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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 7777/2021

In the matter between:

C[....] G[....]

First Applicant

B[....] G[....]

Second Applicant

H[....] G[....]

Third Applicant

S[....] G[....]

Fourth Applicant

JOHANNA CHRISTINA DE SWARDT

Fifth Applicant

And

MOMENTUM RETIREMENT ANNUITY FUND

First Respondent

MOMENTUM METROPOLITAN LIFE LIMITED

Second Respondent

PENSION FUNDS ADJUDICATOR

Third Respondent

C[....]2 A[....]

Fourth Respondent

Coram: Hockey, AJ

Date of hearing: 18 August 2022

Date of judgment: 10 November 2022

JUDGMENT (HANDED DOWN ELECTRONICALLY)

HOCKEY, AJ

[1] This matter concerns the distribution of a death benefit in the sum of R1 201 277.00 by the first respondent following the death of its member, Mr. B[....]2 H[....]2 G[....] (“the deceased”), on 27 December 2018. Ms C[....]2 A[....] (“A[....]”), who was regarded as the life partner of the deceased at the time of his death was allocated the entire death benefit. A[....] is cited as the fourth respondent in these proceedings.

[2] The first to third applicants are children of the deceased, born out of the marriage to the fourth applicant. The deceased and the fourth applicant were divorced on 24 April 2008. In terms of the divorce order, the deceased paid monthly maintenance to the fourth applicant in the amount of R12 000.00 per month until the death of the deceased. At the time of the deceased passing the third applicant was a minor for whom he paid an additional amount of R5 000.00 to the fourth applicant towards the minor’s maintenance and upkeep.

[3] The deceased’s mother was cited as the fifth applicant herein when this matter was instituted since she was also a dependent of the deceased who contributed a monthly amount of R5 000.00 towards her upkeep. The mother of the deceased had since passed away and is no longer a party to these proceedings.

[4] The board of the first respondent (“the board”) allocated the entire death benefit to A[....]. The first respondent is a retirement-annuity fund and the second is the administrator and underwriter of the first respondent.

[5] Aggrieved with the allocation of the entire death benefit to A[....], the applicants lodged a complaint with the third respondent, who is the Pension Funds Adjudicator (“the adjudicator”) established and constituted in terms of section 30B of the Pension Funds Act 24 of 1956 (“the Act”). The complaint was dismissed which led to the applicants instituting the current proceedings.

[6] The application is opposed only by the first respondent.

Background facts

[7] The following facts were presented to the board about the deceased and his estate.

[8] Upon the death of the deceased, the G[...] Testamentary Trust (“the trust”) was created by virtue of his will. The deceased bequeathed his estate to the trust, of which his three children (the first to third applicants) are income and capital beneficiaries. The trust received R41 418 384.93 from the deceased estate, including R7 072 097.06 from various policies of the deceased.

[9] The trustee of the trust informed the board that the trust would continue to make monthly payments to the third and fourth applicants in the amounts of R5 000.00 and R12 000.00 respectively. In addition, the trustee further advised that the trust would make monthly payments to the first and second respondents in the amounts of R7 000.00 and R8 000.00 respectively.

[10] From about 2015, the deceased and A[...] were involved in a relationship. An investigation by the forensic department of the second respondent confirmed that the relationship between the deceased and A[...] was similar to that of a married couple.

Legal principles

[11] The applicants brought this application in an effort to review and set aside two decisions “*of the first and/or second respondent*”¹ dated 12 June 2020 and 7 October 2022 respectively, and also to review and set aside the decision of the adjudicator in dismissing the applicants’ complaint. The application was instituted in terms of the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”), alternatively the common law, as well as in terms of section 30P of the Act.

[12] Counsel for the respondents pointed out that the first decision of the first respondent, which was a preliminary decision dated 12 June 2020, is irrelevant and

¹ The decisions referred to was actually that of the board and is dealt with as such. In any event, counsel for the applicants abandoned the review of these decisions and only persisted with the challenge of the decision by the adjudicator.

has no direct external effect. For the purposes of this application only the second decision, dated 7 October 2020, is relevant. In terms of both these decision the entire death benefit was allocated to A[....].

Preliminary points raised by the first respondent

[13] Furthermore, counsel for the first respondent pointed out that the decisions of the first and second respondents are *res judicata* because these decisions have been adjudicated by a competent tribunal in the form of the adjudicator. In this regard, reference was made to section 30 O(1) of the Act which provides:

“Any determination of the Adjudicator shall be deemed to be a civil judgement of any court of law had the matter in question been heard by such court, and shall be so noted by the clerk of the register of the court, as the case maybe.”

