

SOUTH AFRICA / JUDGMENT

Nel and Others v Netcare 1999 Pension Fund and Others (8142/2019) [2020] ZAGPPHC 423 (24 August 2020) [2020] ZAGPPHC 423

COURT

North Gauteng High Court, Pretoria

BEFORE

S Baqwa

CASE / FILE NUMBER

8142/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

(1)

REPORTABLE:

YES/NO

(2)

OF

INTEREST TO OTHER JUDGES: YES/NO

(3)

REVISED

Case No: 8142/2019

In

the matter between:

MARIA

ELIZABETH JOHANNA NEL

First Applicant

JAN

ALBERT BEETGE

Second Applicant

MARIA MAGDALENA

ROUX

Third Applicant

MARTHA

CARHARIBA

HENDRINA

Fourth Applicant

FRANCINA

HAASBROEK
Fifth Applicant
and
NETCARE
1999 PENSION
FUND
First Respondent
TSHIAMO
CHRISTOPHER LEKALAKALA
Second Respondent
BONOLO
GWENDOLONO LEKALAKALA
Third Respondent

JUDGMENT

BAQWA J

INTRODUCTION

1 The applicants are siblings of Petrus Beetge (the deceased) who seek the following relief:

1.1 An order to review and set aside the decision by the first respondent (the Pension Fund) to award the pension benefit that became payable on the death of the deceased to the second respondent (Tshiamo)

1.2 An order declaring that the applicants qualify as dependents of the deceased in accordance with the provisions of the Pension Funds Act 24 of 1956 (the Act).

1.3 An order declaring that Tshiamo does not qualify as a dependant of the deceased.

1.4 An order awarding the pension benefit to the applicants in equal proportions, alternatively that it be divided between Tshiamo and the applicants.

2 The application is being opposed by both the first and second respondents. By agreement between the parties I hand down judgment after considering documents and submissions made on paper.

BACKGROUND

3 The deceased was married to Evah Mokotsi, Bonolo's mother (about 19 years old at the time), and Tshiamo's grandmother. The deceased was not Tshiamo's biological father.

4 Bonolo and two others murdered the deceased and his wife on 27 December

2015. Bonolo is serving a 20-year prison sentence for said murders.

5 In their last will and testament dated 1 October 2009 the deceased and his wife bequeathed their respective estates to the surviving spouse, provided that they do not pass away within thirty days after the other, in which case they bequeathed their estate to Bonolo.

6 The deceased was employed by Netcare Jakaranda Hospital and as consequence of such employment he became a member of the fund and made contributions thereto. At the death of the deceased his total fund credit was the sum of R2 263 973.17.

7 In 2010 the deceased had nominated his mother and his wife as beneficiaries for the pension benefit which would fall due upon his death and upon the death of his mother he nominated only his wife as a beneficiary.

8 The pension benefit which had to be administered by the pension fund in terms of Section 37C of the Act subsequent to the death of the deceased was the sum of the R2 263 73.17.

THE AWARD

9 The fund awarded the entire pension benefit to Tshiamo on 29 August 2016.

10 The Pension Fund Adjudicator set aside the award by the fund on 14 February 2017 and ordered a re-investigation of the allocation and to consider the minor child and the deceased's siblings as potential beneficiaries.

11 After investigating further, the fund declared that the siblings were not dependants of the deceased on 25 April 2017 and this decision of the fund was confirmed by the Adjudicator on 9 May 2017.

12 On 19 June 2017 an application to review that decision was launched. It was opposed and in May 2018 a settlement was reached in terms of which the matter was referred back to the fund for reconsideration.

13 On 6 December 2018 the fund once more decided to award the pension benefit wholly to the minor child, Tshiamo.

14 The reasons furnished by the fund to the applicants' Attorney were couched as follows:

"The reasons for the decision were as follows:

1. Tshiamo Christopher Lekalakala is the only minor dependant;
2. The siblings of the late P.J Beetge did not factually substantiate financial dependency on the deceased. "

DECISION TO REVIEW

15 In her founding affidavit, the first applicant states as follows:

"48 I am advised that the decision taken by the fund is reviewable: -

48.1 As it is an administrative action as defined in the Promotion of Administrative Justice Act 3 of 2000 (hereinafter referred to as PAJA), in that the decision has been taken by a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect;

48.2 Alternatively as it falls foul of the principle of legality in that the decision has not been taken in accordance with the legal requirements that govern the allocation of death benefits to the dependants of deceased members of the fund."

CONDONATION APPLICATION

16 In line with the above quoted paragraphs from first applicant's affidavit the applicants have filed a further application:

"That the applicants be granted exemption in terms of Section 7(2) (c) of the Promotion of Administrative Justice Act 3 of 2000, from exhausting their internal remedy, namely to refer a complaint to the Pension Funds Adjudicator."

17 This second application is being opposed by the Fund which submits, correctly in my view, that the adjudication by the Pension Fund Adjudicator is not an internal remedy but the administration of the payment of a death benefit which is regulated by the Pension Funds Act 24 of 1956 and which makes provisions for mandatory procedures.

18 In Sections 300; 30E and 30F of the Act the main object of the Adjudicator is to dispose of the complaints lodged in terms of Section 30A (3) of the Act in a procedurally fair economical and expeditious manner. In doing so the Adjudicator has powers to investigate whilst allowing interested parties to comment before making a decision on the matter.

