

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

Case No: 28160/2020

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

DATE:

SIGNATURE:

In the matter between:

JANSEN VAN VUUREN: JASON LEON

First Applicant

JANSEN VAN VUUREN: WESLEY SHELDON

Second Applicant

And

**MOMENTUM PROVIDENT PRESERVATION
FUND**

First Respondent

METROPOLITAN LIFE LIMITED

Second Respondent

RICARDO: TRACEY ANN

Third Respondent

JUDGMENT

Todd AJ

Introduction

1. This is an application brought under the provisions of the Promotion of Administrative Justice Act, 2000 (“**PAJA**”) in which the Applicants seek to review and set aside a decision taken by the First Respondent in terms of section 37C of the Pension Funds Act, 24 of 1956. The decision involved the allocation of a death benefit that was payable on the death of the Applicants’ father. The First Respondent decided to pay the whole amount of the benefit to the Third Respondent.
2. In addition to seeking to set aside the decision of the First Respondent regarding the allocation of the death benefit the Applicants seek an order substituting that decision with an order that the whole benefit be paid in equal shares to the Applicants.

Background and summary of material facts

3. The deceased died on 14 October 2018. He was a member of the First Respondent (**the Fund**). On his death a death benefit became payable under the rules of the Fund. This brought the provisions of section 37C of the Pension Funds Act into play. Although the Applicants claim a benefit in an amount marginally higher than the amount declared by the Fund, nothing turns on this for present purposes. The amount declared by the Fund was R653,288.42.
4. The provisions of section 37C provide, in relevant part, as follows:

“(1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit ... payable by such a fund upon the death of a member shall ... not form part of the assets of the estate of such a member, but shall be dealt with in the following manner:

(a) If the fund within 12 months of the death of the member becomes aware of or traces a dependant or dependants of the member, the benefit shall be paid to such dependant or, as may be deemed equitable by the fund, to one of such dependents or in proportions to some of or all such dependants.

(b) ...

(bA) 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 further that ...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.”

5. The obligations imposed on a fund by these provisions have been dealt with in a number of cases. In *Fundsatwork Umbrella Pension Fund v Guarnieri*¹ the Supreme Court of Appeal stated the following:

“The effect of section 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 section 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.”²

6. In the present matter, after conducting its investigations the board of trustees of the Fund identified the Third Respondent, Ms Ricardo, as being the life partner of the deceased. The Fund concluded that while the Applicants were indeed both dependants of the deceased in the legal sense, they were not financially dependent on the deceased. By contrast, the Fund concluded that Ms Ricardo was financially dependent on the deceased. The Fund decided in the circumstances to pay 100% of the death benefit to Ms Ricardo.
7. The Applicants were dissatisfied with the decision. They brought a complaint to the Pension Funds Adjudicator (**the Adjudicator**), who handed down a determination on 9 July 2020.
8. The Adjudicator upheld the complaint. It set aside the decision of the Fund and ordered it to reconsider the death benefit allocation. In its reasoning the Adjudicator summarised the responsibilities of a board when dealing with the payment of death

¹ [2019] 2 BPLR 321 (SCA)

² at paragraph [8]

benefits and referred to the often repeated summary of those duties set out in *Sithole v ICS Provident Fund and another*³.

9. The essence of the Adjudicator's reasons for setting aside the decision are to be found in paragraph 5.9 of the Adjudicator's decision:

*"The facts indicate that the deceased nominated the complainants to receive his death benefit and they were not allocated the death benefit. Section 37C(1)(bA) provides that if a member has a dependent and has also designated in writing to the fund a nominee, the board should consider the allocation of the death benefit to such dependents and/or nominees. Therefore, the complainants should be considered as nominees of the deceased. The court⁴ held in the matter of *Gowing v Lifestyle Retirement Annuity and others* [2007] 2 BPLR 212 at 219B (PFA), that it is incorrect in assuming that once a dependent is identified, the claim of a nominee need no longer be entertained. The First Respondent is also wrong in relying on the fact that the complainants were not financially dependent on the deceased. This confuses the nature of the respective type of a beneficiary. A nominee is not entitled to be considered as a beneficiary because he or she was financially dependent on the deceased. The entitlement flows from the fact that the person concerned was nominated by the deceased. Thus, the complainants' financial dependency on the deceased is irrelevant as they are nominees. It is therefore not necessary for the complainants to prove their financial dependency on the deceased and the First Respondent should re-consider its allocation as their entitlement flows from the fact that they were nominated by the deceased and no more is required. The complainants need not prove any dependency on the deceased nor hardship in terms of loss of support from his demise."*

