

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

CASE NO:

43479/2021

- (1) REPORTABLE: YES / NO  
(2) OF INTEREST TO OTHER JUDGES:  
YES/NO  
(3) REVISED.

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DATE

In the matter between:

**PATIENCE NTOMBIFUTHI MONTSIOA**  
**LESEISANE JACOB THATO MONTSIOA**  
**TEBOHO BRIAN MONTSIOA**

First Applicant  
Second Applicant  
Third Applicant

And

**eJOBURG RETIREMENT FUND**  
Respondent  
**THE INDEPENDENT PRINCIPAL OFFICER OF THE**  
**FUND**  
**MATSHEPO SELINA RANTSO**  
**MARAKE CASBAY MONTSIOA**

First  
Second Respondent  
Third Respondent  
Fourth Respondent

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**JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL**

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**MAKUME, J:**

- [1] This is an application for leave to appeal the judgment I handed down on the 6<sup>th</sup> July 2022 in which Judgment I found in favour of the Applicants.

[2] The first Respondent is now appealing against that judgment on the following grounds namely:

2.1 That the judgment extends the jurisdiction of a High Court to enquire into the correctness of the discretionary allocation by a Board of Trustees in respect of a death benefit.

2.2 That the judgment conflicts with earlier judgments in respect of the High Court's jurisdiction to interfere in the discretionary allocation by a Board of Trustees in respect of a death benefit.

[3] This application is directed at this Court's decision in directing the first Respondent to reallocate the 15% allocated to the third Respondent on the basis that the allocation by the Trustees was irrational and based on wrong reasons.

[4] It is argued that this Court overstepped its authority by enquiring into the correctness of the discretionary allocation by a Board of Trustees. I do not agree with that argument and repeat that Section 30 of the Pension Funds Act provides that any party who feels aggrieved by a determination of the Adjudicator may apply to a Division of the High Court to reconsider the merits of the complaint and may make any order it deems fit.

[5] The Learned Authors Cameron, De Waal and Solomon in the sixth Edition of "Honoré's South African Law of Trusts" at page 154 writing in respect of the Power of a Court as far as the Trust Property Control Act 57 of 1988 say the following:

"The Act empowers any person who feels aggrieved by the Master's action to apply to Court for relief. The Court's power in such a case are wide and are more encompassing even than the guarantee provided in the Constitution that everyone "has the right to administrative action that is lawful reasonable and procedurally fair. The merits of the matter may be examined. This formulation

makes it plain that the substantive justification for any action by the Master may be scrutinised. The Applicant will in other words not have to establish that the Master committed a reviewable irregularity but only that there are grounds for the Court to substitute a decision it considers better. The Court is expressly empowered to consider the merits of the matter to take evidence and to make any order it deems fit.”

- [6] This Court exercised its powers in the exact manner that the writers above have alluded. The basis on which the Adjudicator allocated the 15% to the third Respondent is not covered in the empowering Section. The third Respondent who did not oppose was neither a spouse nor a dependant of the deceased.
- [7] The Adjudicator wants this Court to sanction an allocation that is clearly not covered by the Act. The Trustees secondly contradicted themselves in a material aspect and have failed to explain away that contradiction. Initially it was said that the allocation was based on the alleged customary marriage between the deceased and the third Respondent. It was only in the Answering Affidavit that the Respondent now say they rely on the basis that the third Respondent was a dependant.
- [8] The Respondent failed to submit any evidence to prove that the third Respondent was a dependant. They failed to submit any affidavit by the third Respondent. I do not think that they have any mandate to speak on behalf of the third Respondent.
- [9] Section 30 of the Pension Fund Act empowers this Court to exercise its discretionary powers to interfere with any ruling that it deems to have been taken on irrational grounds. The Court in **Muerbar v Muerbar 1948 (1) SA 446 AD** a decision that was quoted with approval in **Cronje vs Pelsler 1967 (2) SA 589 AD** concluded that before the exercise of a discretion can be overturned on appeal the Appellant must demonstrate that the decision is one to which no reasonable Court could have come to.

[10] I am not persuaded that the Respondent has satisfied any of the requirements set out in Section 17(1)(a)(i) and or 17(1)(a)(ii). In the result I make the following order:

- (i) Application for leave to appeal is dismissed with costs.

Dated at Johannesburg on this    day of October 2022

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**M A MAKUME  
JUDGE OF THE HIGH COURT  
GAUTENG DIVISION, JOHANNESBURG**

**Appearances:**

DATE OF HEARING            :        30 SEPTEMBER 2022  
DATE OF JUDGMENT        :        11 OCTOBER 2022

FOR APPLICANT             :        ADV MZIZI  
INSTRUCTED BY            :        MESSRS PHAKEDI ATTORNEYS

FOR RESPONDENT          :        ADV ROELOF STEYN  
INSTRUCTED BY            :        MESSRS MINITZERS INC.