

SOUTH AFRICA / JUDGMENT

Van Rhyn and Another v Pension Funds Adjudicator and Others (2138/18) [2021] ZAGPPHC 165 (31 March 2021) [2021] ZAGPPHC 165

COURT

North Gauteng High Court, Pretoria

BEFORE

Millar AJ

CASE / FILE NUMBER

2138/18

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

No. 2138/18

REPORTABLE

OF

INTEREST TO OTHER JUDGES REVISED

In

the matter between:

NICOLAAS
ALBERTUS VAN RHYN
FIRST
APPLICANT
SUSANNA
ELIZABETH VAN RHYN
SECOND
APPLICANT
And
THE
PENSION FUNDS ADJUDICATOR
FIRST RESPONDENT
DSV
FLEXI RETIREMENT FUNDS
SECOND RESPONDENT
DANIEL
ADRIAANS ADAMS

THIRD
RESPONDENT

Coram:

Millar AJ
Heard
on: 24 March 2021 – This application was heard virtually.

Delivered:

31 March 2021 – This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the CaseLines system of the Gauteng Division and by release to release to SAFLII. The date and time for hand-down is deemed to be 14H00 on 31 March 2021.

JUDGMENT

MILLAR, A J

1. This is an application brought by the applicants for review and remittal back for reconsideration of a determination by the Pension Funds Adjudicator made on 7 December 2017.
2. The applicants are the parents of the late Ms van Rhyn who tragically passed away on 19 October 2014. At the time of her death she was a member of the Second Respondent, DSV Flexi Retirement Fund ("DSV"). She was neither married nor had any children and so the determination of to whom the benefits and the proportion thereof fell to be determined in terms of section 37C(a) of the Pension Funds Act[1] which provides:

"(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 or all of such dependants."
3. DSV, after having been notified of Ms van Rhyn's death then conducted an investigation for purposes of determining how the amount available for distribution was to be apportioned. It was in consequence of this investigation that DSV decided that the apportionment, besides including the applicants and various charities, should also include the Third Respondent ("Mr Adams") with whom the late Ms van Rhyn was residing at the time of her death.
4. The applicants objected to the inclusion of the Mr Adams in this apportionment and lodged a complaint with the First Respondent ("the adjudicator") against it.

5. Subsequent to receipt of the complaint, the adjudicator considered it and upheld the complaint and on 13 February 2017 ordered DSV to re-investigate the matter. The reinvestigation that was ordered was into the dependency and extent thereof of both the applicants and Mr Adams[2].
6. DSV thereafter conducted a further investigation and in consequence thereof made a new determination which although it substantially reduced the apportionment in favour of Mr Adams and increased the apportionment in favour of the applicants, still made provision for Mr Adams as a dependant.
7. It was in respect of this revised determination that a further complaint, which is the subject matter of the present litigation, was lodged with the adjudicator.
8. It is the case for the applicants that DSV determination in respect of the second complaint[3], that it was functus officio is wrong and that this Court should set this aside and remit the complaint back to the adjudicator for reconsideration afresh.
9. It was argued by counsel for the applicants that DSV and by implication the adjudicator had not attached sufficient weight to the allegation in the complaint that the deceased and Mr Adams had in fact terminated their mutual dependency some two weeks before her death. However, this argument is not borne out when regard is had to the revised determination submitted by DSV. The revised determination deals comprehensively with all the additional evidence, facts and circumstances considered by DSV in reaching the decision that it did on Mr Adams's dependency and the revised apportionment.
10. The adjudicator for its part, in its determination of 7 December 2017 stated :-

"5.4 A determination was handed down by this Tribunal on 20 February
2017. The First Respondent's decision (Second Respondent in the present proceedings) was set aside and it was ordered to re-investigate the allocation of the deceased's death benefit and to proceed with the payment of the death benefit after finalizing its investigation. This Tribunal's order was final and binding and therefore this Tribunal became functus officio."
11. In order to decide whether or not the adjudicator was indeed functus officio, it is necessary to consider the first complaint in its terms and the second complaint in its terms. If the complaints are materially different, then it cannot be said that a determination has already been made in respect of the second complaint and that the adjudicator was precluded from making a new determination in respect of that second complaint.
12. The applicants did not place before the Court the first complaint. It was not attached to the founding affidavit by reason of "avoiding prolixity". It also does not form part of any of the other documents filed of record. The only reference to the substance of the first complaint is in the second complaint where the applicants stated in regard to the first complaint that:-

“11. The main thrust of the complaint was that Mr Adams was not a dependent of the deceased upon her death and that the complainants should be regarded as dependants

12. The terms of the decision of the Pension Fund Adjudicator, was that:

12.1 the decision of the First Respondent in respect of the distribution published on 27 October 2015 was set aside;

12.2 the First Respondent was ordered to re-investigate the allocation of the death benefit in terms of Section 37C of the Pension Funds Act in respect of the complainants and Mr Adams, considering the extent of their financial dependency on the deceased, their ages and relationship with the deceased”.

