

SOUTH AFRICA / JUDGMENT

Guarnieri v Fundsatwork Umbrella Pension Fund and Others (47754/2016) [2018] ZAGPPHC 579 (24 May 2018) [2018] ZAGPPHC 579

COURT

North Gauteng High Court, Pretoria

BEFORE

Prinsloo

CASE / FILE NUMBER

47754/2016

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION. PRETORIA)

Case

No: 47754/2016

In

the matter between:

ANNA

MARIE GUARNIERI

1st

Applicant

ALBERTO

JACOMO GUARNIERI

2nd Applicant

MAXINE

GUARNIERI

3rd Applicant

and

FUNDSATWORK

UMBRELLA PENSION FUND

1st Respondent

MMI

GROUP

LIMITED

2nd Respondent

STEFANUTTI

STOCKS (PTY) LIMITED

3rd Respondent

PENSION
FUNDS ADJUDICATOR
4th Respondent

JUDGMENT

PRINSLOO, J

[1] The Applicants in this review application, as dependants of the late Massimiliano Guarnieri ("the deceased"), are challenging the distribution of death benefits flowing from the passing of the deceased who, during his lifetime, was a member of the First Respondent pension fund. The distribution was made by the duly authorised committee of trustees of the First Respondent, also called the Board of the Fund ("the Board").

The main thrust of the attack centres around the fact that the Board saw fit to distribute death benefits not only to the Applicants (the widow and two children of the deceased), but also to the mother of the deceased, Ms. Anna-Maria Guarnieri ("the mother").

[2] Before me Mr. Kriiger S.C. with Ms. D' Alton appeared for the Applicants and Mr. Khumalo for the First Respondent.

[3] The Second Respondent is the Administrator of the First Respondent, and did not, as such, play an active role in the proceedings before me.

[4] The Third Respondent was the employer of the deceased during his lifetime, and also did not enter the fray.

[5] The Fourth Respondent is the Pension Fund's Adjudicator, appointed in terms of section 30C(1)(a) of the Pension Funds Act, No. 24 of 1956 ("the PFA").

The Applicants complained to the Fourth Respondent in terms of the PFA, about the distribution of the death benefits made by the Board on 25 July 2014 ("the first distribution").

The Fourth Respondent, in answer to the complaint made a determination in terms of section 30M of the PFA, dated 9 February 2015, setting aside the first distribution and ordering the Board to reinvestigate the matter and re-exercise its discretion in terms of section 37C of the PFA, taking into account the factors pointed out by her in the

determination.

Following the determination, the Board, on 7 April 2015, made exactly the same distribution ("the second distribution") as the first distribution of 25 July 2014. It is this decision of 7 April 2015, or second distribution, which forms the subject of the review application.

The Fourth Respondent filed an affidavit, stating that she had read the founding papers and did not intend opposing the application.

PARTICULARS OF THE SECOND DISTRIBUTION:

- [6] As pointed out, this was done after the first distribution of 25 July 2014 was set aside by the Fourth Respondent, who ordered the Board, on 9 February 2015 "to reinvestigate the matter and re-exercise its discretion in terms of section 37C of the Act", taking into account the factors pointed out by the Fourth Respondent in her determination [emphasis added].
- [7] The total benefit available for distribution to the dependants came to R1,468,501.75 (before tax) and the net benefit after tax came to R1,164,657.19.
- [8] It seems that the gross benefit, totalling R1,468,501.75 was distributed to the dependants in the following percentages:

The mother - 42%

R 616,770.74

The First Applicant- spouse - 37%

R 543,345.64

The son Alberto - 8%

R 117,480.14

The daughter Maxine - 13%

R 190,905.23

TOTAL

R1 ,468,501.75

- [9] It appears that what was indeed ultimately paid out to the three Applicants was the net figure.

THE RELIEF SOUGHT:

- [10] The Applicants ask for the second distribution of 7 April 2015 to be reviewed and set aside.
- [11] The Applicants also ask the following orders:
- That the sum of R616,770.74 allocated to the mother be distributed equally between the Applicants; and
 - That the First Respondent be ordered to pay each of the Applicants the sum of R205,590.25.
- [12] There is also a prayer for costs.