[14] The effect of section 30 O(1), therefore, is that the adjudicator’s determination is binding and enforceable until set aside, and the attempt to review the first and second respondent’s decisions is futile.

[15] Counsel for the respondents also drew attention to section 230 of the Financial Sector Regulation Act 9 of 2017 (“the FSR Act”), the relevant portion of which provides:

*“(1) (a) A person aggrieved by a decision may apply to the Tribunal for a reconsideration of the decision by the Tribunal in accordance with this Part.
(b) A reconsideration of a decision in terms of this Part constitutes an internal remedy as contemplated in section 7(2) of the Promotion of Administrative Justice Act.”*

[16] The “*Tribunal*” referred to is the Financial Services Tribunal and “a *decision*” is defined in section 218 of the FSR Act to include a determination of the adjudicator.² Section 230 of the FSR Act therefore provides for an internal appeal as contemplated in section 7(2) of PAJA. In effect, therefore, the applicants did not exhaust their internal remedy first before taking the decisions of the respondents on review.

[17] For these reasons, counsel for the first respondent submitted in his heads of argument, and I agree, that the first and second prayers of the notice of motion, relating to the decisions of the “*first and/or second respondents*” should be dismissed. This submission has merit, as the decision of the adjudicator is binding and enforceable, which implies that it serves no practical purpose to review the decisions of the board. In any event, counsel for the applicants abandoned the review of the decision of “*first and/or the second respondent*” contained in prayers 1 and 2 of the notice of motion and proceeded only in respect of the appeal in terms of section 30P of the Act.

Section 30C of the Act and the appeal provision in terms of section 30P

[18] Section 37C of the Act confers a discretionary power on a pension fund to distribute pension benefits on the death of a member after the needs and dependency amongst the deceased’s dependants and nominees have been identified. In the first instance, it is incumbent on the board to identify the dependants of the deceased as well as the persons whom the deceased may have nominated to receive the proceeds of the death benefits. The fund, acting through its board, must distribute the death benefits in a reasonable manner and in accordance with the provisions of section 37C.³

[19] The relevant part of section 37C of the Act, provides as follows:

“(1) *Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit . . . payable by such a fund upon the*

² Section 218(d) of the FSR Act refers to “a *decision of a statutory ombud in terms of a financial sector law in relation to a specific complaint by a person*”, and the Act is included in Schedule 1 of the FSR Act as “a *financial sector law*”.

³ See **University of Pretoria Provident Fund v Du Preez** 2015 JDR 1978 (GP) at para 12

death of a member, shall, . . . not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:

If the fund within twelve months of the death of the member becomes aware of or traces a dependant⁴ 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 of or all such dependants.”

[20] The discretion conferred upon the board of a pension fund under section 37C trumps the mere wishes of the deceased member, even where such wishes are expressed in a nomination form or a testamentary instrument. Murphy J summed up the position in **The Municipal Workers Retirement Fund v Mabula and Another**⁵ as follows:

“Section 37C of the PFA is intended to serve a social function. It was enacted to protect dependency, even over the clear wishes of the deceased. Its purpose is to alleviate, in part, the financial hardship in which the deceased's dependants might find themselves on the loss of their source of income and support. The effect of the section is that the fund is expressly not bound by either a will or a nomination form. The section specifically restricts freedom of testation in order that no dependants are left without support and the fund is expressly not bound by a will, nor is it bound by the nomination form. The provision explicitly denies the member of a fund the right to determine how the benefit is to be disposed of by the fund.”⁶

⁴ “Dependent”, in relation to a member is defined in section 1 of the Act as:

- (a) a person in respect of whom the member is legally liable for maintenance;
- (b) a person in respect of whom the member is not legally liable for maintenance, if such person-
 - (i) was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;
 - (ii) is the spouse of the member;
 - (iii) is a child of the member, including a posthumous child, an adopted child and a child born out of wedlock.
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died;

⁵ (96855/16) [2017] ZAGPPHC 1153 (7 December 2017)

⁶ Ibid at para 7

[21] The adjudicator, whose decision is on appeal *in casu*, has the power to interfere with the pension fund's decision. His or her powers are conscribed in chapter VA of the Act, and his or her duties include disposing of complaints⁷ lodged in terms of section 30A (3) the Act. In terms of chapter VA, the adjudicator is enjoined to investigate any complaint, and in terms of section 30M he or she must, after the completion of such an investigation, send a signed statement containing his or her determination and the reasons therefore to all parties concerned, as well as to the clerk or registrar of the court which would have had jurisdiction had the matter been heard by a court.

