



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: **NO**
- (2) OF INTEREST TO OTHER JUDGES: **NO**
- (3) REVISED: **NO**

Date: 03 MAY 2022 Signature:

CASE NO: 24757/2020

In the matter between:

JOHANN ST ARNAUD

Applicant

And

**BALANCED FUTURE FUND
REGISTRATION NO: 12/8/33835**

Respondent

JUDGMENT

NYATHI J

A. INTRODUCTION

- [1]** The Applicant is one of three surviving siblings of the deceased who was a member of the Balanced Future Fund, the First Respondent, which is a pension fund registered in terms of section 4 of the Pension Funds Act, Act 24 of 1956 (“the Act”).
- [2]** The deceased died while he was still a member of the First Respondent (hereinafter “the Fund”) on 12 August 2018, certain benefits became payable by the Fund to only the deceased’s dependants and nominees. This is in terms of section 37C of the Act.
- [3]** The Applicant brings this application on his behalf and on behalf of his two siblings.
- [4]** The Applicant seeks to review and set aside a distribution decision made by the Second Respondent (the board of the First Respondent) in terms of section 37C of the Pension Funds Act, Act 24 of 1956 (“PFA”) on the basis that the decision is irrational;

- [5] In terms of the impugned distribution decision the entire death benefits of Dan St Arnaud (“Deceased”) in the Fund were paid to one Sean St Arnaud, the deceased's estranged, adult adopted son (“the estranged son, Sean”), incorrectly and contrary to a determination of the Pension Funds Adjudicator (“PFA”) that had previously found exactly the same decision to be "unjust, inequitable, irrational" and in which the Trustees had “unduly fettered their discretion”.
- [6] Applicant seeks an order setting aside this decision of the Fund and Trustees; and, that this court substitutes this decision with an order that accords with the prayers of the Applicant set forth in the Notice of Motion or any such order as the Honourable Court deems fit.
- [7] It was submitted in the Applicant’s heads of argument that should this court consider it appropriate, it should set aside the decision of the Fund and Trustees and order them to apply to the Financial Services Tribunal (“FST”) for reconsideration (of the decision of the PFA) in terms of section 230 of the Financial Sector Regulation Act, Act 9 of 2017 (“Financial Sector Regulation Act” or “FSRA”).
- [8] This application also seeks to prohibit the Fund from deducting from the death benefit payable any costs other than costs expressly allowed in terms of the Rules of the Balanced Future Fund.

[9] That the costs of this application be borne by the First and Second Respondents, jointly and severally, the one paying the other to be absolved on a scale between attorney and client.

[10] The Applicant further alleges that, but for this impugned decision, the benefits would, in accordance with the wishes of the deceased, which have been made abundantly clear in his lifetime, not have devolved upon the estranged son Sean, but upon the Applicant and his two sisters; the three of them being the surviving siblings of the deceased.

[11] The First Respondent contends that in terms of section 37C, the board is required to determine whether there are dependants and/or nominees. In the event that, as in this case, there is only (1) dependant as defined in section 1 of the PFA, and zero (0) nominees, the board was obliged to distribute the entire benefit to the only dependant. That sole dependant happens to be the deceased's estranged son Sean.

[12] The term "dependant" is defined in section 1 of the Act whereas "nominee" is defined in section 37C of the Act.

[13] Acting in terms of section 37C of the Act, the Fund's board of management ("the board") determined that only the deceased's estranged adopted son, qualified as a "dependant" in terms of the statutory definition and allocated the entire benefit to him. The Applicant and his siblings do not qualify as either dependants or nominees as defined and contemplated in the Act.¹ They

¹ Respondent's Answering Affidavit P 327 paragraph 38; Page 354 para 141.

are therefore not entitled to any benefit in terms of the Act.² That should ordinarily be the end of the matter.

[14] The First Respondent contends that since neither the Applicant nor his siblings are dependants or nominees, as defined in the PFA, they are not entitled to the relief they seek and the application stands to be dismissed with costs, including costs of two counsel.

[15] Section 37C read with section 1 of the PFA regulate the distribution of benefits upon the death of a member of a pension fund. The relevant provisions of section 37C of the PFA provide as follows:

“37C. Disposition of pension benefits upon death of member.— (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 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) If the fund within twelve 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 board, to one of such dependants or in proportions to some of or all such dependants.

(b) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member, and the member has designated in writing to the fund a nominee who is not a dependant of the member,

² Respondent's Answering Affidavit P 344 para 99.

to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the benefit or such portion of the benefit shall be paid to such nominee: Provided that where the aggregate amount of the debts in the estate of the member exceeds the aggregate amount of the assets in his estate, so much of the benefit as is equal to the difference between such aggregate amount of debts and such aggregate amount of assets shall be paid into the estate and the balance of such benefit or the balance of such portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee.

(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 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) ...” (own emphasis).

[16] The SCA interpreted Section 37C of the Act to mean that the benefits **must** be disposed of according to the subsection’s statutory scheme. (*Kaplan & Another NNO v Professional & Executive Retirement Fund & Others 1999 (3) SA 798 (A) at p83.*)

[17] The subsection’s statutory scheme makes it clear that a benefit payable upon the death of a member can only be paid to dependants and nominees, and where there are no dependants and nominees, to the estate.

[18] Where there is only one dependant, or where there are only dependants, section 37C(1)(a) decrees that the benefit should be paid to that dependant or those dependants only. The board has no discretion in this regard. It must comply with the provisions of section 37C of the Act. Issues of fairness and equity do not come into consideration.