SOME BACKGROUND FACTS:

- [13] These facts appear from the weight of the evidence. They are either undisputed or, on the probabilities, unassailable.

- [14] The First Applicant spouse and the deceased were married on 6 August 1988 in community of property. The marriage still subsisted when the deceased was killed in a motor accident on 22 February 2014, at the age of 51, some twenty five years after the marriage was concluded.
- [15] The two children, Second and Third Applicants, were born on 9 March 1989 and 2 July 1992 respectively. They were 25 and 22 years old at the time of their father's death. They were by then not self-supporting and relied on both the deceased and their mother, the First Applicant, for maintenance. They also stayed in the matrimonial home.
- [16] The Third Applicant daughter completed matric two years late at the age of 20 after the family had relocated to Abu Dhabi for a period of two years at the insistence of the deceased. In the written complaint which the First Applicant submitted to the Fourth Respondent, she states that the relocation to Abu Dhabi took place in 2009 and before they could leave, the First Applicant had to withdraw her pension after working for 18 years for the Department of Justice to pay the debts of both the spouses. At the time of lodging the complaint in October 2014, the First Applicant was working for the American Consulate earning a salary of R11,000.00 per month, which she needs to provide for the children and herself. Because she was financially embarrassed, she had to borrow an amount of R150,000.00 from her mother to make ends meet.
- [17] At the time of the death of the deceased, the marriage relationship had broken down irretrievably as a result of an adulterous relationship which the deceased had with a woman who died in the same motor accident as he did.
- [18] Because of the adulterous affair, the First Applicant sued for divorce in 2013 and, in terms of an interim Rule 43 order, the deceased had to pay maintenance pendente lite to the tune of some R2,000.00 per month.
- [19] It is common cause that, at the time of his death, the deceased was employed by the Third Respondent and, by virtue of that employment, was a member of the First Respondent. The death benefit became payable to the deceased's dependants in terms of section 37C of the PFA.

The Second Respondent, also at times referred to as "Momentum", was, as I have said, the administrator of the First Respondent.

- [20] According to the First Applicant, the deceased never maintained the mother during his lifetime. He may have donated a small amount in cash to her in December 2013.

According to what was said by the Board in the second distribution, the mother did not live with the deceased. She was a permanent resident at 39 Oak Tree Gardens, Hyacinth Way, Durbanville. She received cash amounting to R2,000.00 directly from the deceased for living and medical expenses, according to an affidavit she had submitted. It is not clear whether this was a once-off or a monthly payment.

The mother also received some R680.00 per month from an Old Mutual retirement annuity, State pension of R1,300.00 per month and

R1,000.00 per month from the Italian Association.

[21] The mother was not financially supported by her daughter, Ms. Barbara Swart, who told the Board that she was employed as an operations manager at Flight Training Adelaide, but could not afford to regularly support her mother. Ms. Swart was the sister of the deceased ("the sister").

[22] The deceased's mother suffered from emphysema as confirmed by a nursing sister at Santa Margherita Frail Care Centre. She moved to this frail care centre in May 2014 and the costs involved came to some R13,000.00 per month. She passed away, as per a death certificate, on 21 July 2014.

[23] The first Applicant spouse was earning some R10,000.00 or R11,000.00 per month from her employment with the American Consulate. She was permanently resident in Alberton.

The son, Alberto, who had a matric qualification, was earning some R6,700.00 per month as a credit controller, but was not yet self-supporting and stayed with his mother.

The daughter, Maxine, was a student at Intec College studying fashion drawing, which she hoped to complete by October 2014. She was also not yet self-supporting, and staying with her mother.

[24] I add that all this information is listed by the Board in their second distribution so that I assume that the information was still valid and applicable by 7 April 2015 when the decision, now under attack, was made.

[25] According to what is stated by the Board in the second distribution, they work on the basis of an initial allocation comprising costs for food, housing, clothing, medical expenses, schooling, transport, retirement funding and miscellaneous items and a secondary allocation comprising of any amount remaining after the initial allocation, which is then distributed in equal amounts to the beneficiaries.

