REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 43479/20
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
4 July 2022

In the matter between:

PATIENCE NTOMBIFUTHI MOTSIOA	First Applicant
LESEISANE JACOB THATO MOTSIOA	Second Applicant
TEBOHO BRIAN MOTSIOA	Third Applicant

and

eJOBURG RETIREMENT FUND	First Respondent
THE INDEPENDENT PRINCIPAL OFFICER OF THE FUND	Second Respondent
MATSHEPO SELINA RANTO	Third Respondent
MARAKE CASBAY MOTSIOA	Fourth Respondent

JUDGMENT

MAKUME J:

[1] In this matter the Applicants seek an order restraining the first and second Respondents from processing any payment over the pension benefits of the late Johann Motsioa (the deceased) identity number [....] who died on the 30th July 2020. Secondly that the first and second Respondents are interdicted from transferring and or paying any portion of the pension benefits arising from the death of the deceased to the third Respondent. Thirdly that the customary marriage allegedly concluded on 24 February 2018 between the deceased and the third Respondent be declared void *ab initio*. Lastly that the first and second Respondents be directed to revise the distribution percentages of the pension benefits of the deceased and exclude the third Respondent.

[2] The Applicants were granted relief in respect of Part A and soon thereafter amended their notice of motion in respect of Part B in which they seek an order in the following terms:

> a) declaring the customary marriage allegedly entered into on the 24 February 2018 by the late Johann Motsioa and the third Respondent null and void *ab initio.*
>
> b) That the first and second Respondents be directed to revive the distribution percentages of the pension benefits of the late Johann Motsioa and exclude the third Respondent.
>
> c) That first and second Respondents be directed to pay the pension benefits of the late Johann Motsioa to persons lawfully entitled thereto.

[3] The deceased Johann Motsioa signed a beneficiaries' nomination form on the 18th December 2019 in which he nominated each of the second and third Applicants 40% of the proceeds of his retirement fund and 20% to his brother the fourth Respondent. The deceased passed away on the 30th July 2020.

[4] First Applicant and the deceased concluded a marriage in accordance with civil rights on the 19th September 1996. The second and third Applicants are the children of that marriage. The couple resided at [....] W [....] S [....] C [....], Kempton Park.

[5] During or about the year 2007 the first Applicant left the common home due to matrimonial problems between her and the deceased. She took with her the two sons to her parent's home, she later rented a place in the Vaal area. One of the sons being the second Applicant went to live with the deceased at the matrimonial home in Kempton Park and save for a short period between 2017 and 2018 the second Applicant lived there until the death of his father.

[6] Shortly thereafter first Applicant filed a claim for the deceased pension benefits. In February 2021 a lady from Momentum asked her to furnish her with information about the marriage with the deceased.

[7] On the 25th May 2021 she received a letter from the first Respondent under the hand of the second Respondent the letter informed her that:

> i) An amount of R8 311 422.00 represents the total death benefit that is due and payable to all beneficiaries.
>
> ii) That the Death Benefits Committee of the fund have allocated to her an amount of R1 246 000.00.
>
> iii) That the allocation to her is based on the fact that she was legally married to the deceased although estranged. She still remained a dependant of the deceased.

[8] The writer of that letter said nothing about how the balance was to be distributed all that the letter said invited the Applicant to make choices as to how she would like to access the benefit. Secondly she was referred to the provisions of Section 37 (c) of the Pension Fund Act.

[9] The first Applicant objected to the allocation and demanded to be informed how the total benefits were dealt with. On receipt of the letter of objection the second Respondent replied on the 14th June 2021 and told the first Applicant that the committee decided to award her the amount solely on the basis of her marriage but took into consideration that she and the deceased were not living together since 2007, also that she was employed and not dependant completely on the deceased lastly that she had not been included in the nomination form and that the deceased had a customary wife with whom he shared a relationship and who had supported the deceased since the relationship commenced.

[10] It is significant to note that in her email dated the 8th June 2021 addressed to the second Respondent the first Applicant made it clear that the nomination form only dealt with 50% of her late husband's portion meaning that her sons will each get 40% each of his 50% and their uncle the fourth Respondent will receive 20% of the balance.

[11] The Applicant decided to escalate her objection to the Pension Fund Adjudicator on the 11th June 2021. In it she reaffirmed her claim for 50% to be paid to her by virtue of the marriage.

[12] The Pension Fund Adjudicator dealt with the complaint and dismissed it and in the process endorsed the allocation and determination made by the first Respondent which was:

i)	Ms Rantso (third Respondent)	-	15%
ii)	PN Motsioa (Applicant)	-	15%
iii)	Teboho (Second Applicant)	-	25%
iv)	Thato (third Applicant)	-	25%
v)	MP Motsioa (Mother)	-	5%
vi)	ME Motsioa (Sister)	-	5%
vii)	Ms Motsioa (Niece)	-	5%
viii)	Morake (Brother)	-	5%

[13] First and second Respondents are not opposing the declaration of invalidity of the customary marriage. Incidentally the third Respondent had also not filed any opposing affidavit.

