

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



Case number: 54157/2019

On roll: 27 January 2021 (Decided on papers)

Date of judgment: 12 February 2021

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: YES/~~NO~~
(3) REVISED
12/2/21
DATE SIGNATURE

In the matter between:

SWART (NEÉ VAN DER MERWE), LANÉ N.O.	First Applicant
VAN DER MERWE, JOHANNES GERHARDUS N.O.	Second Applicant
BOSCH, LEON N.O.	Third Applicant
BENNETT, BRIAN DONALD N.O.	Fourth Applicant
DU PLESSIS, GERT JOHANNES N.O.	Fifth Applicant
SWART (NEE VAN DER MERWE), LANE	Sixth Applicant
VAN DER MERWE, JOHANNES GERHARDUS	Seventh Applicant

and

LUKHAIMANE, MUVHANGO ANTOINETTE N.O. **First Respondent**

FUNDSATWORK UMBRELLA PROVIDENT FUND **Second Respondent**

MMI GROUP LTD **Third Respondent**

**BORNMAN (previously VAN DER MERWE),
TERESA** **Fourth Respondent**

JUDGMENT

SWANEPOEL AJ:

INTRODUCTION

[1] First to fifth applicants act in their capacities as the trustees of the Dolf van der Merwe Familie Trust (“the trust”). The trust was founded by the late Rudolph Marthinus van der Merwe (“the deceased”), some years prior his death in 2014. It holds a substantial part of the deceased’s assets. Sixth and seventh applicants are the major children of the deceased from a previous marriage, (they are also the first and second applicants in their capacity as trustees of the trust.

[2] First respondent is the Pension Funds Adjudicator (“the PFA”), who was appointed in terms of section 30 C of the Pensions Fund Act, Act 24 of 1956 (“the Act”). Second respondent is a pension fund registered as such in terms of

the Act ("the Fund"). Third respondent is the administrator of the Fund. Fourth respondent was the deceased's spouse at the time of his death. Only second respondent opposes the application. First respondent abides the decision of the Court.

[3] At the time of his death the deceased's pension fund benefit in the Fund amounted to R 1 675 187.71 ("the pension benefit"). The deceased had nominated the trust and the fourth respondent to each receive 50% of the pension benefit upon his death. The Fund is authorized by virtue of section 37 C of the Act to decide to which dependant or dependants of the deceased the pension benefit should be paid, and in what proportion. It awarded 100% of the deceased's pension benefit to the fourth respondent. The Fund subsequently paid the fourth respondent the sum of R 1 675 187.71.

[4] The trust then filed a complaint with the PFA in terms of section 30 A (3) of the Act, seeking the setting aside of the Fund's decision. On 13 July 2018 the PFA handed down her determination. In the PFA's view the Fund had "unduly fettered" its discretion, had not considered all of the facts properly, and its finding was therefore set aside. The PFA referred the matter back to the Fund for reconsideration.

[5] On 13 November 2018 the Fund again made a finding that 100% of the deceased's pension benefit should be awarded to the fourth respondent ("the second decision"). Upon the applicants again complaining to the PFA, they were told that the PFA regarded herself as *functus officio*, and that if they were

to take the matter further, it would have to be by way of a review application. In this manner the case has found its way to this Court.

RELIEF SOUGHT

[6] Applicants seek the following relief:

[6.1] To the extent necessary, that the decision of the PFA on 30 January 2019 not to consider a second complaint against the Fund's second decision be set aside;

[6.2] That the determination of the Fund on 13 November 2018, that 100% of the deceased's pension benefit must be awarded to fourth respondent, be set aside;

[6.3] An order that 50% of the deceased's pension benefit be awarded to the trust;

[6.4] That fourth respondent be ordered to pay 50% of the benefits that she had already received from the PFA or from the Fund to the trust.

[6.5] That any party opposing the application pay the cost thereof.

THE CONDONATION APPLICATION

[7] The first matter for consideration is applicants' interlocutory application, seeking condonation for the late filing of the replying affidavit. The Fund's

answering affidavit was filed on 25 September 2019. The replying affidavit was filed on 26 March 2020, substantially out of time. Initially the Fund suggested that it would not condone the late filing and that applicants would have to seek formal condonation. Applicants consequently delivered a formal application for condonation which has not been opposed.

