

SOUTH AFRICA / JUDGMENT

Mbonambi and Another v eJobourg Retirement Fund and Others (20601/2022) [2025] ZAGPJHC 679 (14 July 2025)

[2025] ZAGPJHC 679

COURT

South Gauteng High Court, Johannesburg

BEFORE

GA Fourie

CASE / FILE NUMBER

20601/2022

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REPUBLIC OF SOUTH

AFRICA

IN THE HIGH COURT OF

SOUTH AFRICA

GAUTENG LOCAL

DIVISION, JOHANNESBURG

CASE

NO: 20601/2022

(1)

REPORTABLE: No

(2)

OF INTEREST TO OTHER JUDGES: No

(3)

REVISED:

In the matter between:	THANDAZILE
	NOMFUNDO
	First Applicant
	PRINCESS
	MBONAMBI
	THOBEKILE
	VANESSA
	Second Applicant
	THOLAKELE
	NGUBANE
	and
	eJOBURG
	RETIREMENT FUND
	First Respondent
	MOMENTUM
	Second Respondent
	REGISTRAR
	OF PENSION FUNDS
	Third Respondent
Summary:	Challenge to decision of Retirement Fund to allocate death benefit to the nominee only. Applicants failed to establish that the impugned decision was irrational or unlawful. Fund exercised its statutory discretion in a lawful and reasonable manner. Application dismissed with costs.

JUDGMENT

Fourie AJ

Introduction

1. This is an opposed application to review and set aside the decision of the first respondent, eJoburg Retirement Fund (“the Fund”), regarding the allocation of the death benefits of the Late Ms Hlengiwe Nonselelo Jessica Mbonambi (“the Deceased”).
2. The Deceased was a member of the Fund by virtue of her employment. This is a Pension Fund as defined in and regulated by the Pension Funds Act 24 of 1956 (“the Act”). The Deceased had nominated her mother, Mrs Ntombi Mbonambi (Mrs Mbonambi Senior) as the sole beneficiary of any death benefits from the Fund.
3. The Act regulates the distribution of death benefits. These benefits do not form part of the deceased estate, and the beneficiary

nomination is not the sole determining factor in allocating a death benefit. Rather, the Act requires the requires the Fund to exercise a discretion when making a distribution of the death benefit. Section 37C reads in relevant part:

“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 ... 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.” (Emphasis added).
4. The Fund is required to take steps to locate and identify potential dependants and nominees of a deceased retirement fund member, and to effect an equitable distribution of the benefit to the dependants and nominees. This involves the exercise of a discretion, taking into account relevant factors.
5. The Act defines a “dependant” of a member as:
 - “(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)
6. The second respondent, Momentum ,is the appointed Fund administrator, who attended to the investigation on behalf of the Fund. Investigations were conducted into possible dependants of the Deceased, and obtained affidavits from them. Dependency claims were asserted by:
 - 6.1. Mrs Mbonambi Senior, the Deceased’s mother, who is also the nominee.
 - 6.2. The first applicant, Mrs Thandazile Nomfundo Princess Mbonambi, the deceased’s adult sister.

6.3. The second applicant, Mrs Thobekile Vanessa Tholakele Ngubane, an adult sister of the deceased.

7. Mrs Mbonambi Senior and the first and second applicants submitted affidavits to the investigator in support of their dependency claims. The Deceased's father passed away some time ago. The Deceased's brother, Dr Thamsanqa Patrick Mbonambi ("Dr Mbonambi"), did not claim dependency, and supported the distribution of the death benefit to Mrs Mbonambi Senior.
8. On 1 August 2022, the Death Benefits Committee of the Fund considered the question of the distribution of the Deceased's death benefit. The Committee had before it various affidavits deposed to by the claimants and by Dr Mbonambi. The Committee resolved to distribute the full benefit, amounting to R4,064,647, to Mrs Mbonambi Senior. On 12 August 2022, the Fund addressed correspondence to Mrs Mbonambi Senior, informing her of its decision, and providing the following reasons for its decision:

"6. The primary reasons for the allocation to you were as follows:

6.1 You were the Mother and a legal dependent of the Deceased Member.

6.2 As were a pensioner and unemployed, you were partially financially dependent on the Deceased Member.

6.3 The Deceased Member nominated you to receive 100% of his death benefits in terms of a Nomination of Beneficiary Form that was completed during 2015."

