



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

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO.	
(2) OF INTEREST TO OTHER JUDGES: YES / NO.	
(3) REVISED.	
DATE <u>12/5/2017</u>	SIGNATURE <u>[Signature]</u>

CASE NO: 5643/2017

DATE: .

IN THE MATTER BETWEEN:

SENTINEL RETIREMENT FUND

APPLICANT

and

**NTOMBIZODWA JOYCE HADEBE
M. A. LUKHAIMANE N.O.**

**1ST RESPONDENT
2ND RESPONDENT**

JUDGMENT

MNGADI AJ:

[1] The applicant is Sentinel Retirement Fund, a pension fund (the fund), duly registered in terms of the Pension Funds Act 24 of 1956 ('the Act'). The first respondent is Ntombizodwa Joyce Hadebe an adult female of Vryheid in KwaZulu-Natal. The second respondent is M A Lukhaimane N.O. cited in her capacity as the Pension Funds Adjudicator(the Adjudicator) appointed as such in terms of s 30C of the Act.

[2] The applicant seeks an order setting aside a determination made by the second respondent in favour of the first respondent. Pursuant to a complaint by the first respondent to second respondent that applicant was delaying payment of death benefits arising of the death of a member of the fund and that first respondent was not displaying transparency in its processes for the determination of beneficiaries.

The second respondent, as its determination, ordered the applicant to complete its investigation and proceed with the allocation of, and distribution of death benefits in terms of section 37C of the Act within eight weeks and to furnish the second respondent and the first respondent (the complainant) with section 37C report for the allocation and distribution of the death benefits within two weeks of finalising the process. There is no opposition by the first respondent. The second respondent abides by the decision of this court.

[3] The complainant, as a spouse of the deceased member of the fund, lodged the complaint with the first respondent in terms of the Act about the handling of the claim for death benefits by the fund and the consideration of certain persons as potential beneficiaries by the fund.

[4] It is common cause that one Josias Mabhutiza Hadebe (the deceased) was employed by Zululand Anthracite Colliery (the company) and passed away on 31 March 2014. He was a member of the fund and as a result of his death certain benefits became payable to qualifying beneficiaries. The complainant was appointed executor of the estate of the deceased.

[5] The applicant states that it was advised verbally of the deceased's death by his employer on 14 April 2014. The information provided was scanty and the fund had no details regarding potential beneficiaries. In July 2014 some potential beneficiaries submitted copies of their identity document books and bank statements to the deceased's employer but failed to complete benefit claim forms. From September 2014 the fund received benefit claim forms from the complainant for one JJ Dlamini and for various major and minor children. Eventually, it became apparent that the

deceased had between 16 and 18 biological children, a spouse and about three partners or ex-partners. The fund indicates that in order to determine rightful beneficiaries it has to conduct investigations including field investigations in distant parts of the country which are hampered by incorrect or incomplete names, addresses and distant places. It states that it cannot allocate lump sum benefits until it has finalised its investigation or at least has exhausted all reasonable avenues to trace the possible dependant and invite them to claim.

[6] The correspondence in the applicants founding affidavit indicates that in October 2015 the complainant was advised that a report was in the process of being completed for the consideration of the trustees of the fund and on December 2015 it was stated that the matter is now being referred to the Board to take a decision regarding the allocation of benefits. On 17 March 2016 it was advised that due to outstanding information regarding the complainant's divorce process the case was returned to obtain such documents, namely; documents that the complainant's divorce with the deceased was not finalised. On 25 April 2016, at the applicant's request the deceased's tax number was submitted. On 3 May 2016, the fund advised that it will now apply for tax directive from SARS. On 4 July 2016 the fund advised that the divorce summons referred to the deceased paying lobola for Rachel

Mhlonga and building a house for a her and a lady, Shaun Mkhize, therefore, further investigations must be done to clarify the relationship between the deceased and the said ladies. On 14 September 2016 the fund advised that it had not conducted the mentioned investigations as they need enough files relating to investigations to be done in Kwazulu-Natal to justify the costs, that telephonic enquiries to the deceased's family, the present spouse and major children elicited a response that nobody knew anything about the mentioned relationships but the fund cannot proceed without further investigating the allegations.

[7] It is no surprise that the complainant lodged the complaint with the second respondent. The submission and consideration of complaints is regulated by chapter VA of the Act. The second respondent in its determination, at paragraph 5.10 states: 'Given the inordinate period that has passed since the deceased's demise, his beneficiaries suffered prejudice in that they were denied access to benefits which became available to them upon his passing (see *Mothala v Metal Industries Provident Fund* [2004] 6 BPLR 5797 (PFA)). The appropriate remedy is for the first respondent to conduct the investigations and pay the death benefit to the identified beneficiaries without delay (see *Orion Money Purchase Pension Fund (SA) v PFA and Others* [2002] BPLR 38 30 © at 3839F-G and *Mohale v Feedmix Provident Fund and Others* [2008] 1 BPLR 29 at 37E-F). The board of the

first respondent must complete its investigation and consider the relevant factors for an equitable distribution of the death benefits to the deceased's beneficiaries, without any further delay.'

