

**HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case no: 0016223/19

In the matter between:

MARGARET LUNGILE MBATHA

Applicant

and

TRANSPORT SECTOR RETIREMENT FUND

First Respondent

SALT EMPLOYEE BENEFITS

Second Respondent

Case Summary: Death Benefit – Distribution – Pension Funds Act 24 of 1956 (PFA) – section 37C - allocation and distribution of a death benefit take place in the manner provided for in s 37C - when paying a benefit to a minor dependent, the board of a pension fund has a discretion to effect payment to the guardian of the minor or it may establish a trust, from which a monthly income is paid to the guardian (s 37C(2)) or it may hold the monies in the fund's portfolios and effect monthly and *ad hoc* payments to the guardian (s 37C(3)).

Promotion of Administrative Justice Act 3 of 2000 (PAJA) - a decision of the board of a pension fund taken in terms of s 37C of the PFA constitutes administrative action as contemplated in PAJA, which applies to a review of such decision.

JUDGMENT

MEYER J

[1] The first respondent, Transport Sector Retirement Fund, is a pension fund established in terms of the Pension Funds Act 24 of 1956 (the PFA), and the second

respondent, Salt Employee Benefits, is its administrator. Following the death of the late Mr Makhosini Andrias Sigasa (the deceased), a former member of the first respondent, a death benefit became payable to be allocated and distributed in terms of s 37C of the PFA. The first respondent allocated the benefit, *inter alia*, to the deceased's minor children and the applicant, Ms Margaret Lungile Mbatha, who is the mother of two of the minor children. One was born on 30 June 2002 and the other on 9 June 2007 (the minor children). The first respondent paid to the applicant the portion of the death benefit allocated to her, but decided to administer the benefits of the minor children in terms of s 37C(3) of the PFA. The applicant seeks an order that the death benefit allocated to the minor children be paid to her as their legal guardian and care-giver.

[2] What the applicant in effect seeks is the setting aside of the decision of the first respondent's board (the board) to administer the death benefits of the minor children in terms of s 37C(3) of the PFA. The attack is based firstly on an argument that the board did not act within its powers lawfully conferred on it and is legally obliged to pay the death benefits allocated to the minor children to her, she being the 'only primary care giver and manager of the affairs of [her] minor children'. Secondly, she contends that it is not in the best interests of the minor children for the fund to administer their death benefits instead of paying the full amount over to her.

[3] The allocation and distribution of a death benefit takes place in the manner provided for in s 37C of the PFA. Such benefit does not form part of the deceased member's estate and the board of a pension fund is enjoined to exercise an equitable discretion, taking into account a number of factors. A pension fund is expressly not bound by a deceased's will nor to a nomination form. In *Mashazi v African Products Retirement Benefit Provident Fund and another* 2003 (1) SA 629 (W) at 632I-J, Hussain J said this:

'Section 37C of the Act was intended to serve a social function. It was enacted to protect dependancy, even over the clear wishes of the deceased. The section specifically restricts freedom of testation in order that no dependants are left without support. Section 37C(1) specifically excludes the benefits from the assets in the estate of a member. Section 37C enjoins the trustees of the pension fund to exercise an equitable discretion, taking into account a number of factors. The fund is expressly not bound by a will, nor is it bound by

the nomination form. The contents of the nomination form are there merely as a guide to the trustees in the exercise of their discretion.'

[4] Section 37C of the PFA-

' . . . imposes three important duties on the board of management of any pension fund organisation. First, it needs to identify the nominees and dependents (with reference to section 1 of the Act) of the deceased member. Hereafter it needs to effect a distribution of the benefit amongst the beneficiaries with reference to the four subsections outlined in section 37C(1). The final task of the board is to determine an appropriate mode of payment. . . . In summary, when paying a benefit to a minor child, the board essentially has three options. That is, it may effect payment to the guardian of the minor or it may establish a trust, wherefrom a monthly income is paid to the guardian (section 37C(2)) or it may hold the monies in the fund's portfolios and effect an instalment payment to the guardian (section 37C(3)). On a plain reading of the relevant subsections, it is apparent that, before the board considers an alternative mode of payment, there must be good reason in law and fact as to why the option of direct payment should not be followed.'

(*Ramanyelo v Mine Workers Provident Fund* [2005] 1 BPLR 67 (PFA) paras 9 and 13. Also see *Baloyi v Ellerine Holdings Staff Pension Fund* [2005] 7 BPLR 606 (PFA) para 14.)

[5] Section 37C(3) of the PFA is presently relevant. It vests the board of a pension fund with a discretion to administer benefits payable to minor dependents within the fund. It reads thus:

'Any benefit dealt with in terms of this section, payable to a minor dependant or minor nominee, may be paid in more than one payment in such amounts as the board may from time to time consider appropriate and in the best interests of such dependent or nominee: Provided that interest at a reasonable rate, having regard to the fund return earned by the fund, shall be added to the outstanding balance at such times as the board may determine: Provided further that any balance owing to such a dependant or nominee at the date on which he or she attains majority or dies, whichever occurs first, shall be paid in full.'

