

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 67153/2015

Date: 26 April 2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED
26/4/2016
DATE SIGNATURE

In the matter between:

TWP PROJECTS (PTY) LTD

APPLICANT

And

PENSION FUNDS ADJUDICATOR

1ST RESPONDENT

VAN COLLER, CECILIA HENDRINA

2ND RESPONDENT

CORPORATE SELECTION RETIREMENT FUND

3RD RESPONDENT

LIBERTY GROUP LIMITED

4TH RESPONDENT

JUDGMENT

PRETORIUS J.

(1) This is an appeal in terms of section 30 P of the **Pension Fund Act**¹ ("the Act") against the determination made by the Pension Funds Adjudicator.

(2) The second respondent is the widow of the late Mr Petrus Frederik van Coller ("the deceased") who had passed away on 21 April 2014. The deceased was an employee of the applicant.

(3) The relief sought by the second respondent is:

"1. Setting aside the determination in terms of section 30M of the Pension Funds Act, 24 of 1956 by the First Respondent dated 10 July 2015 under complaint reference PFA/GP/00014167/2015/TD ("the determination");

2. Substituting for the determination a determination dismissing the Second Respondent's complaint to the First Respondent."

(4) The complaint, which the second respondent lodged with the adjudicator, was that she, as the widow, had not been paid the death

¹ Act no. 24 of 1956

benefit by the third respondent ("the Fund") at the deceased's death.

- (5) The complaint to the adjudicator was set out in a letter by the second respondent's attorneys.

THE LAW:

- (6) The Pension Fund Adjudicator is appointed in terms of s 30B and C of the **Pension Fund Act**², ("the Act"):

"Adjudicator' means the Pension Fund Adjudicator or Deputy Pension Funds Adjudicator and any acting Pension Funds Adjudicator appointed under section 30C (1)."

- (7) A complaint is defined in section 1 and means:

"complaint' means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation of application of its rules, and alleging-

- (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;*
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;*
- (c) that a dispute of fact or law has arisen in relation to a fund between the fund and any person and the complainant; and*

² *Supra*

(d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;...”

(8) Section 30 P of the Act provides:

“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.***

(3) Subsection (2) shall not affect the court’s power to decide that sufficient evidence has been adduced on which a decision can be arrived at, and to order that no further evidence shall be adduced.” (Court’s emphasis)

(9) The wording of section 30 P contemplates an appeal in the wide sense. In **Meyer v Iscor Pension Fund**³ the Supreme Court of Appeal held:

“From the wording of section 30P (2) it is clear that the appeal to the High Court contemplated is an appeal in the wide sense.

³ 2003(2) SA 715 (SCA) at 725I to 726A

The High Court is therefore not limited to a decision whether the adjudicator's determination was right or wrong. Neither is it confined to the evidence or the grounds upon which the adjudicator's determination was based. The Court can consider the matter afresh and make any order it deems fit. At the same time, however, the High Court's jurisdiction is limited by section 30P (2) to a consideration of 'the merits of the complaint in question'. The dispute submitted to the High Court for adjudication must therefore still be a 'complaint' as defined. Moreover, it must be substantially the same 'complaint' as the one determined by the adjudicator."

(Court's emphasis)

- (10) In **The Pension's Fund Act: A commentary on the Act, regulations, selected notices, directives and circulars**⁴ the learned authors state at page 601 that:

"is also not permitted to reformulate a complainant's complaint in order to find a basis on which to grant relief if that basis did not appear from the complainant's written complaint."

- (11) In **De Beers Pension Fund v Pension Funds Adjudicator**⁵, Thring J found:

"In Iscor Pension Fund v Murphy NO and Another 2002 (2) SA 742 (T), van der Merwe J said at 748J–749E:

⁴ By Rosemary Hunter et al (2010)

⁵ [2003] 3 BPLR 4764 (C) at 4769

"The proper approach to be adopted by this Court in considering an application in terms of s 30P of the Act was dealt with in South African Eagle Pension Fund v Murphy NO, an unreported decision of the High Court of South Africa (Witwatersrand Local Division) dated 11 February 2000 under case No 99/30587. In that case Nugent J stated, inter alia, the following at p 2:

'Although the approach which this Court ought to take when considering a determination made by the adjudicator is not expressly dealt with in the Act, it seems to me to follow from the nature of the adjudicator's duties that this Court is called upon to correct his determination if it is not in accordance with law. In other words, this Court does not merely exercise powers of review over their performance by the adjudicator of his functions, but is required itself to assess the merits of the complaint, and decide whether the adjudicator's determination was correct in law. If not, this Court will substitute its own decision.'