It seems that the secondary allocation made to all four the dependants came to the same figure of R117,480.14, whereas the initial allocation differed.

[26] Of some importance, for present purposes, in my view, is an allegation in the Founding Affidavit that the Board made an advance payment to the mother of R75,555.25 on 23 May 2014, some two months before she passed away.

In her determination, the Fourth Respondent puts it as follows:

"During its investigations, the First Respondent discovered that the mother of the deceased required funds for urgent admission to a frail care institute. As a result, the Board made an advance payment on 23 May 2014 in the amount of R75,555.25 in order for her to be admitted. "

If this figure is deducted from the total award to the mother of R616,770.74, the outstanding balance comes to R541,215.49. In the

second distribution, the Board confirms this state of affairs, but refers to a round figure of R75,000.00, which would leave an amount of RSI,770.74 to be paid to Old Mutual to purchase an annuity. For present purposes, I will accept that the figure mentioned in the Founding Affidavit and in the determination of the Fourth Respondent is the correct one. The Fourth Respondent puts it as follows in her

determination:

"On 23 July 2014, it [presumably the Board] received the e-mail and an application from the Third Respondent indicating that the deceased's mother elected to purchase an annuity with her portion of the death benefit. Thus, when the First Respondent met on 25 July 2014 to pass the final resolution, it was not aware that the deceased's mother passed away on 21 July 2014 At no stage prior to the final resolution or payment of the benefit was the First Respondent aware that the deceased's mother passed away on 21 July 2014."

From the above I gather that the payment to Old Mutual was effected after the passing of the mother.

[27] The First Applicant states in the Founding Affidavit that she notified the Third Respondent about the death of the mother. She does not say exactly on which date she did so. On the probabilities, one could assume that it happened shortly after the death. In her written complaint to the Fourth Respondent, she says:

"I notified Stefanutti Stocks about her death and Momentum still paid the money out into her account"

The submission made by the First and Second Respondents to the Fourth Respondent is summed up as follows by the latter:

"It is submitted that although the Complainant contends that she notified the Third Respondent of the death of the deceased's mother, the First Respondent is a separate legal entity. Therefore, the fact that the Complainant notified the Third Respondent cannot be regarded as notice to the Fund. "

On the weight of the evidence, I have to accept that the First Applicant notified the Third Respondent, but that the First and Second

Respondents were unaware of the death when they passed the resolution on 25 July 2014 and when they, thereafter, made the payment for the annuity to Old Mutual.

Indeed, in her determination, the Fourth Respondent states that the First Respondent only became aware of the death of the mother in November 2014 and "upon becoming aware of her death, the First and Second Respondents contacted Old Mutual to return the benefits paid for the deceased's mother. However, it was informed that the benefit was paid to Ms. D.S. Swart ("the sister"? on 16 October 2014 as she was the nominated beneficiary on the annuity policy "

The Fourth Respondent held that no fault could be ascribed to the First and Second Respondents for this state of affairs.

[28] From the foregoing, it seems that the following conclusions are not inappropriate:

- The mere fact that the First and Second Respondents tried to get the money back from Old Mutual must be a strong indication that they realised that it was a mistake to pay out the money after the mother had passed away. I can see no other reasonable inference to be drawn from these efforts by the two Respondents;
- The First Applicant spouse gave due notice to the Third Respondent about the passing of the mother. On the probabilities she would have done so shortly after the death. In the second distribution the Third Respondent is described as the "participating employer" in the pension fund. The Third Respondent appears to have been remiss in not reporting the death to the First and Second Respondents. The Third Respondent did also not respond, according to the Fourth Respondent to a request for comments. This is what inspired the Fourth Respondent to say " therefore , this tribunal must determine the complaint on the basis of the submissions placed before it";
- There is no duty on the Applicants to report the death of the deceased to the pension fund in which the employer of the deceased participates, with the Applicants having reported the death to the employer.

