as contemplated by the Act to approach a Court to compel the Adjudicator to consider the second complaint. While it may have been open to the applicants to pursue relief of that nature, in

[10] Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae) 2010(4) SA 327 (CC) at paragraph 34.

[11] Supra at paragraphs 44 and 48

[12] This was the result in Titi v Funds at Work Umbrella Provident Fund (1728/2010) [2011] ZAECMHC 22 (10 March 2011)

my view it was not incumbent upon them to do so before proceeding with a review. Rather, the applicants in this case may properly be regarded to have concluded the internal procedures when they received the notification from the Adjudicator advising that the Adjudicator considered itself to be unable to consider what it regarded as the same complaint twice.

18. In coming to this conclusion I have considered whether the Adjudicator's refusal to decide the complaint a second time was an obstruction that could have been taken into account as an exceptional circumstance in an application for exemption. I have considered this in light of the Koyabe decision referred to above. This issue was not however decided in Koyabe. I am satisfied that on the facts of this case, internal remedies were concluded. However, even if I am incorrect, in my view, the applicants were relieved of their duty of doing so when the Adjudicator refused to consider the complaint.[13] I accordingly do not uphold the first point *in limine*.

19. I am also unable to agree with the second point *in limine*. In this regard, Mr Van der Berg submitted that the applicants were non-suited because of their failure to challenge the prior decisions of the Adjudicator, which stand and have the force of civil judgments in terms of section 30O(1) of the Act. The doctrine of *res judicata* and *lis pendens*, so the argument went, precluded consideration of the matter. I do not agree.

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[13] Cf Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining And Development Company Ltd and Others (2014 (3) BCLR 265 (CC); 2014 (5) SA 138 (CC)) [2013] ZACC 52; [2013] ZACC 48 (13 December 2013) esp at para 96 with reference to the decision of that Court in Bengwenyama Minerals (Pty) Ltd and Others v Genorah Resources (Pty) Ltd and Others (CCT 39/10) [2010] ZACC 26; 2011 (4) SA 113 (CC) ; 2011 (3) BCLR 229 (CC) (30 November 2010).

20. The applicants had no reason to challenge the Adjudicator's determination in respect of the January 2015 decision, which was in their favour and which, in substance, required a reconsideration of the decision in terms of section 37C of the Act. As a matter of fact, the Fund then took a subsequent decision - the October 2016 decision. The Adjudicator's first determination was implemented and it is the legality of the October 2016 decision that the applicants seek to challenge. The first determination is neither pending nor does it have any binding effect that precludes a judicial review of a subsequent decision.

21. As regards the Adjudicator's second determination, the Adjudicator did not make any determination on the merits of the complaint. At most, there is a decision of the Adjudicator akin to one where the Adjudicator finds that she is *functus officio* because she had already decided the matter. It is not a pending decision, but a decision taken. It is, furthermore, not a decision determining any cause of action on its merits. The question whether the Adjudicator was right or wrong in her conclusion that she could not decide the second complaint is not before me and I accordingly decline to make any findings in that regard. Whatever its status, its effect is no more and no less than a decision by the Adjudicator to decline to entertain a complaint on its merits.

22. I now turn to the Fund's third point *in limine*, being that the review was out of time as it was instituted more than 180 days from not only the Board's decision – taken on 17 October 2016 – but more than 180 days from 24 April 2017, the date when the Adjudicator informed the applicants that their complaint would not be determined. In circumstances where internal remedies exist, PAJA requires, in section 7(2)(1)(a) that an application for judicial review be instituted without

unreasonable delay and not later than 180 days after the date on which any internal remedies have been concluded. If, as I have found, the internal remedies were concluded when the applicants received the Adjudicator's communication of 24 April 2017, it was incumbent on the Applicants to have instituted review proceedings not later than a date in mid-October. At best for the applicants, the application for judicial review was instituted approximately two months after the outer time limit prescribed by PAJA. In those circumstances, it was incumbent on the applicants to apply for an extension of time in terms of section 9 of PAJA. Under that section, a court may extend the time 'where the interests of justice so require'.

23. In prayer 1 of the notice of motion, the applicants applied for condonation for the late institution of the application to the extent necessary. A consideration of the founding affidavit however, shows that the application is an application for condonation for failing to comply with the six-week period for instituting proceedings in terms of section 30P of the Act. These are, however, not proceedings in terms of that section.

24. I am willing to assume in favour of the applicants that the failure to plead in a manner that made it clear that reliance was being placed on section 9 of PAJA is not fatal to the case, as this would place form over substance. On this basis, I have considered whether the applicants have made out a case that the interests of justice warrant an extension of time for the institution of proceedings until December 2017 when the proceedings should have been instituted at the very latest by mid October 2017.

