

SOUTH AFRICA / JUDGMENT

Letsoalo and Others v Lukhaimane NO and Others (48743/16) [2017] ZAGPPHC 1246 (13 December 2017) [2017] ZAGPPHC 1246

COURT

North Gauteng High Court, Pretoria

BEFORE

Mudau

CASE / FILE NUMBER

48743/16

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 48743/16

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

13/12/2017

In

the matter between:

ANTANASOVA-LETSOALO

ANTONANETA

LIIOUBENOVA

NO FIRST

APPLICANT

ANTONANETA

LIIOUBENOVA SECOND

APPLICANT

LETSOALO, LEHLOGONOLO THIRD

APPLICANT

and

M

A LUKHAIMANE

NO FIRST

RESPONDENT
THE
BOARD OF TRUSTEES, UNIVERSITY
OF
LIMPOPO, RETIREMENT
FUND SECOND
RESPONDENT
ALEXANDER
FORBES ADMINISTRATION
SERVICES
(PTY)
LTD THIRD
RESPONDENT
THE
MASTER OF HIGH COURT, POLOKWANE FOURTH
RESPONDENT
KOENA
LETTY
MOKOATEDI FIFTH
RESPONDENT
MASEFENYA
LETSOALO SIXTH
RESPONDENT
OFENTSE
LETSOALO SEVENTH
RESPONDENT

JUDGMENT

MUDAU J:

- [1] This is an application to set aside a determination made by the First Respondent (the Adjudicator) under the relevant provisions of the Pension Funds Act 24 of 1956 (the PFA) on 9 May 2016. The Adjudicator had dismissed their complaint against a decision made by the Fund's board of trustees in terms of section 37C of the PFA. The Adjudicator abides by the decision of the Court whereas the Second and Fifth to Seventh Respondents are opposing the application. The application is brought in terms of section 30P of the PFA. It is the Applicants' case that they are the only beneficiaries entitled to receive the provident and pension benefits in respect of the late Mr Sefenya Harence Letsoalo (the deceased).[2] The First Applicant is the executrix in the deceased estate. The deceased passed away on 17 October 2014. The Second Applicant and the deceased were married in community of property until his passing. The Third Applicant is the minor child of the Second Applicant and the deceased. At the time of the deceased's passing he was employed at the University of Limpopo and as such a member of the pension fund of the University. Upon his death, a lump sum death benefit became payable to his dependants and nominees in terms of section 37C of the PFA and the rules of the Fund.

[3] Following the passing of the deceased a number of persons as well the Fifth, Sixth and Seventh Respondents alleged that they were 'dependants' of the deceased and as a result entitled to share in the proceeds of the death benefit of the pension fund in accordance with the trustee's determination. Following the determination by the trustees of the Pension Fund, the Fifth, Sixth and Seventh Respondents were amongst the beneficiaries in respect of the death benefit of the pension fund of the deceased.

[4] Acting as required under section 37C of the PFA the Fund determined that: the Second Applicant qualified as a dependant by virtue of the fact that she was married to the deceased (paragraph (b)(ii) of the definition of dependant). The child born of the marriage between the Second Applicant and the deceased (the Third Applicant) qualified as a dependant in terms of paragraph (b)(iii) of the definition of dependant.

[5] It was established that the Fifth Respondent (Letty Mokoatedi) qualifies as a dependant based on factual financial dependency

(paragraph (b)(i) of the definition of dependant). The Fund established that the deceased had paid lobola for the Fifth Respondent as corroborated by his parents . The board of trustees decided that the Fifth Respondent qualified as a factual dependant in that she financially depended on the deceased at the time of his death although her customary marriage to the deceased may not have been legal.

[6] The board of trustees also established that the Fifth Respondent had since 2009 had full authority over the deceased's bank account with FNB and the deceased had allowed her to use this account to support herself financially. The deceased had also given the Fifth Respondent a bank card which she used to transact on said bank account. The Applicants do not dispute that the deceased had paid lobola for the Fifth Respondent. Neither was it disputed that she had a bank card linked to the deceased's bank account which she used for transactions.

[7] It was established that Masefenya Letsoalo, the Sixth Respondent, qualified as a dependant in terms of paragraph (b)(i) of the

definition of dependant. In support of its decision , the board of trustees concluded that even though the Sixth Respondent was not the deceased 's biological child, the deceased supported her financially as he assisted her with her schooling. Furthermore, that, the Sixth Respondent was a registered dependant on the deceased's medical aid since 1 October 1995, a period of 19 years. The Applicants do not dispute that the Sixth Respondent was a dependant on the deceased's medical aid. It is not disputed that the deceased paid for her tuition fees.

[8] It was established that Ofentse Letsoalo, the Seventh Respondent, qualified as a dependant in terms of paragraph (b)(i) of the

definition of dependant. Although the Seventh Respondent was not the deceased's biological child, the deceased supported her financially,

including paying for her education and her other day-to day needs.

- [9] Aggrieved by the board's decision, the Applicants lodged a complaint with the Adjudicator in terms of section 30A of the Act on 10 December 2015, which was subsequently dismissed on 9 May 2016. The Applicants approached the Pension Fund Adjudicator in terms of Section 30 of the PFA, and requested a determination be made in respect of the distribution of the death benefit.
- [10] The office of Pension Funds Adjudicator was established under section 30B of the PFA. The main object of the Adjudicator is to dispose of claims lodged in terms of section 30A (3) of the PFA in a procedurally fair, economical and expeditious manner (See section 30D of the PFA). In order to achieve this main object, the Adjudicator must, subject to one qualification not presently relevant, investigate any complaint and make the order which any court of law might make. A determination by the Adjudicator is deemed to be a civil judgment of a court of law.
- [11] After considering the complaint, the Pension Fund Adjudicator in dismissing the complaint made the following determination: that the First Respondent conducted an appropriate investigation in terms of section 37C of the PFA and identified all the potential

beneficiaries that included the Second and Third Applicants who qualified as legal and factual dependants as defined in section 1.