The First Applicant also complains that she sent correspondence to the Third Respondent, Royal Union Financial Services and Momentum in regard to her complaint but got no response. She complains about the "lack of communication from Momentum before final payment was made ".

SOME NOTES ABOUT THE FOURTH RESPONDENT'S

DETERMINATION

AND THE REASONS FOR HER DECISION:

[29] The Fourth Respondent points out that payment of death benefits by a pension fund organisation is regulated by section 37C of the Act. A death benefit shall not normally form part of the estate of the deceased, but shall be dealt with in terms of this particular section which imposes three primary duties on the Board when distributing a death benefit: it needs first identity and trace all the dependants and nominated beneficiaries of the deceased, secondly the Board must effect an equitable distribution of the death benefit and finally the Board must determine an appropriate mode of payment of the benefit.

The section gives the Board discretionary powers, to be exercised fairly and reasonably, in the distribution of the death benefit.

[30] The Fourth Respondent points out that her Tribunal has to determine whether or not the Board properly discharged the duties imposed on it by section 37C, namely that it considered all the relevant factors to the exclusion of irrelevant factors and did not fetter its discretion, . Where it is found that the Board failed to take into account relevant factors, or took into account irrelevant factors, its decision shall be reviewable on the grounds that it exceeded its powers or that the decision constituted an improper exercise of its powers. She refers to *Jordaan v. Protektor Pension Fund*, [2001] 2 BPLR 1593 (PFA) at 1596 F-G and 1597 B - D.

[Emphasis added]

[31] The Fourth Respondent, erroneously, noted that the resolution of the Board indicated that the mother lived with the deceased. This is not correct, as I have explained. Nevertheless, not too much turns on this in the general scheme of things. The Fourth Respondent noted the various items of income received by the mother, which I have listed. She also says that it was established that the mother received "amounts of between R1,500.00 and R2,000.00 from the deceased". There is no indication, as I have pointed out, whether this was a regular monthly payment or a once-off affair. The Fourth Respondent, with respect incorrectly, observed that it is clear that due to the mother living with the deceased, she in fact financially depended on him. Therefore, she says, the Board considered relevant factors in accepting the deceased's mother as a dependant. It does not appear to me that this is a correct

conclusion.

[32] Importantly, the Fourth Respondent then goes on to say

" However, in deciding to allocate 42% of the death benefit to the deceased's mother, it does not appear that the Board considered her medical condition in light of her admission to a frail care centre and this resulted in over-providing for her maintenance. This in turn had an impact on the fairly substantial death benefit that was allocated to her. Furthermore, the Board also failed to consider that the duty to financially support the deceased's mother did not only rest on him. His sister also bore the same duty. The fact that the death benefit became available upon his death did not absolve the deceased's sister of the duty to financially support her mother. On the basis of the First Respondent's failure to show that it fully considered the factors in arriving at its decision, the decision falls to be set aside."

[33] The Fourth Respondent noted that the Complainant was of the view that the benefit of 37% allocated to her and the benefits allocated to the children were insufficient and that the Complainant seeks an order directing the First Respondent to reverse the allocation to the mother and have the benefit divided between her and the children. To this request, the Fourth Respondent remarked:

"However, it must be noted that it is not the role of this Tribunal to decide what the fairest and most generous distribution is. Rather, the test in law is to determine whether or not the Board acted rationally and arrived at a proper and lawful decision. See *Ditshabe v. Sanlam Marketers Retirement Fund & Another*, (2) [2001] 10 BPLR 2579 (PFA) at 2582 F- G."

[34] The Fourth Respondent found that her Tribunal was satisfied that the Board considered the relevant factors when deciding on the percentage allocations to be made to the three Applicants.

[35] The fourth respondent then goes on to say the following:

" However, it has already been found above that the Board erred in failing to consider the medical condition and life expectancy of the deceased's mother together with the fact that the deceased's sister also had an obligation to financially support her mother. It has also been made clear that this unfortunate oversight on the Board's part is inextricably linked to the decision to allocate 42% of the death benefit to her. As the decision falls to be set aside, in the event that the Board reconsiders the matter and arrives at a different conclusion, this may have an impact on the death benefits allocated to the Complainant and her children. There/ore, the matter must be referred back for its fresh consideration and decision."