9. Aggrieved by their exclusion from the distribution of the Deceased's death benefits, the first and second applicants instituted these review proceedings, aimed at setting aside the Fund's distribution decision. The review application was launched in August 2022, and is opposed by the Fund. The distribution has not been given effect to, pending the outcome of this application, which came before me for argument on 17 April 2025.
10. The applicants cited the Fund, its administrator Momentum and the Registrar of Pension Funds as the respondents in the review application. It is not clear why the second and third respondents were cited, as they are not necessary parties, but as neither of these parties objected to their joinder, and as no relief is sought against these parties, nothing turns on it. A more serious issue is the non-joinder of Mrs Mbonambi Senior as a respondent. Clearly Ms Mbonambi Senior is a necessary party as her rights and financial interests are directly affected by the relief sought herein.
11. Herbstein & van Winsen[1] describe joinder of necessity as follows:

"A third party who has, or may have, a direct and substantial interest in any order the court might make in proceedings or if such an order cannot be sustained or carried into effect without prejudicing that party, is a necessary party and should be joined in the proceedings, unless the court is satisfied that such person has waived the right to be joined.

...

Joinder can be dispensed with only if the interested party has unequivocally waived the right to be joined and undertaken to be bound by any decision that the court may make.

A 'direct and substantial interest' has been held to be 'an interest in the right which is the subject-matter of the litigation and not merely a financial interest which is only an indirect interest in such litigation'. It is 'a legal interest in the subject matter of the litigation, excluding an indirect commercial interest only'... “

12. Rule 10 of the Uniform Rules of Court provides for the joinder of parties and causes of action. In *Judicial Services Commission and another v Cape Bar Council and another*[2], the SCA held that:

“[12] It has by now become settled law that the joinder of a party is only required as a matter of necessity – as opposed to a matter of convenience – if that party has a direct and substantial interest which may be affected prejudicially by the judgment of the court in the proceedings concerned (see eg Bowring NO v Vrededorp Properties CC 2007 (5) SA 391 (SCA) para [21]. The mere fact that a party may have an interest in the outcome of the litigation does not warrant a joinder plea. The right of a party to validly raise the objection that other parties should have been joined to the proceedings, has thus been held to be a limited one.”

13. Normally the non-joinder of a necessary party will have the result that the Court will refuse to determine the matter until the non-joinder has been rectified. There are exceptions to this rule, one of which is where the Court is satisfied that the affected party is aware of the proceedings and consents to the continuation thereof without a formal joinder. In my view, the interests of justice are best served by determining the merits of the application, despite the non-joinder of Mrs Mbonambi, for the following reasons:

13.1. Mrs Mbonambi Senior’s affidavit in support of her claim of dependency, as submitted to the Fund, forms part of the review record and can be considered.

13.2. Dr Mbonambi, assisted by attorneys, appeared at the virtual hearing and made submissions in support of Mrs Mbonambi Senior’s claim as sole dependant, and the Fund’s determination. I was informed that Mrs Mbonambi Senior was anxious to have the matter finalised.

13.3. The delay of almost three years since the determination was made is causing serious prejudice to Mrs Mbonambi Senior, an elderly woman with serious health issues. An order directing her joinder will inevitably cause a further delay of many months.

13.4. The view I take of the merits of the review application, which I now turn to.

14. The applicants seek an order setting aside the Fund’s decision to distribute the death benefit to Mrs Mbonambi Senior only, and replacing it with a decision to distribute the death benefit equally between the two applicants and Mrs Mbonambi Senior.

15. The basis of their claim, as expressed in the founding affidavit, can be summarised as follows:
 - 15.1. They were also dependants of the Deceased at the time of her passing;
 - 15.2. Mrs Mbonami Senior had already benefitted from receipt of the proceeds of an insurance policy that paid out in her benefit on the death of the Deceased.
 - 15.3. Mrs Mbonambi Senior acted improperly and to the detriment of the applicants by failing to disclose their details to the Master's Office.
16. The second ground is legally irrelevant to the determination decision of the Fund, and therefore is also irrelevant to a review of the Fund's decision. The same can probably be said of the third ground, as the death benefit falls outside of the deceased estate, but in any event, as no evidence to support a conclusion of improper or fraudulent conduct by Mrs Mbonambi was produced, and as Mrs Mbonambi had no opportunity to refute these allegations (as she was not cited as a respondent in the review application), the third ground is of no consequence here.
17. I now turn to the first and only relevant ground of review, being the complaint that the first and second applicants were dependents of the Deceased, and should therefore have received a portion of her death benefit.
18. The Fund administrators assigned an in-house investigator to collect information from potential dependants of the deceased. He secured affidavits from the applicants, Dr Mbonambi and Mrs Mbonambi Senior.
19. In her affidavits submitted to the Fund in support of a dependency claim, the first applicant described a close relationship with the Deceased, who was three years younger than her. The Deceased was also close to her daughter, who often stayed with her. The Deceased often contributed with groceries and cash, and would occasionally transfer money to the first applicant or her daughter, to buy food or medicine.
20. The first applicant also described how, when their sister the second applicant was struggling financially, she and the Deceased would take turns to send money and groceries every month. The Deceased assisted her financially during a period when she was unemployed in 2017. She mentioned that she was again unemployed, as she had been retrenched during August 2021, and that she was currently residing in the Deceased's house.
21. The first applicant stated that her father had passed away during July 2021, and that her brother and mother had sold the family home without her or the second applicant's consent. She stated that she was a single mother, and that her age would make it difficult for her to find employment. She intended using monies received from the death benefit distribution to start a business.