13. The second complaint was expressed by the applicants as follows:

“19. The complainants objection to the second distribution is solely aimed at:

19.1 the finding by the Board of Trustees of the First Respondent that Mr Adams was a dependent of the deceased as defined in the Pension Funds Act at the time of her death;

19.2 the extent of his alleged dependency; and

19.3 whether Mr Adams should be disqualified from receiving any benefit.”

14. If regard is had to the terms of the first complaint as set out in paragraph 12 above as well as the terms of the second complaint, in paragraph 13 above it is apparent that it is the same complaint.

15. The adjudicator correctly insofar as this aspect is concerned, stated the position in making its determination in respect of the second complaint and finding that it was functus officio that:

“The complainants cannot keep raising new issues in an effort to get the result they want, which is the total exclusion of the partner as a dependent”.

16. However, the enquiry does not end in finding that the complaints were the same and that the adjudicator was correct in concluding that it was functus officio on that basis alone.

17. In terms of section 30P(2) of the Act this Court, on any referral to it, may consider the merits of the complaint made to the First Respondent and the evidence upon which the determination of the complaint was made and “may make any order it deems fit”.

18. In *Gerson v Mondi Pension Fund and Others*[4] it was held that:

“In determining the applicant’s complaint to the adjudicator, the adjudicator had no power to simply substitute his or her discretion for that of the board. Section 30E of the Act provides that the adjudicator shall investigate any complaint and ‘may make an order which any court of law may make’. Since a court of law could not without more substitute its discretion for that of the board, it follows that neither could the adjudicator. This court is in that respect in the same position as the adjudicator.”

19. Regard must be had to the terms of the first determination and whether or not DSV in re-investigating the apportionment, conducted a proper re-investigation and thereafter exercised its discretion properly in deciding that Mr Adams was a dependant of the deceased? If it did then it is axiomatic that the adjudicator was indeed *functus officio* and there is no basis for this Court to interfere with the decision of DSV.
20. The case for the applicants on the papers was that the adjudicator's

determination

that it was *functus officio* was wrong and for that reason this court should refer the second complaint back to it for reconsideration. In argument the main thrust of the challenge, although this was not the case made out in the papers, was that insufficient weight had been attached to the fact that Mr Adams and the deceased had, according to the family of the deceased, allegedly ended their relationship two weeks before her passing.

21. The reasons for the apportionment provided by DSV make it clear that they considered all the allegations made by the deceased's family and contacted the persons (neighbours' of the deceased and Mr Adams) that were identified by the applicants who would presumably have corroborated this. They in fact did not corroborate the allegations. Furthermore, additional objective evidence such as the bank records of both the deceased and Mr Adams which reflected an inter-dependence between them as well as the fact that the deceased was a dependant on Mr Adams medical aid was considered.
22. DSV issued a comprehensive report in which it set out all the evidence available to it after its reinvestigation of the matter and its reasoning for the conclusion that Mr Adams was indeed a dependent of the deceased.
23. In *Fundsatwork Umbrella Pension Fund v Guarneri and others*[5], Wallis JA held that:
"[25], the proper construction of section 37C(1)(a) is that the time at which to determine who is a dependant for the purpose of distributing a death benefit is when that determination is made, and furthermore, the person concerned must still be a beneficiary at the time when the distribution is made. That is the only way in which to ensure that the persons identified as dependants are those whose interests the section seeks to protect."
24. The approach adopted by DSV is entirely consonant with this if regard is had to the evidence that it had before it.
25. It was not suggested by the applicants that there was any further available relevant evidence which had not been made available to the adjudicator or DSV. The reinvestigation resulted in all relevant evidence for the determination of dependency being made available and considered.

26. In the second complaint the applicants had asserted that they had not had sight of all the evidence that was considered however they were unable to proffer any explanation as to why this had not been sought in these proceedings by way of discovery as they were entitled to do.
27. There being no further evidence and DSV having properly considered the matter in the exercise of its discretion[6], there is no basis upon which either the adjudicator or this court can interfere therewith.
28. The parties both agreed that the costs should follow the result but that the costs relating to the appearances in court in June and September 2018 should be excluded. This will be reflected in the order that I intend to make.
29. In the circumstances, it is ordered:

29.1 The application is dismissed

29.2 The applicants are ordered to pay the costs of the application to date which costs are to exclude the costs of the appearances in June and September 2018.

A MILLAR

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON:

24 MARCH 2021

JUDGMENT

DELIVERED ON:

31 MARCH 2021

COUNSEL FOR THE APPLICANTS:

ADV. H DRAKE

INSTRUCTED BY:

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REFERENCE:

J ESTERHUIZEN

NO APPEARANCE FOR EITHER THE FIRST OR THIRD RESPONDENT

[1] 24 of 1956

[2] See paragraph 14 *infra* where the terms of the first determination are set out in quoted paragraph 12

[3] dated 7 December 2017

[4] 2013 (6) SA 162 (GSJ) at paragraph 28, see also *Meyer v Iscor Pension Fund* 2003 (2) SA 715 SCA

[5]

[2019] 2 BPLR 321 (SCA) at para 25

[6] *Sentinal Retirement Fund v CV Bold & Others* (80105/2015) [2017] ZAGPPHC 83 (7 March 2017)

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