10. Following this reasoning the Adjudicator concluded that the board had acted irrationally and misdirected itself in the way it had applied the legal framework to the facts and stated that the board should reconsider the allocation of the death benefit in terms of section 37C(1)(bA) of the Act in respect of the complainants in their capacity as nominees.
11. Following the Adjudicator's determination the Fund reconsidered the distribution of the death benefit. Having done so, it again decided to allocate the whole of the death benefit to Ms Ricardo. In a letter dated 20 July 2020 addressed to the Adjudicator and the Applicants the Fund explained its reasons for this decision.

³ [2000] 4 BPLR 430 (PFA), at paragraphs 24 and 25

⁴ In fact the decision referred to was one of the Pension Funds Adjudicator and not a court.

12. In that letter the Fund explained that no new information had been placed before its trustees following their initial consideration of the matter and consequently that the trustees had reconsidered the matter on the strength of the information that had previously been made available to them. The approach of the Fund, it went on to explain, was that the trustees accepted that the Applicants were dependants of the deceased as a result of being children of the deceased. They were identified as dependants together with Ms Ricardo, and the trustees then applied themselves to an equitable distribution of the benefit as contemplated in section 37C(1)(a).
13. The Fund explained that it had taken “a basket of factors” into account in making its assessment of what was equitable, taking into account the dependency needs of each of the three dependants it had identified for possible allocation of a share of the benefit (being Ms Ricardo and the two Applicants). The factors it took into account included the nature and extent of material support provided, financial needs including special circumstances, other sources of income, their ages and future income earning capacity, the nature of the relationship with the deceased, the amount available for distribution, and the wishes of the deceased.
14. The Fund then explained its reasoning in relation to each of the three potential beneficiaries identified in this way, including specifically Ms Ricardo and each of the Applicants. The Fund also explained why notwithstanding having been nominated as beneficiaries, the deceased’s sister and brother were not allocated any portion of the benefit.
15. As regards the Applicants specifically, the Fund stated the following:

“Neither of the deceased’s sons lived with him.

Since they already qualify as dependants due to them being the children of the deceased, they cannot also qualify as nominated non-dependant nominees. The deceased’s nominations in his case are therefore merely seen as an expression of wish.

The trustees had to consider the financial dependency needs of the sons in order to determine whether any portion of the benefit should be allocated to them. The sons declared the following in sworn affidavits: “I was not financially dependent on the deceased... nor was there any legal liability for support had the deceased not died”. Furthermore, each were bequeathed 40% (R349,915.60) of the deceased’s estate.

The trustees therefore concluded that they were not financially dependant on the deceased.

If the amount available for distribution was more than what was required to meet the financial dependency needs of the only financially dependent dependant (TA Ricardo), the sons could have qualified for inclusion in the allocation. However, as stated above, the benefit available for distribution is not sufficient to cater for the financial dependency needs of TA Ricardo and still allow for the non-dependent nominees to receive a portion. For this reason, the trustees did not allocate any portion of the benefit to the sons.”

16. The trustees asserted that they had considered and they had taken into account all relevant factors and excluded irrelevant factors and had distributed the benefit in a manner that was both equitable and reasonable as required by the provisions of section 37C of the Act.
17. Dealing with the reason why no part of the benefit was allocated to nominees, the Fund continued as follows:

“The fact that certain dependants and the deceased’s nominated beneficiaries were excluded from the benefit does not mean that the trustees only based their distribution decision on financial dependency. While it plays a role in the distribution of a death benefit under section 37C(1)(bA), the amount available for distribution also has to be considered. In this case, the value of the benefit was not sufficient to cover the needs of a financially dependent dependant in a meaningful way and still allow for the non- financially dependent dependants and non dependent nominees to receive a portion.”