In the unreported judgment of Wise AJ in the matter of Southern Staff Pension Fund v Murphy NO and Another (case No 14179/99, Witwatersrand Local Division) the following was stated at p 6 of the judgment concerning s 30P of the Act:

'Subsection (2) enacts that the Court 'shall have the power to consider the merits of the complaint in question, to take evidence and to make any order it deems fit'.

I do not understand this to exclude or limit this Court's inherent review jurisdiction. In my view, it is the intention of this section to give the Court powers in addition to its inherent powers of review.'

I respectfully agree." (Court's emphasis)

I agree with these findings as it is clear that section 30P of the Act does not only relate to a review, but grants the court additional wide powers.

- (12) It is abundantly clear from the wording of the definition of complaint that only subsection (d) applies in the present instance as it is the only subsection dealing with "*an employer*" as is the case here.
- (13) The second respondent thus has to prove that the applicant "*has not fulfilled its duties in terms of the rules of the fund*".

BACKGROUND:

- (14) The complaint was that the applicant offered the deceased an opportunity to take early retirement with effect 31 March 2014. This offer was accepted on 13 March 2014. On 31 March 2014 the deceased signed the withdrawal notification to Liberty Life. This form, which was initialled on each and every page and signed at the end by the deceased provided: "*Date of withdrawal March 14*".
- (15) In the complaint to the Adjudicator the second respondent alleged that

the deceased had accepted the offer of early retirement on 13 March 2014 from 31 March 2014, but at the same she alleged that the deceased was in his notice period when he passed away. This is clearly a contradiction. On 21 April 2014 the deceased passed away. The second respondent alleged that the deceased was in his notice month when he passed away and as a result a death benefit became payable. At the time the deceased was no longer working, but according to the second respondent he was in his notice month and had leave to stay at home. On 23 May 2014, an administrator at the fund, third respondent, indicated that the insurance premium for the month of April 2014 had not been paid on behalf of the deceased by the applicant. It is common cause that the premium was subsequently paid to the Fund, where it was accepted and not returned.

- (16) A representative of the applicant confirmed that the deceased should have been covered in April by e-mail as follows:

"I would appreciate it if you could look into the below as I can confirm that Piet was in his notice month when he sadly passed away.

He should have been covered for this period."

- (17) An administrator of the fourth respondent replied to this email and set out:

"I confirm that Liberty claims department have been notified of the error in administration and we now await their advice on any

outstanding requirements regarding this claim. I will update you as soon as possible."

(18) On 11 June 2014 the same administrator, Ms Kay Maguire, replied that a premium had been received from the applicant on behalf of the deceased for the month of April 2014 and that *"the claim should be finalized soon"*.

(19) The early retirement calculations show the period for notice pay as April 2014. The tax directive from SARS shows the date of accrual as 30 April 2014, which supports the contention that the deceased's last month of employment was April 2014, which was regarded as his notice month.

(20) It is set out in paragraph 2.13 of the complaint to the adjudicator:

"It is submitted that given all the arguments made above together with the documentary evidence attached the deceased was indeed a member of the fund at the time of his death and a death benefit accordingly became payable."

(21) The relief sought by the second respondent from the Adjudicator was:

"3.1.1 The fund and/or administrators of the fund be ordered to furnish the complainant and the tribunal with the reinsurance policy forthwith for purposes of establishing her rights and benefit entitlement;

3.1.2 The fund be ordered to exercise its discretion in terms of

s 37 C of the Act and pay the deceased's death benefit;

3.1.3 *Alternatively, in the event that it is found that the employer erroneously communicated the incorrect information to the fund and/or its administrator it should be held liable to pay the death benefit.*

(Court's emphasis)

- (22) The only relief applicable to the applicant is the alternative relief set out in paragraph 3.1.3, as the first two paragraphs relate to the third respondent, the fund. Neither the third nor the fourth respondents opposed the present application as no relief is sought against them.
- (23) The second respondent alleged negligence on the part of the applicant in that the withdrawal form, which had been signed by the deceased on 13 March 2014, had not been completed in all respects. There is no evidence in the body of the complaint as to what the information allegedly was that the applicant "erroneously" communicated to the fund and/or its administrator or how or when this erroneous communication took place. It is set out that the form was incomplete as it did not contain the required information as to which option had been selected to transfer the money, namely cash, cheque or electronic transfer. The second respondent alleged:

"It is submitted that given all the arguments made above together with the documentary evidence attached the deceased was indeed a member of the fund at the time of his death and a death benefit accordingly became payable."