25. The question whether the interests of justice require the grant of such extension depends on the facts and circumstances of each case. Relevant factors include the nature of the relief sought, the extent and cause of the delay, its effect on the administration of justice and other litigants, the importance of the issues to be raised in the intended proceedings, the reasonableness of the explanation for the delay and the prospects of success.[14] The party seeking an extension must furnish a full and reasonable explanation for the delay which covers the entire duration thereof.[15]

26. I deal first with the prospects of success. The applicants do not mention PAJA in their founding affidavit. The Constitutional Court held in *Bato Star*[16] that it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon which they base their cause of action and the legal basis of their cause of action. The Court held that while it is not necessary for a litigant who relies on a statutory provision to specify it, it must be clear from the facts alleged by a litigant that the section is relevant and operative.

27. The question whether Ms Arries was factually dependent on the deceased lies at the heart of this review. The Act defines a dependant in section 1. The definition is a wide definition and includes a person in respect of whom a member is legally liable for maintenance or would have become legally liable for maintenance if the

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[14] City of Cape Town v Aurecon South Africa (Pty) Ltd (CCT21/16) [2017] ZACC 5; 2017 (6) BCLR 730 (CC); 2017 (4) SA 223 (CC) (28 February 2017) at paragraph 46

[15] Camps Bay Ratepayers' and Residents Association v Harrison [2010] 2 All SA 519 (SCA) at para 54

[16] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others (CCT 27/03) [2004] ZACC 15; 2004(4) SA 490 (CC); 2004(7) BCLR 687 (CC) 12 March 2004) at paragraph 27.

person had not died. Material to Ms Arries (and Mr Arries for that matter), it also includes various persons in respect of whom a member is not legally liable for maintenance but such person

27.1. Was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance,

27.2. Is the spouse of the member;

27.3. Is a child of the member, including a posthumous child, an adopted child and a child born out of wedlock.

28. Mr Arries is eligible for consideration for a distribution not only because he was nominated by the deceased in the nomination form but because he is a dependant under the section, being a spouse. Ms Arries, however, is only a dependant if she falls under the rubric of factual dependency as defined.

29. Mr Wilkins submission was that the applicable review ground was an error of fact as contemplated by the decision of the SCA in the *Pepkor* case.[17] In *Pepkor,* the SCA held[18] that where legislation empowers a functionary to make a decision, in the public interest, it should be made on the material facts that ought to have been available for the decision properly to be made. If a decision has been made in ignorance of facts material to a decision and which should therefore have been before the functionary, the decision may be reviewed and set aside. The *Pepkor* decision foreshadowed that a review of this sort would fall under the rubric of

[17] *Pepkor Retirement Fund and another v Financial Services Board and another* [2003] 3 All SA 21 (SCA).

[18] At paragraph 47

section 6(2)(e)(iii) of PAJA, which provides that administrative action is reviewable if the action was taken because irrelevant considerations were taken into account or relevant considerations were not considered. The SCA has since affirmed that an error of fact as contemplated by *Pepkor* can ground a review under both this sub-section and sub-section 6(2)(i) (the catch-all review ground where an 'action is otherwise unconstitutional or unlawful'.[19] However, in *Dumani v Nair,* the SCA held that in applying the review ground, Courts must be astute to retain the distinction between review and appeal and to do so have held that it is only available in circumstances where a 'functionary had made an error in respect of a fact that was established in the sense that it was non-contentious and objectively verifiable.'[20] That is not the case in this application – Ms Arries' factual dependency on the deceased upon her death is neither non-contentious nor susceptible to objective verification on the information before the Court.

30. Mr Wilkins did not rely on any other review ground. I am mindful however that the applicants plead and allege in the founding affidavit that Ms Arries was not a factual dependant at the time of the deceased's death as she did not live with the deceased at that time and thus did not fall within the definition of dependency as contemplated by section 1 and section 37C of the Act. The point was also made in the heads of argument. In this regard, the Board itself found upon further

[19] Chairperson's Association v Minister of Arts and Culture 2007(5) SA 236 (SCA) at paragraph 48 Chairman State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman State Tender Board v Sneller Digital (Pty) Ltd 2012(2) SA 16 (SCA) at paragraph 34.