18. The Applicants remained dissatisfied with the Fund’s decision following its reconsideration of the matter. They then launched the present application seeking to review and set aside the Fund’s decision and substitute it with a decision that the benefit is payable to them in equal shares.

The applicable legal principles

19. In taking the relevant decision the Fund was exercising a discretion that it undoubtedly had under the provisions of section 37C(1).

20. It is well established that the Fund enjoys a wide discretion – also described by the Supreme Court of Appeal as a “large” discretion.⁵
21. A reviewing body will not lightly interfere with a decision taken in the exercise of a discretion of this kind. The general principle is that courts will interfere only where it has been shown that the decision maker has taken into account irrelevant, improper or irrational factors, or where its decision can be said to be one that no reasonable decision maker properly directing itself could have reached: see for example *Sentinel Retirement Fund v CV Bold and others* [2017] ZAJPPHC 83 at paragraph [30] referring to the English Court of Appeal in *Edge and others v Pensions Ombudsman and another*.
22. Essentially the principle is that the ordinary duty which the law imposes on a person who is entrusted with the exercise of a discretionary power is that they exercise the power for the purpose for which it is given, giving proper consideration to the matters which are relevant and excluding from consideration matters which are irrelevant.
23. The point that a court or tribunal will be slow to interfere with a decision of the kind contemplated in section 37C has also been made on a number of occasions by the Pension Fund Adjudicator.⁶
24. In *Bato Star*⁷ the Constitutional Court approved the explanation of Hoexter on the reason for showing appropriate deference to administrative decision makers:

“[46] In the SCA, Schutz JA held that this was a case which calls for judicial deference. In explaining deference, he cited with approval Professor Hoexter’s account as follows:

“[A] judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly

⁵ in *Fundsatwork* – see the extract referred to in paragraph 5 of this judgment

⁶ See for example *Ditshabe v Sanlam Marketers Retirement Fund* [2001] 10 BPLR 2579 (PFA) at 2582 F-G, and *Stacey Koevort v Old Mutual Protektor Pension Fund* [2005] 1 BPLR 73 (PFA).

⁷ 2004 (4) SA 490 (CC)

consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administration action, but by a careful weighing up of the need for and the consequences of judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal.”

Schutz JA continues to say that “[j]udicial deference does not imply judicial timidity or an unreadiness to perform the judicial function”. I agree. The use of the word “deference” may give rise to misunderstanding as to the true function of a review court. This can be avoided if it is realised that the need for courts to treat decision-makers with appropriate deference or respect flows not from judicial courtesy or etiquette but from the fundamental constitutional principle of the separation of powers itself.” (footnotes omitted)

25. Nevertheless, and despite the existence of a wide discretion under the provisions of section 37C(1), the decision must still be one that the Fund can rationally assert is equitable in the sense contemplated in the subsection.

Evaluation

26. Ms Crow, who appeared for the First Respondent, submitted that the Applicants had failed to exhaust internal remedies before resorting to PAJA because they had not challenged the fresh or “reconsidered” decision of the Fund by bringing a further complaint to the Pension Funds Adjudicator. The Applicants had already followed this route. They had been successful before the Adjudicator, having secured an order that the Fund should reconsider its decision, but they remained dissatisfied when the Fund made the same decision again. It seems to me to be somewhat technical to insist that they should again have referred the matter to the Adjudicator. The better approach, in my view, is to treat the Fund’s initial and subsequent decisions as a continuing course of action in respect of which the Applicants have made use of their access to the Adjudicator and now seek to attack the reconsidered decision. In those circumstances I am satisfied that I should consider the review application on its merits.