- (24) The complaint was not that the applicant had erroneously informed the fund of the date on which the deceased left its employ or ceased to be a member of the fund. There were no allegations that the erroneous information provided to the fund caused the non-payment of the death benefits nor that the applicant had breached its duties in terms of the rules of the fund. There was no indication that the repudiation of the claim by the fund and/or its insurer was due to any failure of the applicant to timeously deduct the contribution for April 2014 and to pay it to the fund. The complaint was:

"To ensure that the complainant is not left financially destitute, we further need to determine the rights of the complainant and this can only be done by perusing the contents of the reinsurance policy, which may provide that there was death cover in place one month after the deceased member's death."

- (25) Nowhere in the body of the complaint does the second respondent allege that the applicant was responsible for the Fund being notified, in error, in the withdrawal form that the deceased's employment and membership of the Fund had terminated at the end of March 2014. There is no indication that the applicant had communicated to the Fund that the deceased had left its employ or ceased to be a member of the Fund in error and that is the reason for the Fund and the fourth respondent declining to pay the death benefit.

- (26) The correspondence, by email, between the applicant and the

administrator at Liberty supports the fact that the instalment for April 2014 had been paid and had been received by the fund. This cannot be the reason for holding the applicant liable.

- (27) The first respondent made the following order after dealing with the facts:

“6.1.1 The first respondent is ordered to calculate the amount of the death benefit that would have been payable to the deceased’s beneficiaries in terms of section 37C of the Act had the third respondent had the April 2014 contribution to the first respondent in terms of its rules, together with interest at a rate of 9% per annum from 1 September 2014 to date of payment, less the amount already paid to the complainant;

6.1.2 The first respondent is ordered to transmit to the third respondent its computations in paragraph 6.1.1, within three days of completing them;

6.1.3 The first respondent is ordered to conduct the investigations, identify the deceased’s beneficiaries and allocate the death benefit in terms of section 37C of the Act, within eight weeks of this determination;

6.1.4 The first respondent is ordered to notify the complainant and the third respondent of its decision in writing, in terms of paragraph 6.1.3 above within one week thereof;

and

6.1.5 The third respondent is ordered to pay the deceased's beneficiaries as identified in paragraph 6.1.3 above, the death benefit as computed in paragraph 6.1.1 above within two weeks of receipt of information in paragraph 6.1.3 above."

- (28) This order made by the first respondent was in total contradiction to the relief requested by the second respondent.
- (29) The complaint against the applicant made it quite clear that the primary complaint was against the fourth respondent and not against the applicant, the employer of the deceased. In the introduction the Adjudicator set out the issues of determination as set out above.
- (30) In the present instance the Adjudicator had to find that the employer erroneously communicated the incorrect information to the third and fourth respondents and or their administrators. There is, however, no indication in the complaint or the body of the complaint as to the information allegedly erroneously communicated to the fund. The only complaint was that the withdrawal form had not been completed in all respects. This complaint, according to the second respondent, indicated negligence on the part of the applicant. There is no mention or indication as to how the applicant's so-called negligence had an impact on the decision by the third and fourth respondents not to pay

the death benefit. In any event, the deceased had signed the form and requested Ms Hugo, one of the employees, to submit the form.

- (31) There is no mention of the applicant in this introduction, although the ultimate finding was against the applicant. The second respondent deals in detail with the facts to decide whether the applicant was serving his notice period during April 2014, however that was not the basis of the complaint to the Adjudicator. The basis of the complaint was the issue of the reinsurance policy not being furnished to the second respondent to peruse it and the relief sought against the applicant reflects this. Counsel for the second respondent is correct that the Adjudicator is, in terms of section 30E(1)a of the **Pension Funds Act** not limited to the relief sought by a complainant, but at the least, the *audi alteram partem* rule should be considered and applied. This did not take place in this instance.
- (32) It is pertinent to note that the second respondent did not allege that the applicant had erroneously communicated the wrong date to the fourth respondent on which the deceased had left its employ, nor that the fourth respondent had declined to pay due to the wrong information from the applicant. The second respondent failed to set out that applicant breached its duties in terms of the rules of the fund. There is nowhere any indication on the papers that the applicant is to blame for the repudiation of the claim by the fourth respondent and no mention as to why the applicant is to be blamed for the repudiation.