[6] The board of a pension fund, therefore, has the discretion to administer a minor dependant's benefit and to *inter alia* make monthly payments and *ad hoc* payments 'as the board may from time to time consider appropriate and in the best interests of such dependant'. It 'is also not precluded from making direct capital payments to third parties in respect of money owed in respect of the minor, such as to a school or university, or for medical expenses and so on'. (Rosemary Hunter et

al *The Pension Funds Act: A Commentary on the Act, regulations, selected notices, directives and circulars* at 707.) The statutory power to decide which of the three payment methods to follow in paying the death benefits of the minor children is that of the board of the first respondent. This the board did, and in acting in terms of s 37C(3), it decided to administer their death benefits. There is accordingly no merit in the contention that the board did not have the power to resolve to administer the death benefits of the minor children within the fund.

[7] It is trite that affidavits in motion proceedings constitute both pleadings and evidence. (See *Radebe and others v Eastern Transvaal Development Board* 1988 (2) SA 785 (A) at 793C-F.) The applicant has failed to put up the requisite primary facts in support of her conclusion that it is not in the best interests of the minor children for the first respondent to administer their death benefits and not to pay the full amount directly over to her. In her founding affidavit she merely states:

‘From their birth to date, the minor children have always been under my care as their parent and primary care-giver. This was the case even during the lifetime of the deceased. I remain the person responsible for managing the affairs of the minor children and meeting their daily needs such as, inter alia, education, shelter, clothing food, transport, entertainment, discipline and religious development.’

And:

‘. . . I have not been approached by any of the respondents to inquire into the needs of my minor children or as to how the beneficiary account could operate and assist my minor children. I do not know where it is held or administered and my children remain unassisted by the benefit left for them by their deceased father. I continue to take care of my minor children, albeit frugally, out of my own pocket and limited means.’

In her replying affidavit she states:

‘The older minor child . . . , for example, is 17 years old and is now attending Grade 11. It goes without mention that this is a crucial stage for any child’s educational development if their life is to come to anything meaningful. She, thus, needs all the material support possible to be able to assist her succeed in her matric. There are funds left behind by her late father for her benefit yet she, and her sister are having to rely on borrowed and donated money to meet the most basic of their educational needs.’

[8] However, after having given notice of its intention to oppose the applicant’s application and before the filing of the first respondent’s answering affidavit on 25 June 2019, its attorneys of record addressed a letter dated 5 June 2019 to the

applicant's attorneys of record in order to persuade them that the application should not proceed any further. Therein, it is stated, *inter alia*, that-

' . . . the Fund's trustees, acting in accordance with section 37C(3) of the PFA, took the decision to administer within the Fund the benefits payable to [the minor children]. In administering the allocated benefits for those minors' benefit, the Fund may pay regular monthly instalments and may also make ad hoc payments to cover the costs of school fees, uniforms, stationery, clothing and the like.'

The applicant's attorneys of record replied by letter dated 7 June 2019, confirming the applicant's intention to pursue the application. The financial requirements of the children were not raised nor was any request made for monthly and *ad hoc* payments in respect of the minor children. Furthermore, the applicant omits to set out primary facts in her founding affidavit why it would serve the interests of the minor children best if she is to administer their death benefits and not the first respondent and why it would not serve their best interests if the first respondent *inter alia* makes monthly and *ad hoc* payments as the board may from time to time consider appropriate and in their best interests.

[9] Nevertheless, until an unlawful administrative act is set aside by a court it exists in fact and is capable of having legally valid consequences: *Oudekraal Estates (Pty) Ltd v City of Cape Town and others* 2004 (6) SA 222 (SCA) para 26. I subscribe to the generally accepted view that a decision of the board of a pension fund taken in terms of s 37C of the PFA constitutes administrative action for the purposes of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) and that PAJA applies to such a review (*Mashazi v African Products Retirement Fund and another* 2003 (1) SA 629 (W) at 635C; *Titi v Funds at Work Umbrella Provident Fund* ((1728/2010 [2011] ZAECHMHC (10 March 2011)) para 14; *Themba and another v Retail Provident Fund (Shoprite) and others* ((unreported) WCHC case no 9647/13 (6 May 2014) para 21; *Guarnierie v Funds At Work Umbrella Pension Fund and others* (47754/2016) [2018] ZAGPPHC 579 (24 May 2018) para 39; *Moshoshoe v Sentinel Retirement Fund and others* ((unreported) GPJ case no 2506/19 (13 September 2019), paras 11-13), unlike the contrary view expressed in *Gerson v Mondi Pension Fund* 2013 (6) SA 162 (GSJ) that PAJA was not applicable to s 37C reviews.

[10] The applicant did not attack the decision of the board by way of review in terms of PAJA or by way of a legality review nor did she exhaust the internal remedies provided in the PFA or apply for an exemption from the duty to exhaust internal remedies in terms of s 7(2)(c) of PAJA. (See *Titi* paras 15-20; *Kim v Afgri Staff Pension Fund and others* (2017/47543) [2019] ZAGPJHC (6 February 2019) paras 12-16.) The application, therefore, falls to be dismissed.

[11] The applicant is impecunious and she, I accept, attempts to advance the best interests of the minor children in these proceedings. I am therefore reluctant to award costs against her and consider it appropriate in the circumstances rather to make no order as to costs.

[12] In the result the following order is made:
The application is dismissed.

P.A. MEYER
JUDGE OF THE HIGH COURT

Hearing:	20 November 2019
Judgment:	19 February 2020
Applicant's counsel:	Adv E Nhutsve
Instructed by:	Qhali Attorneys, Johannesburg
First Respondent's counsel:	Adv P van der Berg SC
Instructed by:	Shepstone & Wylie, Sandton, Johannesburg