[14] The only prayer remaining is that the first and second Respondents should revise the allocation and make payment to persons lawfully entitled to receive such payment and to revise the allocation.

[15] In further submissions it was brought to my attention that the first Applicant is not insisting of being allocated her 50% in terms of the marriage to the deceased. Her objection is that there is no basis to have awarded 15% to the third Respondent. She asserts that the 15% should be allocated to her two sons.

[16] Section 30 of the Pension Fund Act 24 of 1956 permits a party aggrieved by a determination of the Pensions Adjudicator to approach the High Court for relief. It reads as follows:

> i) Any party who feels aggrieved by a determination of the Adjudicator may within six weeks after the date of determination apply to a 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.
>
> ii) The division of the High Court Contemplated in subsection (1) may consider the merits of the complaint made to the Adjudicator under Section 30 A (3) and on which the Adjudicator's determination was based and may make any order it deems fit.

[17] I deem appropriate to first dispose of the two points in *limine* raised by the first and second Respondents. The first one being that the Applicants adopted an incorrect procedure in that the Applicants did not follow the provisions of Section 30P of the Pension Act in that according to the Respondents the Applicants on receipt of the Adjudicators decision should have either approached the High Court or the Financial Services Tribunal for a reconsideration of the PFA's decision.

[18] I am failing to understand that argument because it is exactly what the Applicants did they exercised the right to approach the High Court for a review of the PFA's ruling which is what is before the Court. I accordingly dismiss the first point in *limine*.

[19] The second point in *liming* is that of misjoinder. It is asserted that the second Respondent should not have been joined in these proceedings as he is an employee of the first Respondent and carried out decisions of the Board of the First Respondent and has no interest in the outcome.

[20] The second Respondent is a vital functionary within the administrative function of the first Respondent and should be joined for convenient sake no costs order is sought against the second Respondent. The court in **Rabinowitz and Another NNO v NED-Equity Insurance Co Limited 1980 (3) SA 415 (W) at page 419F** held as follows:

> "I do not think that the question whether joinder was competent in terms of Rule 10(3) is decisive in regard to the proper order as to costs. The Rule is not and was not intended to be exhaustive of the case in which a Plaintiff may join separate in one action. (**CF Lewis N.O. vs Schoeman N.O. and Others 1951 (4) SA 133 NO**). Under common law a number of defendants may be joined whenever convenience so requires subject to power of the court to order separation of the actions."

[21] The second Respondent has not indicated what prejudice will befall him if he is left as a Respondent in this matter. I accordingly rule that the second point in *limine* is also without substance and falls to be dismissed.

[22] What is now remaining is the merits of this review. The starting point is in my view the provisions of Section 37 (c) of the Pension Fund Act which has been recited at several instances in the correspondence by the Respondents. It is a long section comprising of subsections.

[23] Section 37 (c) governs the distribution and payment of the lump sums benefits payable on death of a member of a pension fund, provident fund, pension and provident fund preservation fund and retirement annuity funds. Its intention is to protect dependants.

[24] Section 1 of that Act defines dependant as spouses, children and anyone proven to have been financially dependent on the member at the time of the member's death or anyone who may in future have become financially dependent on the member for example a child conceived prior to the death but born after the death of the member.

[25] A Board of Trustees entrusted with making a determination as to a proper distribution of the fund is normally directed first by the deceased member's nomination secondly marital status and lastly dependency. It is further correct as the Respondents argue that once the Trustees have identified all the dependents of the member they then move on to the second step which is to determine the nature and extent of each dependants financial dependency on the deceased member.

[26] In this matter it is in determining both the first and second steps that has resulted in the Applicants questioning the rationale behind the determination. In particular, the Applicants seek nullification of the award made to the third Respondent on the basis that she does not qualify both as a dependant or based on her alleged customary marriage with the deceased.

ALLOCATION TO THIRD RESPONDENT

[27] The first and second Respondents justify the allocation of 15% benefit to the third Respondent on the basis of a lobola letter dated the 24 February 2018. They also rely on the affidavit by the deceased's brother the fourth Respondent. In my view the two documents take that aspect no further and it is neither proof of the existence of a customary or the absence thereof. I say this because of what follows hereafter.

[28] It is common knowledge that the third Applicant being the son of the deceased says that the third Respondent was a helper who came to do housework once a week at the home. He lived with his father and confirms that there was no intimate relationship between his father and the third Respondent. This is in direct opposition to the affidavit of the fourth Respondent.

[29] Secondly the third Respondent herself having being confronted with the three affidavits coupled with a damaging report compiled by Molomafo Assessor decided to keep quiet and not respond thereto. She is a married woman to another person and can therefore never have been legally married to the deceased by way of custom. The provisions of the Recognition of Customary Marriage Act require that before a man concludes a customary marriage during the existence of a civil marriage that second marriage should have been consented to by the partner or wife in the civil marriage.