(33) The main complaint was that the applicant had not provided a copy of the reinsurance policy to the second respondent when requested to do so, and not that the applicant had been negligent in paying the April 2014 premium late. The late payment of the premium did not play a roll, as it was accepted by the third and fourth respondents.

(34) In **Southern Staff Pension Fund v Murphy NO and Another**⁶, Wise AJ held at page 970 to 971 that:

"This complaint was never put to the Fund. It was never given the opportunity of dealing with it. In my view this failure to observe the requirements of audi alteram partem was material and sufficient to render the procedure by which such finding were reached unlawful." (Court's emphasis)

I agree with this finding and the principle must be applied in this instance. The second respondent did not have the opportunity to reply to these findings and therefor the procedure was unlawful and falls to be set aside.

(35) The only reason the first respondent found against the applicant is that she found that the applicant failed to pay the premium for April 2014 on behalf of the deceased and therefore the fourth respondent repudiated the claim.

(36) This was not the case the first respondent had been asked to adjudicate and was not the basis of the second respondent's

⁶ [2000] 9 BPLR 963 (PFA)

complaint. There was no evidence on which such a finding could be based.

- (37) It is thus clear that the Adjudicator made her finding on facts not before her and not supported by the evidence in the body of the complaint. The applicant had no opportunity to deal with these findings and to place facts before the first respondent to refute these findings.
- (38) Due to the fact that the first respondent is confined to make a finding on the complaint made by the complainant, she acted beyond her jurisdiction. On this ground alone the finding must be set aside.
- (39) However, if I should be wrong in this respect, I deal with a further ground on which the applicant relies to have the Adjudicator's finding set aside. The applicant contends that the determination should be set aside due to procedural unfairness as the *audi alteram partem* rule was not applied. The complainant, the second respondent, did not raise the point of non-payment of the April 2014 contribution, but the fourth respondent raised it. This was never taken up with the applicant, as a result the applicant never had an opportunity to respond to the allegation and to deal with it. The first respondent therefor did not comply in terms of section 30D of the Pension Funds Act as she did not dispose of the matter in a procedurally fair manner, as the *audi alteram partem* rule was not applied⁷.
- (40) It is also clear that the Adjudicator was wrong on her findings on the

⁷ See Southern Staff Pension (*supra*)

facts.

- (41) The fourth respondent repudiated the claim on the basis that the deceased had withdrawn from the fund as of 31 March 2014. The premiums were paid monthly in arrears. Thus the payment on 1 April 2014 was for the month of March and not for April. An e-mail was sent to the deceased's son on 2 July 2014 which set out:

"The board have made their decision and I have notified WPRSA as the decision was made late Friday and I know they will be contacting you shortly.

Liberty has not sent the formal notification as yet, I am awaiting this in order to forward to WPRSA management.

*Regrettably, **the board have declined the claim due the fact that your Farther had withdrawn from the fund as of the 31st March by agreement with WPRSA.***

I am very sorry as I know this is not the news you wanted."

(Court's emphasis)

- (42) The fourth respondent sent a letter on 9 June 20014 which set out:

"We refer to your request for the Complaints Resolution Committee to consider a death claim for the above former member.

After carefully considering the evidence and information presented from our records, it was agreed that regrettably we are unable to accept this as a death claim as the member withdrew from the fund prior to his death."

It is thus quite clear that the claim was declined as the fund had found that the deceased had withdrawn from the fund on 31 March 2014 and not that the premium for April 2014 had not been paid.

- (43) No payment was made at the end of May 2014 for April, but due to the fact that the applicant was informed on 29 May 2014 that further consideration would be given to the claim, the amount of R1 683.13 was paid to the fourth respondent in respect of the deceased's contribution for April 2014.
- (44) The fourth respondent repudiated the claim due to the withdrawal from the fund by the deceased on 31 March 2014 according to the withdrawal form. The Adjudicator had made an error on the facts when finding that the applicant had delayed payment for April. On this ground alone the determination must be set aside as well.
- (45) The second respondent alleged in her complaint that the deceased had accepted an offer "*to take early retirement with effect from 31 March 2014*". The written agreement, completed by the deceased, set out that the deceased would take "*early retirement with effect from 31 March 2014*".
- (46) The senior human resources business partner of the applicant, Mr Duncan, took the view that the deceased was in his notice month when he passed away.