[8] The applicant submits that the Adjudicator did not have the jurisdiction to have dealt with the complaint because disputes about the allocation of death benefits in terms of Section 37C of the Act are outside the Adjudicator's jurisdiction. The complaint was about the unreasonable delay in taking a decision relating to the distribution of death benefits and displaying no transparency in the determination of who to qualify as beneficiaries.

[9] The principal challenge of the applicant is that the distribution of death benefits is not part of the administration of a fund. It is submitted, Section 37C sets out how benefits are to be dealt with on the death of a member of the pension fund. The first respondent (the complainant) was an estranged wife of a member of a pension fund who had passed away. Therefore, it is submitted, the adjudicator did not have the jurisdiction to have dealt with the first respondent's complaint as disputes about the allocation of death benefits in terms of section 37C of the PFA is beyond the adjudicator's jurisdiction. The applicant notes that in its research the issue of

jurisdiction of the adjudicator in respect of distribution of death benefits in terms of Section 37C has not been authoritatively decided.

[10] It is trite that the Adjudicator is a creature of statute and has no inherent jurisdiction. Section 30B of the Act provides that there is established an office which shall be known as the Office of the Pension Funds Adjudicator. The functions of the Office shall be performed by the Pension Funds Adjudicator. Section 30D provides that the main object of the Adjudicator shall be to dispose of the complaints lodged in terms of section 30A(3) of the Act. The Adjudicator's powers are confined to those conferred upon him or her by the provisions of Chapter V A of the Act. Section 30D of the Act sets out the main object of the adjudicator which is to dispose of the "complaints" in a procedurally fair, economical and expeditious manner. Section 30E provides that the Adjudicator shall investigate any "complaint" lodged with it in terms of s 30A and may then make an order which a court may make. It is self evident that the Office of the Pension Funds Adjudicator was created to be a less formal, fair, expeditious and less expensive manner of resolving complaints. See *Shell and BP SA Petroleum Refineries NO 2001 (3) SA 683 at 690E-F*. In *Meyer v Iscor Pension Fund* 2003(2) SA 715 (SCA) para 7 wherein Brand JA stated:

At the risk of stating the obvious, it must be borne in mind that , since the office of the adjudicator is a creature of statute, the adjudicator has no inherent jurisdiction. His powers and functions are confined to those conferred upon him by the provisions of chap V A. For present purposes, he is enjoined by these provisions to determine 'complaints' as defined in s 1 of the Act.

[11] The Act provides that after the Adjudicator has completed its investigation, he or she shall send a statement to the interested parties containing his or her determination and the reasons thereof, signed by him or her as well as to the clerk of the court or registrar of the court which would have had jurisdiction had the matter been heard by a court. Any determination of the Adjudicator shall be deemed to be a civil judgement of any court of law had the matter in question been heard by such court, and shall be so noted by the clerk of court or the registrar of the court, as the case may be. A writ or warrant of execution may be issued by the clerk or the registrar of the court in question and executed by the sheriff of such court after expiration of a period of six weeks after the date of the determination. (See sections 30M, 30N & 30O of the Act)

[12] The High Court's jurisdiction to entertain an appeal against the determination by the Adjudicator is governed by the provisions of s 30P of the Act which provides that

'any party who feels aggrieved by a determination of the Adjudicator may apply to the Division of the High Court which has jurisdiction for relief. The Division of the High Court in question shall have the power to consider the merits of the complaint in question, to take evidence and to make an order it deems fit.

[13] The definition of a complainant is person who is or who claims to be a beneficiary of a fund or any person who is or who claims to be a spouse or former spouse of a member or former member of a fund. Complaint means a complaint of a complainant relating to the administration of a fund and alleging that the complainant has sustained or may sustain prejudice as a consequence of the maladministration of the fund by the fund or any person, whether by act or omission. (See s 1 of the Act)

[14] The principal challenge of the applicant is that the distribution of death benefits is not part of the administration of a fund. It is submitted Section 37C sets out how benefits are to be dealt with on the death of a member of the pension fund. The first respondent (the complainant) was an estranged wife of a member of a pension fund who had passed away. Therefore, it is submitted, the adjudicator did not have the jurisdiction to have dealt with the first respondent's complaint as disputes about the

allocation of death benefits in terms of section 37C of the PFA is beyond the adjudicator's jurisdiction. The applicant notes that in its research the issue of jurisdiction of the adjudicator in respect of distribution of death benefits in terms of Section 37C has not been authoritatively decided.