27. Ms Potgieter, who appeared for the Applicants, described two main grounds on which the Applicants attack the line of reasoning adopted by the Fund in explaining its decision. Both are primarily concerned with questions of fact.
28. In the first instance the Applicants contend that Ms Ricardo was, as a matter of fact, neither a life partner of the deceased nor financially dependent on him. In this regard the Applicants point to an affidavit deposed to by the deceased's former spouse disputing that Ms Ricardo was a life partner, to the fact that Ms Ricardo had in fact made a claim for expenses from the deceased's estate, which indicated that she was supporting the deceased and not the other way around, and that Ms Ricardo had provided financial assistance to the former spouse of the deceased. In those circumstances they contend that Ms Ricardo could not as a matter of fact be considered to have been financially dependent on the deceased.
29. I have considered these points carefully. Where there are disputes of facts on the papers I must of course, as Ms Crow submitted, follow the approach in *Plascon-Evans*. I must also bear in mind that these are review proceedings. The crucial question is whether the Fund properly took into account the factual material presented to it. It is not relevant whether I agree with the conclusions reached arising from those facts, unless the Fund reached conclusions that no reasonable decision maker could have reached in the circumstances.
30. I can find no basis on the papers to interfere with or depart from the conclusions reached by the Fund following its investigations. The Fund's conclusions of fact appear to have been accepted by the Adjudicator too, treating Ms Ricardo as a dependant in her capacity as a life partner and as being financially dependent on the deceased. Although she did indeed earn a salary in an amount of R250,000 per annum, this was clearly taken into account by the Fund when it considered the extent of her financial dependency on the deceased. That she had contributed to the deceased's expenses does not seem to me to exclude the possibility that she was herself financially dependent on him.
31. The second main criticism which the Applicants direct at the Fund's decision concerns the conclusion that the Applicants had not been financially dependent on the deceased. In this regard the Applicants disavowed their initial assertion that they were not financially dependent on their father, and stated that they were both, at the

⁸ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)

time of the Fund's reconsideration of its decision, unemployed. This meant, they submitted, that they should have been considered by the Fund to be financially dependent on the deceased. In addition, Ms Potgieter submitted, the Fund had failed to take into account or to attach sufficient weight to the fact that the Applicants were nominated beneficiaries of the deceased.

32. In these respects, too, I can find no basis for interfering with the Fund's conclusions on the facts, mindful of course that these are judicial review proceedings. Both Applicants had provided the Fund with a positive assertion that they were not financially dependent on the deceased. Although they subsequently recanted from this stance, claiming that they had been misled by Ms Ricardo into making that assertion, they failed to respond to subsequent invitations by the Fund to provide evidence of the manner or extent to which they were financially dependent on the deceased. In those circumstances I cannot fault the Fund's conclusion that they were dependants in their capacity as children of the deceased, but not financially dependent on the deceased.
33. This leads then to the final question which, it seems to me, constituted the essence of the Adjudicator's reasoning, which is whether the Fund may be said to have acted irrationally by failing to attach sufficient weight to the fact that the Applicants were nominated beneficiaries of the deceased; and that the matter could or should have been dealt with differently, applying the provisions of section 37C(bA).
34. The evidence of exactly how or in what manner the Applicants were nominated as beneficiaries of the death benefit is unclear, and no written nomination appears in the papers. The Fund, however, dealt with the matter on the basis that they were so nominated, and for that reason I accept for the purposes of deciding this application that the Applicants were indeed nominated beneficiaries.
35. In *Kaplan and another NNO v Professional and Executive Retirement Fund*⁹ the Supreme Court of Appeal held that the provisions of section 37C took precedence over any nomination of a beneficiary under the rules of a fund. The court concluded that all benefits payable in respect of a deceased member, whether or not subject to a nomination, must be dealt with in terms of one or other of the subparagraphs in section 37C.