[19] The term dependant is defined in section 1 of the act as follows:

“dependant”, in relation to a member, means-

(a) a person in respect of whom the member is legally liable for maintenance;

(b) a person in respect of whom the member is not legally liable for maintenance, if such person-

(i) was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;

(ii) is the spouse of the member;

(iii) is a child of the member, including a posthumous child, an adopted child and a child born out of wedlock.

(c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died; (own emphasis)

[20] The term dependant expressly includes an adopted child. It is common cause that Sean was an adopted child of the deceased. He therefore qualifies as a dependant in terms of the statutory regime applicable.

[21] The sole basis upon which the Applicant contends that Sean should be denied the benefit is that he and the deceased were estranged at the time of the deceased's death. There is no merit to this contention.

[22] The FST was confronted with the same issue in *Momentum Retirement Annuity Fund vs VR KRZUS and Another (PFA53/2019) [2020] Financial Services Tribunal (09 March 2020)*. 21. In that matter the facts were that the deceased member and a spouse who was a sole dependant were estranged for several years. The tribunal found that the fact of the estrangement did not disqualify her from receiving the benefit.

[23] The Act does not define the term "nominee" in section 1. In section 37C, the legislature refers to a situation where:

"the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund."

[24] It is therefore clear that what is contemplated by the legislature is that in order for a person to qualify as a nominee, that person must have:

- 24.1 Been designated by the member in writing to the Fund;
- 24.2 Must not be a dependant;
- 24.3 Been designated by the member to receive the benefit or a portion of the benefit in writing to the Fund.

[25] In *Matlonya v FundsAtWork Umbrella Pension Fund and another* [2017] 2 BPLR 294 (PFA) at para 5.6, The Adjudicator said:

“5.6 The term “nominee” is not defined in the Act and for a beneficiary to claim to be a nominee, there must exist a valid nomination form. The nomination must be in writing and the beneficiary must not be a dependant. The nominee is distinguishable from a dependant in that, a nominee is not by virtue of having been nominated entitled to a death benefit. The board is not bound by the nomination form completed by the deceased, instead the nomination form serves merely as a guide to assist it in the exercise of its discretion (see *Mashazi v African Products Retirement Benefit Provident Fund* [2002] 8 BPLR 3703 (W) at 3705I–3706C).”

[26] In *Gowing v Lifestyle Retirement Annuity and Others* [2007] 2 BPLR 212 (PFA) at para 7.3, the then Adjudicator said:

“7.3 A nominee is a person designated in writing by the deceased to receive the benefit, or a portion thereof. “Dependant” is defined in section 1 of the Act to include a broad category of persons who were financially dependent on the deceased (factually or legally), or who stood in a particular family relationship to him, such as a spouse or child, major or minor, or who would have become legally dependent on the deceased had the deceased notionally been alive.”

[27] The Applicant and his siblings have not been designated by the member in writing to the Fund to receive the benefit or any portion of the benefit. They do not, therefore, qualify as nominees and must be excluded from the distribution.

[28] The Applicants are at liberty to produce that nomination if they claim it exists. The Fund has not, despite a diligent search, been able to find any nomination designating the Applicant and his siblings to receive the benefit.

[29] In the heads of argument filed on behalf of the Applicant, his counsel submits at paragraph 63:

“63. The Applicant contends, for various reasons that have been made throughout the course of this matter, from as early as directly after the making known of the first decision of the Trustees to award all benefits to the estranged son, that the deceased would have completed and provided a nomination form; and that this form, which the Fund, the Third Respondent, the fund administrator, Robson and Savage ('Robson Savage', and the Fourth Respondent, the employer, PG Bison ('PG Bison')) were duty-bound to obtain and keep safely, has been lost or destroyed.”

[30] From the above paragraph it becomes clear that no designation in writing to the Fund existed as at the date of the deceased's death. The allegation that it may have existed in the past but was lost or destroyed is not supported by any facts and is fictional in nature.

[31] That the benefit does not form part of the deceased's estate is trite. The deceased's testament is not relevant to these proceedings. The will cannot be

used as a basis to contend that the Applicant and his siblings are entitled to receive a benefit in the Fund.

[32] In paragraph 2 of the heads of argument filed on behalf of the Applicant, it is suggested that one of the alternative prayers sought is an order that the Fund should apply to the Financial Services Tribunal (“FST”) for reconsideration (of the decision of the PFA) in terms of section 230 of the Financial Sector Regulation Act, Act 9 of 2017 (“Financial Sector Regulation Act” or “FSRA”).

[33] Counsel for the Respondents submitted that such an order was not sought in the notice of motion. It cannot be sought in the heads of argument. Counsel further submitted that it was open to the applicant to amend his notice of motion and seek that order if he so wished. The Respondents’ Counsel had not exercised that option. There is merit in both submissions.

[34] The Court cannot competently choose for the Respondents which forum they should approach to resolve their grievances.

[35] Having regard to the statutory provisions and decisions analysed above, it becomes abundantly clear that the application by the Applicant is devoid of merit and cannot succeed.

[36] In the circumstances I make the following order:

The application is dismissed with costs including costs of two Counsel.

J.S. NYATHI
Judge of the High Court
Gauteng Division, Pretoria

Date of Judgment: 30 April 2022

On behalf of the Applicant: Adv. M. Tromp
Instructed by: St Arnaud Attorneys
398 Central Park Way
Strubenkop Village
Lynnwood
PRETORIA
Tel: 012 348 0852
Fax: 086 623 2754

On behalf of the Respondents: Adv. S. Khumalo S.C.
With: Adv. A. Mbatha
Instructed by: Jonathan Mort Inc.
2 Hermitage Terrace
Richmond
JOHANNESBURG

e-mail: vbell@mortlaw.net