[22] The High Court, in turn, has jurisdiction to consider an appeal against a determination by the adjudicator in terms of section 30P of the Act. The section 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.”

⁷ "Complaint" is defined in section 1 of the Act as meaning “a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and 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 or any person and the complainant; or

(d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund; but shall not include a complaint which does not relate to a specific complainant”.

[23] Section 30P affords a party who is dissatisfied by the ruling of the adjudicator a complete re-hearing of the matter. This entails that the court is not confined to the record which was before the adjudicator, but may include additional evidence or information. As held in **Meyer v Iscor Pension Fund**⁸:

“From the wording of s30P (2) it is clear that the appeal to the High Court contemplated is an appeal in the wide sense. 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 s 30P (2) to a consideration of ‘the merits of the complaint in question’.”

Submissions by the applicants

[24] The essence of the grievance of the applicant's grievance is that the entire death benefit was allocated to A[....] solely on the basis that she was involved in a relationship with the deceased with whom he had lived before his passing. They also take issue with the fact that they were not consulted, nor were they provided with information upon which the board relied to make a decision.

[25] The applicants also take issue with the degree of dependency of A[....] upon the deceased. They aver that there was no proper investigation and consideration of what the deceased and A[....] respectively contributed to their joint household, what A[....]'s assets and liabilities are and what her maintenance requirements were. Furthermore, it is alleged that the relationship between A[....] and the deceased had broken down and terminated before the latter's death, a factor which, they say, was not properly investigated. In essence, the applicants allege that when the decision was made to allocate the entire death benefit to A[....], it appears that the conclusions reached are irrational and not supported by the facts of this matter.

⁸ 2003 (2) SA 715 (SCA) at para 8

Discussion

[26] The board on the present matter identified the first to fifth applicants as well A[...] as dependants of the deceased. As already stated, the fifth applicant has since passed away and she is no longer a party to these proceedings. The remaining applicants, however, dispute that A[...] was a dependant of the deceased, and is therefore not entitled to share in the death benefits.

[27] The deceased had nominated the trust as beneficiary of his death benefits, but the board correctly concluded that such nomination was of no force and effect as the death benefits must be distributed in terms of section 37C which serves a social purpose, and as such, a member of a retirement fund cannot nominate a juristic or inanimate entity (such as a trust) to receive a death benefit.

[28] As already alluded to, an appeal under section 30P, which is a rehearing of the applicant's complaint, affords them the right to present any relevant information to the court, irrespective of whether such information was part of the record when the adjudicator made his decision. The applicants had been afforded the record in terms of Uniform Rule 53 pertaining to the decision which they initially sought to be reviewed in terms of the notice of motion. They had the right to supplement the information therein with any new or additional information for consideration by this court. The complaint that the applicants were not consulted or given an opportunity to make submission relating to the allocation of the death benefits, in my view, has become moot. To the extent that they failed to place additional information in front of this court is (if such additional information exist), is of their own making.

[29] Regarding the complaint that no proper investigation was conducted before the death benefit was allocated to A[], it is undisputed that an investigation did in fact take place. The board did obtain an affidavit from the fourth applicant. Despite the first applicant denying that in her founding affidavit she was contacted by an investigator, she retracted this statement in her supplementary founding affidavit wherein she admits that an investigator had interviewed her. The retraction was made after the applicants received the record containing the decision of the board, which included a forensic investigation report. It was reported that the investigator

spoke to first applicant who advised that she knew her late father had a relationship with A[....], but her father never mentioned anything about marrying A[....]. The report also revealed that the investigator had spoken to both the second and fourth applicants.

[30] In addition the forensic investigation report also discloses that the investigator interviewed several persons who knew the deceased and A[....]. These individuals confirm that the two were living together and there is evidence that they were engaged to be married. What is indisputable is that the deceased and A[....] had been living together for several years prior to the demise of the deceased. They initially leased a premises where they lived and later bought a property together which was registered in the name of A[....]. It is common cause that the deceased paid an amount in excess of R500 000.00 towards the purchase price of this property.

[31] A further issue which the applicants alleged were not properly investigated is the allegation that the relationship between the deceased and A[....] had terminated before the death of the deceased. The applicants acknowledged that A[....] and the deceased had a tumultuous relationship and that there were occasions when the deceased would go and stay at his house in Gansbaai after disagreements. The two would mend their relationship and the deceased would move back to their shared home.