[20] Dumani v Nair and Another (144/2012) [2012] ZASCA 196; 2013 (2) SA 274 (SCA); [2013] 2 All SA 125 (SCA) (30 November 2012) at paragraph 32. See too Airports Company South Africa v Tswelokgotso Trading Enterprises CC (19548/2015) [2018] ZAGPJHC 476; 2019 (1) SA 204 (GJ) (22 June 2018)

investigation that Ms Arries did not live with the deceased at the time of her death and relied on the fact rather that they had been dependent until that time. The argument thus, at least in part, accepts the correctness of the Board's factual findings and is premised on a contention that Ms Arries was simply not eligible for any distribution as a matter of law or perhaps invariable reasonableness. In order to succeed in this argument on the papers, it would be necessary to hold that factual dependency can never arise as contemplated by section 37C read with (b)(i) of the defiition where a person is not sharing a common household on the date of death. I am unable to accept this as the question whether a person is in fact dependent on a deceased upon their death will always be a question to be considered in light of the nature of any dependency. For example, and there may be many others, factual dependency may arise in circumstances where a person pays for the living expenses or rental costs where that person lives elsewhere.

31. Various other submissions are made in the heads of argument that relate to an alleged irrationality or unreasonableness of the October 2016 decision, none of which were developed in oral argument. Leaving aside whether these grounds were adequately pleaded, these submissions amount to contentions that greater weight should have been given to the nomination form, certain inferences should have been drawn from the nomination form or the Board should have exercised the section 37C discretion in how it allocated the benefit differently. I am not persuaded that any of these submissions suffice to ground a review on the basis of either irrationality or unreasonableness in the sense contemplated by PAJA.

32. In my view, if there is merit in the application it lies in a complaint, pleaded in the founding affidavit, that the Board failed properly to investigate Ms Arries' factual

dependency as required by the Act and by the ruling of the Adjudicator both in respect of the fact of dependency and the extent of any dependency. This complaint does not in my view give rise to a review under *Pepkor* as was argued.

33. However, this complaint raises issues of public importance. It also raises issues of some complexity as even a cursory consideration of authority reveals. For example, the issues are canvassed in Hunter et al *The Pension Funds Act: A Commentary on the Act regulations, selected notices, directives and circulars* 2010. According to the authors, '*The board of a fund is not entitled to rely only on information in regard to potential dependants of a deceased member that is brought to its attention; it is instead required to take all reasonable steps to identify and locate such persons. What steps will be considered 'reasonable' will depend on the circumstances of the case, but funds are expected to balance, on the one hand, the need to give effect to the section by identifying all potential beneficiaries and, on the other hand, practical considerations such as the time and cost involved of doing so.*'[21] The authors advance the view that the duty to investigate extends to investigating the facts and circumstances that will enable the board of the fund to exercise its discretion as to how to allocate a benefit equitably between dependants and nominees having regard to relevant factors.[22] These views and findings, in my view, have real force as it is difficult to see how the Board of a Fund can perform its functions fairly, lawfully, reasonably and

[21] See p 684-5. The authors motivate their views in light of the fund's duty of good faith to all persons with an interest in the fund and the determination of the former adjudicator (then Prof John Murphy) in *Sikhali & another v Metal Industries Provident Fund (1) [2001] 12 BPLR 2895 (PFA)* in which the board's duty is described as follows at para 14: 'There is a common misconception amongst the parties in this matter and the pensions industry at large, that there is duty on a dependant to come forward and inform the board of his or her status and potential entitlement to a death benefit. In terms of section 37Cof the Act, the onus is squarely on the board of management of a pension fund to conduct an investigation to trace the dependents of a deceased. Thus, in any death benefit claim arising out of a pension fund organization, it is imperative for the board to take all reasonable steps to locate the dependants of the deceased.'

[22] See p 691 to 693.

rationally absent the Board taking reasonable steps to ascertain relevant information. This applies both to the first step of identifying any dependant and thereafter the second step of determining how equitably to allocate a benefit between dependants and / or nominees. On a consideration of the affidavits and while not fully ventilated in argument, the applicants' complaint may well have some merit at least in respect of the adequacy of the Fund's investigations to enable it to determine how equitably to allocate the benefit between dependents and / or nominees.

34. The importance of the issues and the prospects of success are not, however, the only relevant considerations in assessing the interests of justice and there are other factors that persuade me that on the facts of this case the interests of justice would not be served by granting an extension of time. These concern the reasonableness and adequacy of the explanation for the delay, the impact on the administration of justice and other litigants, the nature of the known prejudice in this case and the nature of this particular matter.