- [12] Section 30P of the PFA provides as follows:

"30P Access to Court

- (1) Any party who feels aggrieved by a determination of the Adjudicator may, within six weeks after the date of the determination, apply to the division of the High Court which has jurisdiction, for relief, and shall at the same time give written notice of his or her intention so to apply to the other parties to the complaint.
- (2) The division of the High Court contemplated in subsection (1) may consider the merits of the complaint made to the Adjudicator under section 30A (3) and on which the Adjudicator's determination was based, and may make any order it deems fit.
- (3) Subsection (2) shall not affect the court's power to decide that sufficient evidence has been adduced on which a decision can be arrived at, and to order that no further evidence shall be adduced."

- [13] The approach to be adopted by a Court in considering a section 30P application and the nature of such applications has been dealt with in numerous judgments. In the case of *Cape Town Municipality v South African Local Authorities Pension Fund and Another*[1] it was stated that the appeal under section 30P is a complete rehearing and a fresh determination on the merits of the matter with or without additional evidence or information and an aggrieved party is entitled to have the legal dispute that was dealt with by the Adjudicator reconsidered de novo by the Court.

[14] In Meyer v ISCOR Pension Fund[2] the Court stated:

"From the wording of section 30P (2) it is clear that the appeal to the High Court contemplated is an appeal in the wide sense. The High Court is therefore not limited to a decision whether the adjudicator's determination was right or wrong. Neither is it

confined to the evidence or the grounds upon which the adjudicator's determination was based. The Court can consider the matter afresh and make any order it deems fit. At the same time, however, the High Court's jurisdiction is limited by section 30P (2) to a consideration of 'the merits of the complaint in question'. The dispute submitted to the High Court for adjudication must therefore still be a 'complaint' as defined. Moreover, it must be substantially the same 'complaint' as the one determined by the adjudicator."

[15] As also stated in De Beers Pension Fund v Pension Funds Adjudicator and Another, [3] an application in terms of section 30P is sui generis and a Court, in addition to its powers of review, exercises jurisdiction analogous to the original jurisdiction. Consequently a Court has the power to consider the complaint but is required itself to assess the merits of the complaint, and decide whether the adjudicator's determination was correct in law. If not, the Court will substitute its own decision.

[16] Section 37C of the PFA referred to above applies to the benefits payable upon the death of deceased. The relevant part read 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 (3) and 370 , 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 fund, to one of such dependants or in proportions to some of or all such dependants."

[17] In Kaplan & Another NNO v Professional & Executive Retirement Fund & Others[4] the SCA interpreted section 37C (1) as follows:

"The plain meaning of the subsection is this. All benefits payable in respect of a deceased member, whether subject to a nomination or not, must be dealt with in terms of one or other of the quoted subparagraphs. In other words none fall into the estate save in the circumstances stated in subparagraphs (b) and (c). In addition, these nominations having been made in terms of the rules, and the rules requiring the benefits to go to the nominated beneficiaries, the trustees'

case is inextricably linked to the rules. However, as the phrase 'notwithstanding anything to the contrary...contained in the rules' makes unmistakably clear, it matters not in the present situation what the rules say - the benefits must be disposed of according to the subsection's statutory scheme."

[18] In *Makume v Cape Joint Retirement Fund and Another*,^[5] which counsel for the respondent also referred to, it was held that the benefit payable by a pension fund upon the death of a member has nothing to do with whether parties were married in community of property. The Court held that the benefit must be distributed in terms of section 37C of the Act, and rejected the claim by the applicant in that case that she was entitled to 50 per cent of the benefit simply because she was married in community of property to the deceased in that case, as it is in this matter.

[19] Section 37C(1)(a) provides that the benefit must be distributed between the deceased's dependants and nominees in a manner the board deems equitable. The term 'dependant' is defined in section 1 of the PFA 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;... " (Emphasis added).

[20] It is trite that the Board's decision can be interfered with where it is demonstrated that it had taken into account irrelevant, improper or irrational factors, or where its decision can be said to be one that no reasonable body of trustees properly directing themselves could have reached. Furthermore, it is also common cause that where a discretionary power has been conferred on the Board, the Court and the Adjudicator cannot, without more, substitute their discretion for that of the trustees [*Gerson v Mondi Pension Fund and Others.*] [6]

[21] There is no indication that the Board acted irrationally or took into consideration irrelevant facts. On the contrary, it disregarded

irrelevant facts. By way of example, one K Maja was conditionally allocated 5 per cent, but her parent was unable to provide proof of financial dependence to the Board. In my view the Board exercised its discretion properly and did indeed arrive at a proper and lawful decision as the Adjudicator found. Placing myself in the position of the Adjudicator, I am unable to agree, she was wrong in dismissing the complaint. Accordingly I find that the applicants did not establish a right to the relief claimed in their application.

[22] The application is dismissed with costs.

TP MUDAU

[Judge of the High Court,

Gauteng Local Division,

PRETORIA]

Date of Hearing: 31 October 2017

Date of Judgment: 13 December 2017

APPEARANCES

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[1] 2014

(2) SA 365 (SCA) para 28 .

[2] 2003

(2) SA 715 (SCA) at 7251-726A.

[3]

[2003] 2 All SA 239 (C) para 245.

[4] 1999 (3) SA 798 (A) at 803A-C.

[5]

[2007] 2 BPLR 147 (C) para 152.

[6] 2013 (6) SA 162 (GSJ) para 28.

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