22. The first applicant complained that her brother and mother had benefitted disproportionately from the deceased estates of her father and the Deceased, and that this inequity should be rectified by splitting the death benefit distribution equally between her, the second applicant and Mrs Mbonambi Senior.
23. The second applicant confirmed the first applicant's version of a close-knit family, with the three sisters being inseparable since childhood, and always supporting each other as adults, particularly when one of them was going through a hard time. She stated that when her husband lost his job during 2020, the Deceased would assist them with money, groceries, and contributing towards her children's school fees.
24. The second applicant accused her brother Dr Mbonambi of improper conduct in the administration of their father's deceased estate, and of taking control over Mrs Mbonambi Senior's bank accounts.
25. The second defendant stated that the Deceased always assisted her mother and both sisters financially, with groceries and money. She mentioned that she is currently unemployed.
26. Dr Mbonambi also submitted an affidavit. He stated that Mrs Mbonambi Senior was heavily dependant on the Deceased for support. She lived with the Deceased, was financially dependent on her, and they were extremely close. He disputed the claims of dependency by the first and second applicants. She stated that the first applicant was employed in a senior position, and that the second applicant was employable, but chose not to work as her husband supported her.
27. Dr Mbonambi motivated honouring the Deceased's nomination of Mrs Mbonambi as sole beneficiary by explaining her financial needs: Mrs Mbonambi needed to purchase a retirement unit in an assisted living facility, and to have sufficient funds to support her medical and other needs for the remainder of her lifetime.
28. All of this information was duly placed before and considered by the Fund when determining how to distribute the death benefit. Ultimately the Fund decided to honour the Deceased's nomination and to pay the entire death benefit to Mrs Mbonambi Senior, for the reasons set out above.
29. In its answering affidavit, the Fund explained that a further factor in its decision was the failure by the applicants to provide evidence to support their claims of financial dependence on the Deceased. Aside from a bank statement showing a single transfer of R300 from the Deceased, no other documentary evidence of money transfers from the Deceased to either of the applicants was produced.
30. In reply, the applicants contended that the Fund erred in failing to consider the informal nature of the dependency relationship between close adult siblings, and particularly in the African culture, where, they contended, formal money transfers were not the usual means of providing financial support. It was usual to provide cash and groceries rather than bank transfers. When the siblings were far apart, the deceased would apparently send money via

the Shoprite money transfer service, but it was claimed that it was nearly impossible to obtain historical records of such transactions from Shoprite, a claim I find hard to believe, given the strict record keeping duties on companies providing financial services.

31. The central question on review is whether the decision of the Fund is liable to being set aside. To answer this question requires an assessment of the nature of the discretion exercised by the Fund when determining an allocation of a death benefit in terms of section 37C of the Act, and the applicable test on review of the decision.
32. The review test is akin to the test on appeal to the High Court against a decision of the Pension Funds Adjudicator, in terms of section 30P of the Act. (For reasons not adequately explained, the applicants did not first pursue a complaint to the Pension Funds Adjudicator).
33. Section 37C places a statutory duty on the trustees of a fund to allocate and pay the death benefit in a manner that it deems fair and equitable. Nomination by a member is not binding, but is a factor to be considered. Trustees have a positive duty to take steps to trace potential dependants and to consider their claims when determining the distribution of a death benefit. This was duly done by the Fund.
34. The Fund has a wide discretion to determine an allocation. This is not an unfettered discretion. In *Gerson v Mondi Pension Fund and Others* 2013 (6) SA 162 (GSJ) the Court explained:

[15] In the determination of *Stacey (Koevoort) v Old Mutual Protektor Pension Fund and Another* the erstwhile pension funds adjudicator sets out the law on this point:

'As already alluded to in the preliminary ruling, the effecting of an equitable distribution requires of the board of trustees to take into consideration all the relevant factors and discard irrelevant ones. The board may also not unduly fetter its discretion, nor should its decision reveal an improper purpose. If it has acted as aforesaid, no reviewing tribunal will lightly interfere with their decision. It should be noted that even if may not necessarily agree with the decision of the board, that in itself is not a ground for setting aside the board's decision. This is because it is not my role as a reviewing tribunal to decide on what is the fairest and most generous distribution. The test in law is whether the board has acted rationally and arrived at a proper and lawful decision.'

35. Recently the High Court dealt with a similar application, and summarised the law on review. See *Ndwandwe v Trustees, Transnet Retirement Fund and Others* 2025 (2) SA 211 (KZD):

"[51] The Fund's obligation (which is analogous to a qualifying fund's obligations under s 37C(1)(bA) of the PFA) has been expressed by the Supreme Court of Appeal to be the following:

'The effect of s 37C(1)(a), as read with the definition of "dependant", is to require a fund, within a period of 12 months from the death of the member, to identify the dependants of the deceased who may potentially qualify for an equitable distribution from the deceased's death benefit in terms of s 37C. Having once identified the potential class of dependants, the board of the fund is vested with a large discretion to determine, in the light of its assessment of their respective needs, in what proportions the death benefit will be distributed among the class of dependants.'

[52] That discretion has also been described as a 'wide discretion', meaning that the discretion is not unfettered but that if the Fund honestly applied its collective mind to the facts placed before it and neither took into account irrelevant, improper or irrational factors nor reached a decision that no reasonable decision-maker properly directing itself could have reached, there is no legal basis on which to set aside or otherwise interfere in its decision."

36. Applying the law as set out by the High Court in Gerson and more recently in Ndwandwe, I see nothing untoward or irregular in either the manner in which the Fund went about the exercise of its discretion in determining an equitable distribution of the Deceased's death benefit, or in the result itself:

36.1. The Fund complied with its statutory duty to take positive steps to trace potential dependants and to obtain information from them, prior to exercising its discretion.

36.2. The Fund applied its mind to the competing claims and to the difficult question of whether, and to what extent, the applicants were dependants of the Deceased.

36.3. The applicants failed to make out a case for dependency. While they may have received occasional informal support from the Deceased, this did not, in the opinion of the Fund's Death Benefit Committee, amount to sufficient proof of to disturb the nomination of Mrs Mbonambi Senior, who clearly was a dependant, as the sole beneficiary of the death benefit.

36.4. A further factor that demonstrates the extent to which Mrs Mbonambi Senior was dependant on the Deceased (to a far greater extent than her adult siblings ever were), is the fact that the Deceased nominated her mother as the sole beneficiary of not only her death benefits under the Fund, but also of a life insurance policy. In my view, this demonstrates the extent to which the Deceased regarded her mother as being dependent on her, and also the extent to which the Deceased did not regard her sisters as being financially dependent on her.

36.5. The Fund provided coherent and rational reasons for its decision.

37. In my view, the applicants have failed to make out a case to interfere with the exercise of the discretion of the Fund to award the entire death benefit to the nominee, Mrs Mbonambi Senior.

38. Accordingly, the application stands to be dismissed. I see no reason to depart from the normal principle that costs should follow the result, particularly given the failure by the applicants to join a necessary party to the proceedings, and their election not to follow the speedier and custom-designed route of referring the dispute to the Pension Funds Adjudicator instead of approaching the High Court directly.

Order:

1. The application is dismissed with costs on the “B” scale, including costs of counsel.

GA Fourie

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

HEARD ON: 17 April 2025 DATE OF JUDGMENT: 14 July 2025 FOR THE APPLICANT: Peter Zwane Attorney FOR THE RESPONDENT: Adv Roelof Steyn INSTRUCTED BY: Minitzers Attorneys

- [1] Cilliers et al Herbstein & van Winsen The Civil Practice of the High Courts of South Africa, Juta, 5th Ed, p215-217.
- [2] Judicial Service Commission and another v Cape Bar Council (Centre for Constitutional Rights as amicus curiae) 2012 (11) BCLR 1239 (SCA)

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