[30] Lastly the third Respondent's name appears nowhere in the nomination executed by the deceased.

[31] In their opposing affidavit the first and second Respondents allege that the reason for allocating 15% to the third Respondent was not on the basis of a customary marriage to the deceased but that the third Respondent was a dependent of the deceased. This is not what was indicated in the emails to the Applicant by both the first and second Respondents including the PFA. The reason that third Respondent was a dependant is raised for the first time in the answering affidavit. This is disingenuous and bad in law the Respondents can and should not be allowed to rely on new or additional reason in review application.

[32] The decision by the Respondents to allocate a benefit to the third Respondent was taken on wrong reason and was irrational and falls to be set aside.

ALLOCATION TO FIRST APPLICANT

[33] It is correct that first Applicant and the deceased were still married in community of property at the time of death. They however had been living apart

since the year 2007. The first Applicant is employed and was strictly speaking not dependant financially on the deceased. She was also not a nominee like all the other beneficiaries with exception of the second, third and fourth Respondents.

[34] The first and second Respondents used their discretion based more on marriage than anything else to allocate her the 15%. It must be recalled that the first Applicant abandoned her claim of 50% of the benefit based on her marriage and correctly so. It is trite law that community of property comes to an end when a marriage is terminated. The proceeds of the Pension Fund never formed part of the joint estate of the deceased and the first Applicant accordingly never became entitled to one half of the proceeds by virtue of the marriage in community of property.

[35] Traverso AJP in **Danielz NO v De Wet 2009 (6) SA 42 C) at paragraph 41 to 43** confirmed that prior to death the proceeds of a life police do not exist and do not form part of the joint estate.

[36] The first Applicants counsel informed this Court that first Applicant is not claiming more than what was allocated to her she however would like to see the 15% that was allocated wrongly to third Respondent being reallocated to persons lawfully entitled to.

[37] The question that then remains is whether in terms of Section 30P this Court has the right to decide to whom the 15% must be redirected to.

[38] The first Applicant pleads the case of her two sons the second and third Applicants and says that the Trustees should revise and allocate the 15% to them based on the fact that both still attend college and need the money.

[39] The Respondents argue that once the Trustee have made an award they become *functus officio* and cannot reply to discussion on this matter. I do not think that this is the correct meaning of Section 30P. Once a Court has made a ruling setting aside a determination or portion thereof it is incumbent that the Trustee carry out that order.

[40] The Court in **De Beers Pension Fund v Pension Funds Adjudicator & Another [2003] 2 ALL SA 239 C** found as follows:

> "An application in terms of Section 30P is sui generis and a court in addition to its powers to review, exercise 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 adjudication determination was correct in law. If not the Court will substitute with its own decision."

[41] It is common cause that the central and core intention of the Act as Stipulated in Section 37 C is to protect dependants. The Act serves as a social function striving to ensue that no one who was financially dependent on the member is left without support.

[42] The second and third Applicants are not only dependants of the deceased they are heirs to his estate. Over and above that they were nominated by the deceased and still attend school. There is a strong case in my view that the Trustees should exercise their discretion in reallocating the now available 15% to second and third Applicants.

[43] The Applicants have no problem in the rest of the beneficiaries retaining the amounts allocated to them. This Court recognises the fact that the fourth Respondent is still in full time employment as a Teacher and is accordingly not a dependent strictly speaking.

[44] It is hereby directed that without usurping the discretionary powers of the Trustees that they pay strict adherence to the principles as set out in **Sithole vs ICS Provident Fund and Another [2000] 4 BPLR 430 (PFA)**. It is common cause that second and third Applicants were totally dependent on the deceased unlike the other beneficiaries. The second Respondent in his letter to the first Applicant said the following:

> "We can also confirm that your two major sons had shared in the allocation of death benefits and the fact that they both were students was considered."

[45] In conclusion I am persuaded that the application should succeed in so far as setting aside the allocation to the third Respondent and revise the allocation by considering first the second and third Applicants.

[46] In the result I make the following order:

ORDER

1. The application is granted and I hereby order as follows:

   1.1 The Pension Fund Adjudicator's determination in confirming the Trustees allocation of a 15% benefits to the third Respondent is hereby set aside.

   1.2 The Trustees of the first Respondent are hereby directed to revise the allocation by reallocating the 15% mentioned in 1.1 above to persons lawfully entitled thereto including the second and third Applicants.

2. The balance of the allocation are hereby confirmed.

3. The first Respondent is ordered to pay the Applicants taxed party and party costs which shall include the costs of counsel.

DATED at JOHANNESBURG this the 06 day of JULY 2022.

M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

DATE OF HEARING : 03 MAY 2022

DATE OF JUDGMENT	:	06 JULY 2022
FOR APPELLANT	:	Adv N Mzizi
INSTRUCTED BY	:	Messrs Phakedi Attorneys
FOR 1st & 2nd RESPONDENTS	:	Adv Roelof Steyn
INSTRUCTED BY	:	Messrs Minitzers Inc.