[36] The Fourth Respondent found that the First Respondent cannot be held liable for paying the benefit in ignorance of the death of the mother. On the available evidence, I am unable to criticise this

conclusion.

[37] The order of the Fourth Respondent reads as follows:

"6.1 In the result, this Tribunal makes the following order:

6.1.1 The decision of the Board is hereby set aside; and

6.1.2 The Board of the First Respondent is ordered to reinvestigate the matter and re-exercise its discretion in terms of section 37C of the Act, taking into account the factors pointed out in this determination and inform the Complainant and this Tribunal of its decision, within eight weeks from the date of this determination."

[38] As already pointed out, the Board, about two months later, came to light with exactly the same determination that it made on 25 July 2014.

DO THE PROVISIONS OF THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT, 3 OF 2000, COME INTO PLAY?

- [39] The Applicants, for some reason, which I do not understand, do not explicitly state that they rely on the provisions of the above-mentioned Act ("PAJA").
- [40] The First Respondent in the Opposing Affidavit, makes the observation that the Applicants "do not rely" on PAJA " and therefore one can read into the application that the Applicants seek to rely on general common law grounds of review". The First Respondent argues that "in so doing, the Applicants are required to set out a case challenging the legality of the decision of the Board of the fund, i.e.: the Applicants need to put before the Court reasons as to why they contend that the Board did not exercise its discretionary power lawfully, rationally or in good faith. In this regard, all that is alleged by the Applicants is that the Board did not properly consider certain factors that it was directed to consider by the adjudicator"
- [41] This subject did not receive any meaningful attention during the proceedings before me. Perhaps understandably so. The fact that the provisions of PAJA were not explicitly mentioned, does not mean, in my view, that the provisions of PAJA don't come into play. It was clearly stated in *Bato Star Fishing (Pty) Ltd v. Minister of Environmental Affairs*, 2004(4) SA 490 (CC) at 506 J-J that:

"The provisions of section 6 [my note: of PAJA] divulge a clear purpose to codify the grounds of judicial review of administrative action as defined in PAJA. The cause of action for the judicial review of administrative action now ordinarily arises from PAJA, not from the common law as in the past "

- [42] In my view, the decision of the Board, and the resultant distribution made, clearly resorts under "administrative action" as defined in section 1 of PAJA.
- [43] Moreover, this is not, strictly speaking, a so-called legality review, as the First Respondent appears to suggest, which involves a situation where the attack is based on an argument that the decisionmaker or administrator did not act within the powers lawfully conferred on it - see *Fedsure Life Assurance Ltd v. Greater Johannesburg Transitional Metropolitan Council*, 1999(1) SA 374 (CC) at 400 D-F and Cora Hoexter, *Administrative Law in South Africa*, Second Edition, page 122 to 123.
- [44] Rather, it seems that the attack, in this case, resorts under the PAJA section 6 grounds. For example, the stipulation in section 6(2)(e) that:

"The action was taken -

- (i) for a reason not authorised by the empowering provision;
- (ii) ...

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv)...

(v)...

(vi) arbitrarily or capriciously."

The provisions of section 6(2)(f) that:

"The action itself -

(i) ...

(ii) is not rationally connected to -

(aa) the purpose for which it was taken;

(bb) the purpose of the empowering provision;

(cc) the information before the administrator; or

(dd) the reasons given for it by the administrator."

or what is said in section 6(2)(h) that:

"The exercise of the power or the performance of the function authorised by the empowering provisions, in pursuance of which the administrative action was purportedly taken is so unreasonable that no reasonable person could have so exercised the power or performed the function ... "

[45] I add that, in the Replying Affidavit, it was argued by the Applicants that the Board "did not exercise its discretionary power lawfully, rationally or in good faith ...".