- (47) This contention lead to both Ms Maguire and the second respondent to believe that April 2014 was the deceased's notice month. Mr Duncan was wrong when he informed the Adjudicator that the deceased had been retrenched, as it is patently clear that the deceased took early retirement. It is common cause that the deceased took early retirement.
- (48) The applicant explained that the so-called salary for April 2014 as set out in the annexed computation, was an *ex gratia* payment to put the deceased in the same favourable position he would have been, had he been retrenched. On this computation the end date is clearly indicated as 31 March 2014 and not 30 April 2014.
- (49) In **SA Transport and Allied Workers Union v Old Mutual Life Assurance Co SA Ltd**⁸ at 318 D Murphy AJ held:
- "By electing early retirement such employees relieved the employer of the burden of dismissing them. Unlike normal retirement, which may amount to the termination of employment through the effluxion of time, early retirement is akin to resignation and normally involves the communication of an intention to terminate employment by the employee. In the circumstances, the exercise of such an election cannot be a dismissal."* (Court's emphasis)
- (50) In this instance the termination or withdrawal agreement explicitly set out the agreed date as 31 March 2014. The further actions by the

⁸ (2005) 26 ILJ 293 (LC)

deceased supports this as he had instructed that March 2014 should be reflected as his last month of membership in the withdrawal form to the fourth respondent, and the same instruction in respect of his contribution to the Medical Aid Fund. It is quite clear that the deceased had given the instruction to withdraw from the fund as from 31 March 2014.

- (51) If it is found that the deceased was still employed during April 2014, the applicant will not be liable, as the premium for April had been paid. At best, the third or fourth respondent may be liable, but it is not for this court to make such a decision as to who would be liable and to what extent.
- (52) The main reason set out by the second respondent for requesting the court to uphold the Adjudicator's finding against the applicant, is that the applicant should never have submitted the incomplete withdrawal form to the fourth respondent and the applicant thereby breached its fiduciary duty. I cannot agree as the deceased had signed the withdrawal form and had given instructions to Ms Hugo, his underling, to forward it to the fourth respondent. She acted on his explicit instructions and there can be no other explanation for the form reaching the fund.
- (53) I have considered all the oral and written arguments, as well as the finding by the Adjudicator. If the principles are applied as set out in the **Meyer case** (*supra*), as well as **De Beer's case** (*supra*) there can be

no doubt that the first respondent did not deal with the complaint, but found for the second respondent on facts that were not ventilated and to which the applicant had no opportunity to reply.

(54) In these circumstances I find that the Adjudicator had exceeded her powers by adjudicating a point that was not the issue in the complaint. Due to this error the applicant never had the opportunity to be heard on this issue and the Adjudicator did not comply with the *audi alteram partem* rule. The Adjudicator further erred on the finding of facts that the fourth respondent had not paid the claim due to the non-payment of the contribution for April, but that finding was totally inconsistent with the second respondent's complaint and not part of the complaint. If it is so that the Adjudicator was of the opinion that the deceased was still employed in April 2014, then the third or fourth respondent may be held liable but certainly not the applicant. Due to the facts found above, this court need not make a decision on whether the deceased was still employed during April 2014, and that the third or fourth respondent is liable. I do find that the applicant has to succeed in these circumstances.

(55) I have been requested to dismiss the second respondent's complaint to the first respondent, but in these particular circumstances in this matter, I am of the opinion that, although the Act gives me wide powers, this should not be done. By dismissing the second respondent's complaint to the first respondent I will be closing the door for her to pursue her claim against the third and fourth respondents as

well.

(56) The order is:

1. The determination in terms of section 30M of the Pension Fund Act 24 of 1956 by the first respondent dated 10 July 2015 under complaint reference PFA/GP/00014167/2015/TD is set aside;
2. The second respondent to pay the costs of the application, including the cost of senior counsel.

A handwritten signature in black ink, appearing to read 'C Pretorius', is written over a horizontal line.

Judge C Pretorius

Case number : 67153/2015

Matter heard on : 22 March 2016

For the Applicant : Adv AJ Freund SC

Instructed by : Werksmans Attorneys

For the Respondent : Adv. KA Magan

Instructed by : Soonder Incorporated

Date of Judgment : 26 April 2016