⁹ 1999 (3) SA 798 (SCA) at 802J – 803B

36. Ms Potgieter sought to distinguish the decision in *Kaplan* on the facts, pointing out that in that case the death benefit had in fact been distributed between a dependant and two nominated beneficiaries. I accept that that was so in that matter, but this does not affect the point of law, which is that the provisions of section 37C are peremptory and must be applied. In *Kaplan* the court considered that where nominees are also dependants the situation falls under subsection (1)(a).
37. The decision in *Kaplan* does not necessarily mean that a nomination should be ignored completely where there are dependants. As the decision of the court *a quo* in that case made clear,¹⁰ the presence of non-dependant nominees as well as dependants falls under subsection (1)(bA). And in my view even where nominees are dependants and the situation falls under subsection (1)(a) the fact of a nomination may still be a relevant consideration in deciding an equitable allocation. The correct approach, it seems to me, is for the Fund to determine which subsection to apply, and then to decide what allocation is equitable in the circumstances. The Fund was required to select one subsection under which it should make a decision, and it could not apply two subsections at the same time. Since the Applicants were dependants within the meaning of (1)(a) they were indeed considered for a possible allocation of the benefit, as they were entitled to be.
38. In this respect, it seems to me, the Adjudicator's approach was inconsistent with the reasoning of the High Court in *Kaplan*, which considered the nominees referred to in (1)(bA), as in (1)(b), to be nominees who are not dependants. Subsection (1)(bA) does not expressly refer to a nominee who is not a dependant, but this interpretation appears to me to be more consistent with the overall structure of the section, and is how this court understood the position in *Kaplan*. In any event, it seems to me that nothing ultimately turns on the question whether the Fund could or should have applied subsection (1)(bA) instead of (1)(a) since both of those provisions require an allocation between the potential beneficiaries that the Fund "deems equitable" in the particular circumstances.
39. In communicating the outcome of its reconsideration the Fund gave specific reasons for again deciding to allocate the whole benefit to the only person who it had established was a financial dependent, explaining that the whole benefit was

¹⁰ *Kaplan and Another NNO v Professional and Executive Retirement Fund and Others; Kaplan and Another NNO v VIP Retirement Annuity Fund and Others* 1998 (4) SA 1234 (W), at 1237G; and see also *Fundsatwork supra* at footnote 4 of the judgment.

insufficient to mitigate the adverse financial consequences of the death of the person on whom the beneficiary had been financially dependent.

40. In those circumstances I am unable to find fault with the approach of the Fund in dealing with the matter as it did. The Fund carefully considered what weight to attach to the fact of the Applicants' standing as nominated beneficiaries and it concluded that it should treat them as dependents as contemplated in paragraph 37C(1)(a).
41. In any event, what the Fund was required to do, whether under subsection (1)(a) or (1)(bA), was to determine an equitable allocation of the benefit. In its view it did so by allocating the benefit to the only dependent who its investigations had established was financially dependent on the deceased, and it made it clear that its decision to allocate the whole benefit to that person was primarily influenced by the consideration that the amount of the benefit was insufficient to compensate her for the loss of support that flowed from the deceased's demise.
42. It is possible that the Fund could have reached a different conclusion on the allocation. It could, for example, have concluded that although Ms Ricardo was the only dependant who had been financially dependent on the deceased it would nevertheless be equitable to provide a proportion of the benefit to each of the Applicants as well in light of their standing as nominees. That that might also have been a rational decision, or an equitable decision, does not have the consequence that the decision taken by the Fund was irrational or inequitable, or that it fell outside the ambit of the discretion afforded to the Fund under section 37C. There was more than one possible rational and equitable decision available in the circumstances. I can see no basis on which to conclude that the decision the Fund took was inequitable or irrational.
43. In conclusion, the Applicants have not in my view established grounds under PAJA on which to set aside the decision reached by the Fund in the exercise of the discretion conferred on it by section 37C.
44. Ms Crow submitted that even if this court were minded to review and set aside the decision, there are no exceptional circumstances that would warrant a decision of this court to step into the shoes of the Fund, substituting its own decision for the Fund's decision regarding the allocation of the benefit. She referred me in this regard to the decision of the Constitutional Court in *Trencon Construction (Pty)*

*Limited v Industrial Development Corporation of South Africa Limited*¹¹. I would have been inclined to agree with that submission, but in light of the conclusion that I have reached in the matter it is not necessary for me to consider the point further.

45. As regards costs, both parties sought an order for costs, I can see no reason why costs should not follow the result.

Order

46. In the circumstances I make the following order: the Application is dismissed, with costs.

C Todd

Acting Judge of the High Court of South Africa.

For the Applicant: Adv. K Potgieter

Instructed by: Klopper Jonker Inc.

For the First Respondent: Adv. LS Crow

Instructed by: Shepstone & Wylie

Hearing date: 6 September 2021 & 23 August 2022

Judgment delivered: 30 August 2022

¹¹ 2015 (5) SA 245 (CC)