CONCLUSIONARY REMARKS:

[46] I cannot find any justification for the Board's decision of 7 April 2015 to make exactly the same distribution and take exactly the same decision that it did on 25 July 2014:

- Unlike with the first distribution, the Board was now aware of the fact that the mother passed away before the distribution was made in July 2014; and
- As mentioned earlier, the fact that the First and Second Respondents tried to get the money back from Old Mutual when they heard about the passing of the mother, clearly indicates that had they known about the passing before they made the distribution, they would not have done so. This can be nothing other than an acknowledgement that they erred with the first distribution although, on the probabilities, in ignorance, not having known about the passing of the mother; and

- It is difficult to understand why they elected, in April 2015, being fully aware of the true state of affairs, to perpetuate the error: they were clearly instructed by the Fourth Respondent "to reinvestigate the matter and re-exercise its discretion", yet, in presenting the identical distribution, they did not say a single word about the instruction of the Fourth Respondent to "reinvestigate and re-exercise". They are completely silent on the instruction by the Fourth Respondent to take into account the factors pointed out by her in her distribution which must, inevitably, in my view, include the fact that the mother passed away before the distribution was made, although the Fourth Respondent seems to place more emphasis on the life-expectancy of the mother and the fact that she

was in frail care; and

- In my view, the first distribution (in ignorance) and the second distribution (on purpose) were flawed because, in the spirit of

section 6 of PAJA, irrelevant considerations were taken into account and relevant considerations were not considered. A distribution was made to a dead person. This was a relevant consideration. The dead person was no longer a dependant in the spirit of section 37C of the PFA. This relevant consideration was not considered or, if it was, was overlooked; The action taken was not rationally connected to the purpose for which it was taken or to the purpose of the empowering provision (i.e. to distribute death benefits to dependants) or to the information before the decision maker (the passing of the mother);

- For these reasons I have come to the conclusion, and I find, that the review application should succeed and the second distribution should be set aside;
- I am not persuaded that the advance payment made before the passing of the mother in the amount of R75,555.25 to facilitate the admission to the frail care facility before the passing of the mother, should also be set aside. I have referred to the various calculations and in my view the Board should only be ordered to distribute the amount of R541,215.49 and not the full amount of R616,770.74 amongst the three Applicants, as the only remaining dependants;
- I am not persuaded that this Court has the power to order the Board in what percentages the distribution of the aforesaid amount should be made to the three Applicants. This is clearly something that falls inside the discretion of the Board in the spirit of section 37C and, when referring the matter back to the Board for redistribution of the aforesaid amount amongst the Applicants in percentages to be determined by the Board, I am also not finding that the percentages applied in the first and second distributions (37%, 8% and 13% respectively) in respect of the Applicants fall to be set aside. This should be left to the discretion of the Board when making the distribution flowing from the review; and

- I am alive to the fact that the First Respondent pension fund may well have lost the amount of R541,215.49 erroneously distributed to the mother. It may be difficult to recover this amount from the sister, but these damages, if it were to be suffered, flow from an error by the Board as a result of an unfortunate turn of events which cannot be laid at the door of the Applicants.

THE COSTS:

[47] I see no reason why the costs should not follow the result.

[48] In my view the Applicants acted prudently and reasonably in employing the services of two counsel. I find no basis for refusing to grant the costs of two counsel. This is a matter of some complexity.

THE ORDER:

[49] I make the following order:

1. The decision of the Board to distribute the death benefits, in the manner that it did, on 7 April 2015, is reviewed and set aside;
2. The matter is referred back to the First Respondent which, through its Board, is ordered to distribute the sum of R541,215.49 allocated to the mother of the deceased, to the Applicants, in percentage proportions to be determined by the Board;
3. The First Respondent is ordered to pay the costs of the Applicants, which will include the costs flowing from the employment of two counsel.

W.R.C. PRINSLOO

JUDGE OF THE GAUTENG DIVISION, PRETORIA

Matter heard on:

31 October 2017

Counsel for the Applicants: T.P. Kruger S.C. and C D' Alton

Instructed by:

Rothmann Phahlamohlaka Incorporated

Counsel for the First Respondent: S. Khumalo

Instructed by:

Shepstone & Wylie

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