[15] The issue is whether a complaint relating matters envisaged in section 37C of the Act falls within the jurisdiction of the Adjudicator or not. A provision either it be specific or be general must be found on which jurisdiction to deal with the type of complaint in question must be based. The interpretation must take into account the position of the Pension Fund Adjudicator's role in the general scheme of the Act. It must not be premised in either limiting or extending the powers of the Adjudicator other than the powers entrusted in terms of the Act.

[16] Section 7A of the Act provides that notwithstanding the rules of a fund, every fund shall have a board consisting of at least four board members. The object of a board shall be to direct control of, and oversee the operations of a fund in accordance with applicable laws and the rules of the fund. In pursuing its object the board shall act with due care, diligence and good faith, and act impartially in respect

of all members and beneficiaries, have a fiduciary duty to members and beneficiaries in respect of accrued benefits or any assessed to provide a benefit.

[17] A beneficiary is defined in the Act as a nominee of a member or dependant who is entitled to a benefit as provided for in rules of the relevant fund. A benefit is defined as any amount payable to a member or beneficiary in terms of the rules of that fund. A dependant is defined as a person for whom the member is legally liable for maintenance, who upon the death of the member is in fact dependent on the member for maintenance or is a spouse of the member or a child of the member.

(See s 1 of the Act)

[18] It is clear that the board decides whether a person was a dependant of the member or not and on paying to a beneficiary a benefit. It is submitted by the applicant that the discretion conferred in terms of section 37C on the board of the applicant to distribute death benefits is clearly not part of the administration of the fund.

[19] It is significant that the distribution of death benefits is done by the pension fund through its board. It falls under the overall administration of the fund. The main

object of the pension fund adjudicator is to investigate any complaints relating to the administration of the pension fund by its board. It is not provided in the Act that when the board deals with the distribution of death benefits it is not carrying out a function relating to the administration of a pension fund; nor is there a provision that a complaint relating to the distribution of death benefits must be dealt with differently from a complaint relating to the administration of the pension fund.

[20] In my view, when the board deals with matters envisaged in Section 37C of the Act it is exercising a function relating to the administration of the pension fund. As a result, the pension funds adjudicator is authorised and obliged to investigate complaints relating to the manner the board is carrying out or has carried out its functions. The complainant, as a spouse of the deceased member of the fund, lodged the complaint with the first respondent in terms of the Act about the handling of the claim for death benefits by the fund and the consideration of certain persons as potential beneficiaries by the fund. The first respondent had jurisdiction to deal with the complaint. This ground of the appeal has no merits.

[21] The applicant as a second ground, states that the second respondent's order that the fund must complete its investigations within eight weeks is unreasonable in

the light of the complicated personal affairs of the deceased. The fund has decided to investigate the issues referred to in the divorce summons and decides how to investigate those issues. It became aware of the deceased's death on 14 April 2014 from the employer of the deceased. It is not clear in the papers what steps it took to obtain the necessary information from the employer of the deceased. It is not clear when the fund became aware of the contents of the divorce summons. It is possible that the deceased communicated to his employer that he was in the process of a divorce and the employer advised the fund. In any event, the fund states that in July 2016 it was investigating issues raised in the divorce summons. It is from that date that needs to be determined whether eight weeks provided for in the determination is unreasonable or not. In my view, it is a reasonable period in view of the history of the matter. The applicant can not raise its inactiveness as a ground that the period granted is inadequate. It appears to me if there are good reasons the applicant can request an extension from the second respondent.

[22] The order relating to the fund furnishing a report to the second respondent and the first respondent is to enable the second respondent to ensure compliance with the determination. Secondly, it seeks to address the complainant's complaint of lack of transparency. The concern of the applicant relates to the undesirability of referring

to other persons a report intended to inform the board to take a decision are well founded. The complainant as a spouse of the deceased and the executor of the estate is entitled to be informed of the proposed allocation and distribution of death benefits and be provided with at least ten days within which to raise objections. Once the objections, if any, have been considered, the allocation may be confirmed and the distribution proceeded with.

[23] I make the following order:

1. The application is dismissed, except that paragraph 6.1.2 of the determination is set aside and is replaced with the following:

"6.1.2 The respondent is directed to provide this tribunal and the complainant with its proposed allocation and distribution of the deceased's death benefit within two weeks of taking a decision relating thereto, and to grant the complainant at least ten days within which to raise objections, if any, to the proposed allocation and distribution, and having considered the objection, if any, to proceed with the allocation and distribution of death benefits."

2. No order as to costs

MNGADI

HEARD ON: 21 April 2017

DELIVERED ON

APPEARANCES:

FOR THE APPLICANT: Adv. P van der Berg SC

INSTRUCTED BY: Shepstone & Wylie (ref.: J Esterhuizen/SENT 29917.14)

FOR THE RESPONDENT: (No appearance)