35. Importantly, the applicants have not offered an adequate explanation as to why, after receiving the Adjudicator's letter in April 2017, it took until December 2017 to institute the review proceedings. On the facts of this case, prompter action was required. The applicant refers without any elaboration to an absence of funds to instruct lawyers until October 2017. They also do not provide an adequate explanation as to why, when lawyers were instructed at the beginning of October 2017 and within the 180-day period in PAJA, proceedings were further delayed for two months. It appears that the applicants wanted at that stage to

seek to persuade the Adjudicator to change her mind, but then altered course to pursue a review of the Board's decision. There is also inadequate information in the founding affidavits (and in turn in answer) that enable a proper consideration of the respective prejudice to the parties affected by the delay that has already ensued. Yet it is clear on the common cause facts that the nominees and dependants each need their distribution. In matters of this sort, the administration of justice will often be served by finality being reached within a relatively short time-frame because the distributions made are made to alleviate dependency.[23] Long delays that result in funds being withheld from distribution can cause immense prejudice to people and their ability to support themselves on the death of a person. There may be cases where no such prejudice arises, but on the common cause facts, this is not such a case. The deceased died in August 2014 and while both the Fund and the Adjudicator contributed to the delays until April 2017, the delays thereafter are the applicants' responsibility.

36. Furthermore, this is not a case where the applicants will receive no distribution. They are to receive a distribution. There has also already been a redetermination that has resulted in a reduction of Ms Arries' allocation based on the same complaint. I have also considered that the applicants' complaint about the inadequacy of the investigation is stronger as regards the Fund being in a position equitably to allocate the benefit between nominees and dependants than it being in a position to decide that Ms Arries should benefit at all. And Ms Arries has not been substituted as a party in her own name.

[23] I am mindful that the 180-day limit in PAJA is an outer limit and the section 30P procedures are to be instituted within 6 weeks. I am also mindful that under the Act, a Fund must make a distribution after a 12 month period from the death of a member. See section 37(C) at fn 1 above.

37. I conclude that the interests of justice will be served if there is finality in this matter that has been drawn out for a considerable length of time in circumstances where each person affected most probably has a claim to a distribution under the Act.

38. In these circumstances, I am satisfied that the application was instituted late and an extension of time should not be granted in terms of section 9 of PAJA and for this reason the application for condonation should be dismissed. In the result, it is not appropriate for the Court to make further findings on the merits of the application.

39. This leaves the question of costs. The applicants have not succeeded in obtaining their relief. I am however of the view that the parties should each carry their own costs in this application. The applicants were in my view justifiably aggrieved at the manner in which they were engaged by the Fund in their attempts to resolve their dispute. They received no response to their second letter of complaint and they have raised complaints that may well have merit. The Fund adopted a technical defence to the application that was concerned less with explaining how it reached its decision and more with seeking to persuade the Court to decline to permit access to court. The Fund is performing an important social function when making determinations in terms of section 37C of the Act. When dealing with challenges to its decisions it is appropriate that a Fund assist a Court, and provide a Court with sufficient information in response to the challenges advanced regarding how its decisions were taken and what investigations were done, whether through provision of its record and reasons or

through the filing of its affidavits. A Fund should also be diligent in its dealings with persons aggrieved by its decisions and in the usual course, in any subsequent litigation, not regard themselves as an adversary of a person aggrieved by their decisions.[24] This is not a case where bad faith was alleged in the founding affidavit.

40. Although the Fourth Respondent opposed the application, there was no explanation offered for the Fourth Respondent's belated involvement in the application and non-compliance with the Practice Directives. Furthermore, the Fourth Respondent's participation was on a very narrow basis that served to highlight the contested nature of the Arries' factual dependency.

41. I make the following order.

41.1. The application for condonation for the late institution of proceedings is dismissed.

41.2. Each party is to pay its own costs.

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[24] Different cases will warrant different responses by funds. Though made in a different context and on different facts, the remarks of Pickard J in *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others*1999 (1) SA 324 (Ck) ([1997] 4 All SA 363) at 353F - 353I are instructive: 'It is almost standard practice that an independent tribunal such as the Tender Board would in review proceedings comply with the requirements of Rule 53 of the Uniform Rules of Court by making available the record of its proceedings and its reasons and such other documentation as the Court may need to adjudicate upon the matter and, if necessary, to file an affidavit setting out the circumstances under which the decision was arrived at. It seems, however, unusual to me that an independent tribunal such as the Tender Board should file such comprehensive and lengthy papers and offer such stringent opposition by employing senior counsel and the like to argue their case. More often than not independent tribunals, having done their duty in terms of the provisions of Rule 53, take the attitude that they abide the decision of the Court and leave the other matters to the interested parties to dispute before the Court.

SJ COWEN

ACTING JUDGE OF THE HIGH COURT

Date of Hearing: 22 November 2018

Judgment Delivered: 05 February 2019

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