[32] According to the first respondent, it was precisely because of contradictory versions of the relationship between A[....] and the deceased that they decided to conduct their own forensic investigation, which investigation concluded that the relationship between the deceased and A[....] was like that of a married couple. The deceased did in fact go to stay at his house in Gansbaai a few days before his passing, but I agree that this is not indicative that his relationship with A[....] had terminated.

[33] Both the forensic investigation report as well as the reasons for the final decision of the board which are contained in the very comprehensive letter from the fund dated 7 October 2020 are indicative that the board gathered a considerable

amount of information before they made their decision to allocate the death benefits to A[....]. The board clearly considered all relevant factors pertaining to the identified dependants. In paragraph 11 of the letter, they stated:

“The trustees take the following factors into account when looking at each dependant’s dependency needs:

- *Nature and extent of material support*
- *Financial need*
 - ✓ *Special circumstances*
 - ✓ *Other sources*
 - ✓ *Ages*
 - ✓ *Future income-earning capacity*
- *Nature of relationship with [the] deceased*
- *Amount available for distribution*
- *Wishes of the deceased.”*

[34] The letter then proceeds to state what the board found in applying the above factors. I quote verbatim what these findings are:

“12. The Deceased’s mother (C de Swart):

She qualifies as a dependent as she received R5,000 per month from the Deceased. She has no source of income and will continue to receive R5,000 from the Trust.

Considering the nature of her relationship with the deceased (being his mother) and the fact that her financial dependency needs will be met fully through the R5,000 she will continue to receive from the Trust, the Trustees of the Fund decided to allocate 0% of the benefit to her.

13. The Deceased’s ex-spouse (S G[....])

She was married to the Deceased and their marriage was dissolved by a divorce order granted on 24 April 2009. She qualifies as a dependent as she received monthly maintenance from the Deceased

in the amount of R17,000 for herself and her minor son, H G[....]. According to the Trustee of the Trust, she will continue to receive R12,000 for herself as the Deceased had a duty to maintain her for the rest of her life.

Considering the nature of her relationship with the Deceased (being his ex-spouse), her age and the fact that her future financial dependency needs will be met through the Trust continuing to pay her R12,000 per month for the rest of her life, the Trustees decided to allocated 0% of the benefit to her.

14. The Deceased's life partner (C A[....])

According to the Fund's information, she was the Deceased's life partner and she lived with him since 10 June 2015. Due to the Trustees receiving contradictory information relating to the nature and permanency of her relationship with the Deceased, the Trustees appointed the Fund's Administrator's Forensics Department to investigate this matter. The Forensics Department interviewed various persons that were not related to either C A[....] or the Deceased, who confirmed that their relationship was similar to that of a married couple. The Trustees were comfortable with the independence and impartiality of the persons interviewed and accepted the finding of the Forensics Department.

Ms A[....] is employed and she and the Deceased were co-dependent on one another for their household financial needs. It is in that regard that she qualifies as a dependent in the first instance. In the second instance, she qualifies as a dependent by virtue of the fact that she was his life partner. Section 1 of the Act defines 'spouse' to include a permanent life partner for purposes of the Act and reads as follows:

"'spouse' means a person who is the permanent life partner or spouse or civil union partner of a member in accordance with the Marriage Act, 1961 (Act 68 of 1961), the recognition of Customary Marriages Act, 1998 (Act 68 of 1997), or the Civil Union Act, 2006 (Act 17 of 2006), or the tenets of a religion".

Considering the nature of her relationship with the Deceased (being his life-partner), her age and level of income (being in her early fifties

which does not give her many working years ahead of her prior to reaching the normal retirement age), and the fact that she will not receive anything from the Deceased's estate, including the Trust which has assets worth over R40 million, the Trustees decided to allocate 100% of her benefit to her. She will receive the entire death benefit in the amount of R1,207,277.

15. The Deceased's major son (B G[....])

He is a child of the Deceased and therefore qualifies as a dependent. According to the Fund's information, he is employed and earns about R66,000 per annum. He was financially dependent on the Deceased and now receives R8,000 per month from the Trust. He is an income and capital beneficiary of the Trust with assets worth approximately R42 million.