19 More pertinently, Section 300 provides as follows:

"300 Enforceability of determination -

- (1) Any determination of the Adjudicator shall be deemed to be a civil judgment of any court of law had the matter in question been heard by such court, and shall be so noted by the clerk or the registrar of the court, as the case may be.
- (2) 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, on condition that no application contemplated in section 30P has been lodged."

Evidently, the procedure provided for in terms of this section cannot be circumvented by a direct approach to the Court other than the procedure provided for in terms of the Act.

20 The fact that there was a previous engagement with the Adjudicator is irrelevant to the current status of the matter. Legally and procedurally the applicants ought to approach the Adjudicator again if they desire to take the matter further. If the applicants are unsuccessful and should they desire to progress the matter further they may then act in terms of the provisions of Section 30P of the Act.

21 Section 30P provides:

" 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."

THE MAIN APPLICATION

22 It is common cause that the death benefit was payable in terms of Section 37C of the Act and the Rules of the fund. The Act gives the trustees a wide discretion as to whom amongst identified beneficiaries the benefit had to be allocated and in what proportions. Upon a reading of the record of their proceedings, it would seem that the trustees conducted their investigations in terms of the relevant legal provisions.

23 The applicants seem to labour under the impression that a legal relationship had to exist with the deceased in order for the benefit to ensue. The trustees on the other hand, applied their discretion equitably when they applied the following principles, namely, the ages of the beneficiaries, wishes of the deceased, extent of the dependency on the deceased, beneficiaries' relationship with the deceased, future earning capacity/potential of the beneficiaries, the financial status of the beneficiaries and the amount available for distribution.

24 The trustees identified the following beneficiaries as the deceased's legal dependants, namely: Mrs E.M Beetge (wife), Mrs M.E.J Serfontein (mother), Tshiamo and Bonolo. They came to the conclusion after

considering all the relevant information that 100% of the benefit be allocated to Tshiamo. This was despite the fact that Tshiamo was the biological grandson of the deceased's wife and not of the deceased, who had no children of his own. Bonolo, Tshiamo's mother, was excluded because it was accepted that one cannot benefit from the proceeds of a death a person had caused.

25 It was found by the trustees that there was no necessity for a biological link to exist in order for him to benefit. What was established instead was that Tshiamo was financially dependent on the deceased. He was held to qualify as a factual dependant of the deceased as he lived with the deceased and his wife on a daily basis and was cared for by them.

26 According to the Principal Officer of the fund, in a letter submitted to the Adjudicator on 29 August 2016.

"The trustees identified all the relevant dependants and exercised their discretion in a manner giving rise to equitable results. The Board's decision was well considered, reasonable and justifiable."

"BLOEDIGE HAND"

27 The applicants' grievance seems to arise mainly from the guilty verdict against Tshiamo's mother and her preclusion from receiving a benefit on the basis of the principle that "bloedige hand neem geen erfenis". According to the reasoning of the applicants Tshiamo is equally not entitled as the common law principle ought to be extended to a beneficiary who becomes entitled to receive a pension benefit instead of an inheritance.

28 The assumption and/or submission by the applicants cannot be correct as the "bloedige hand" principle does not extend down the bloodline to exclude anyone other than the "bloedige hand" from receiving a benefit. Whilst the emotion behind the submission may be understandable, there is insufficient factual justification in the applicants' affidavit other than the submission that Tshiamo's mother might have access to the proceeds awarded to Tshiamo upon release from jail.

29 The applicants contend that they ought to share proportionally with Tshiamo as siblings of the deceased as they qualify as dependents in terms of the Act. In other words, they seek to exploit the "status"

of dependency as opposed the "factual" dependency. The latter seems to be the criterion which the board applied and I cannot find fault with that approach.

30 The trustees compared Tshiamo's position with that of the applicants and established that they are not indigent and that their need was premised on what could be categorised as speculative future contingencies.

31 It is common cause that Tshiamo is a minor whose mother is serving a 20 year prison sentence. The fact that he is currently staying with grandparents does not alter his status at the time of the death of the deceased and should not be utilised to pass what was the responsibility of the deceased to the grandparents. When the grandparents pass on from this world Tshiamo will be left destitute.

32 In the circumstances, having read the documents filed, and the Heads of Argument filed by Counsel for the parties and having considered the matter, I am not persuaded that the applicants have made out a case to entitle them to the relief sought. I do not find that the Board of Trustees exercised their discretion in an improper manner.

THE ORDER

33 In the result the following order is made:

33.1 The condonation application is dismissed.

33.2 The main application is dismissed.

33.3 The applicants are ordered to pay the first and second respondents costs jointly and severally⁰, the one to pay the other to be absolved.

JUDGE SELBY BAQWA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Heard on

: 19 August 2020

Judgment

delivered

: 24 August 2020

Appearances:

For the Applicant

: Adv. JL Basson

Instructed by

: Coetzer and Partners

For the 1st Respondent : Adv. B Roux S.C

Instructed by

: Whally Van Der Lith Inc.

For the 2nd Respondent : Adv. JG Rautenbach S.C

Instructed by

: Mkhonto and Ngwenya Attorneys

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Prepared on 14 October 2026 · Esheria