Considering the nature of his relationship with the Deceased (being his son), his age and level of income (being in his twenties which gives him many working years ahead of him), and the fact that any financial dependency needs would be more than fully met through what he stands to receive from the Trust (being the income and capital beneficiary), the Trustees decided to allocate 0% of the benefit to him.

16. The Deceased's major daughter (C G[....])

She is a child of the Deceased and therefore qualifies as a dependent. She did not live with the Deceased. She is a registered student at the University of South Africa under the LLB program and she is employed as a bartender. She received R7,000 per month from the Trust and she is an income and capital beneficiary of the Trust with assets worth approximately R42 million.

Considering the nature of her relationship with the Deceased (being his daughter) her age and level of income (being in her twenties which gives her many working years ahead of her), and the fact that any financial dependency needs would be more than fully met through what she stands to receive from the Trust (being the income and capital beneficiary), the Trustees decided to allocate 0% of the benefit to her.

17. The Deceased's minor son (H G[....])

He is a child of the Deceased and therefore qualifies as a dependent. According to the Fund's information, he is still a school-going learner. He lives with his mother, S G[....]. He was financially dependent on the Deceased and now receives R5,000 from the Trust. He is an income and capital beneficiary of the Trust with assets worth approximately R42 million.

Considering the nature of his relationship with the Deceased (being his son), his age, and the fact that any financial dependency needs would be more than fully met through what he stands to receive from the Trust (being the income and capital beneficiary), the Trustees decided to allocate 0% of the benefit to him."

[35] The comprehensive nature of the letter dated 7 October 2020 with its content leads one to conclude that the board did in fact conduct a thorough investigation and took into account all the relevant and pertinent information that was at its disposal. I agree with counsel for the first respondent that the applicants cannot complain that the principle of *audi alteram partem* was not adhered to. The applicants were furnished with the board's preliminary finding and were given a reasonable opportunity to furnish the board with all relevant information. They also had such opportunity when they lodged their complaint with the board.

[36] As for the dependency of A[....] on the deceased, I have already dealt with the fact that they lived together and shared a common home. The applicants complained that A[....] is employed and earned a higher income than that of the deceased when he was alive. In this regard, the board concluded in its final decision as follows:

"Ms A[....] is employed and she and the Deceased were co-dependence on one another for their household financial needs. It is in that regard that she qualifies as a dependent in the first instance. In the second instance, she qualifies as a dependant by virtue of the fact that she was his life partner. Section 1 of the [Pension Funds] Act defines 'spouse' to include a permanent life partner for purposes of the Act."

[37] It is without doubt that the co-habitation between the deceased and A[....] entailed that they shared household expenses, such as for utilities, food, household maintenance, etc. Without the contributions of the deceased, A[....] has to carry such expenses on her own.

[38] It is clear that the board took into account that the trust will continue to meet the applicant's financial needs. This is the case despite the applicant's averment that the deceased estate may have a cash shortfall of R9.4 million which may necessitate the sale of certain assets. The end result, as concluded by the adjudicator, would still be that the applicants would be far better off than A[....]. The death benefit which was allocated to A[....] in the amount of R 1 201 277.00 is insignificant in comparison to the assets held by the trust. I agree with the adjudicator's conclusion that the board's decision regarding the distribution of the death benefit is both reasonable and equitable.

[39] The adjudicator is in full agreement with the board's decision to allocate the full amount of the death benefit to A[....], based on the same reasons. I am mindful that with the discretion conferred on the board in section 37C of the Act, the board's decision cannot be interfered with without more.⁹ The adjudicator, or the court, can interfere in circumstances where it is demonstrated that the board took into account irrelevant, improper or irrational factors, or where its decision can be said to be one that no reasonable body of trustees properly directing themselves could have reached.¹⁰ This is not such a case and the adjudicator's decision therefore cannot be faulted, in my view. The applicants did not make out a case for the setting aside of the adjudicator's decision, and the application falls to be dismissed.

[40] As for costs, there is no reason why costs should not follow the outcome.

[41] In the result, I order that the application is dismissed with costs.

⁹ See **Gerson v Mondi Pension Fund and Others** 2013 (6) SA 162 (GP) at para 28

¹⁰ See **Letsoalo v Lukhaimane NO** JDR 2018 0277 (GP) at para 20

S HOCKEY
ACTING JUDGE OF THE HIGH COURT

Appearances:

For the applicant:	Adv LJ Smit
Instructed by	De Vries De Wet & Krouwkam Attorneys
For the Respondents:	Adv S Khumalo SC
Instructed by	Shepstone & Wylie Attorneys