[8] It would not be inaccurate to say that applicants' attorney paints a chaotic picture of his office when the replying affidavit should have been attended to. The chaos was caused firstly by the breakup of Hogan Lovells (SA) Inc, and the subsequent formation of Lawton's Africa. The result was a breakdown in IT and email services. To add to the chaos in applicants' attorney's offices, counsel seems to have been under some time constraints, further delaying the finalization of the affidavit. The Christmas holidays intervened, followed by another move of personnel from Lawton's to Cox Yeats. The result of all these factors was a breakdown in the communication between the attorney, his secretary and his clients. Complicating matters was the fact that Ms. Swart resides in Vanderbijlpark, whilst applicants' attorney practiced in Sandton.

[9] In considering whether to grant condonation, I am mindful that it is required of applicants to provide a proper explanation dealing with the entire period that the replying affidavit was delayed.¹ The factors to be assessed have been stated by the Supreme Court of Appeal as follows:²

¹ Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA), ([2003] ZASCA 37 par. 6)

² Mulaudzi v Old Mutual Life Assurance Company (South Africa) Limited 2017 (6) SA (SCA); ([2017] ZASCA 88 at par. 2

'A full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this court and the avoidance of unnecessary delay in the administration of justice.'

[10] The delay in filing the replying affidavit is substantial. However, it seems clear that the circumstances in applicant's attorney's office were difficult, and whilst it is incumbent on an officer of Court to comply with the rules of Court, there are circumstances that would understandably lead to delays in complying with time periods. Two factors weigh heavily in applicants' favour: Firstly, the application for condonation is not opposed. Secondly, there would be no prejudice to the respondents should condonation be granted. I have a wide discretion to grant condonation where it is in the interests of justice to do so. In these circumstances I believe that it would be appropriate to do so.

THE REVIEW

[11] It is not in dispute that the second decision by the Fund, and the decision by the PFA to refuse to hear the second challenge to the Fund's determination, are both administrative actions which are reviewable under the Promotion of Administrative Justice Act, Act 3 of 2000 ("PAJA"). In order to succeed with a

review under PAJA, applicants have to bring the action under one of the grounds of review set out in section 6 of PAJA:

“Judicial review of administrative action

6. (1) *Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.*

(2) *A court or tribunal has the power to judicially review an administrative action if-*

(a) *the administrator who took it-*

(i) *was not authorized to do so by the empowering provision;*

(ii) *acted under a delegation of power which was not authorized by the empowering provision; or*

(iii) *was biased or reasonably suspected of bias;*

(b) *a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;*

(c) *the action was procedurally unfair;*

(d) *the action was materially influenced by an error of law;*

(e) *the action was taken-*

(i) *for a reason not authorized by the empowering provision;*

(ii) *for an ulterior purpose or motive;*

(iii) *because irrelevant considerations were taken into account or relevant considerations were not considered;*

(iv) *because of unauthorized or unwarranted dictates of another person or body;*

(v) *in bad faith; or*

(vi) *arbitrarily or capriciously;*

(f) *the action itself-*

(i) *contravenes a law or is not authorized by the empowering provision; or*

(ii) *is not rationally connected to-*

(aa) *the purpose for which it was taken;*

(bb) *the purpose of the empowering provision;*

(cc) *the information before the administrator;*

(g) *the action concerned consists of a failure to take a decision;*

- (h) *the exercise of the power or the performance of the function authorized by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or*
- (i) *the action is otherwise unconstitutional or unlawful.”*

THE BACKGROUND

[12] The deceased and the fourth respondent were married on 12 February 2011. At the time of his death on 15 November 2014 they been married for slightly less than four years. The deceased died at the age of 53 years. Fourth respondent was then thirty nine years of age.

[13] The deceased was also survived by his two adult children from a previous marriage, the sixth and seventh applicants. They were then 27 and 26 years old respectively. They had received regular cash payments from the deceased, and he had also paid certain monthly expenses such as their medical aid, insurance premiums and the like.

[14] On 31 August 2011 the deceased completed a nomination form in which he nominated fourth respondent and the trust to each receive 50% of his pension benefit. Upon the deceased's death the trust lodged a claim with the Fund. Acting in terms of section 37 C of the Act, the Fund allocated 100% of the pension benefit to fourth respondent. The Fund did so having made the following findings:

[14.1] The deceased was married to the fourth respondent at the time of his death. She was therefore a spouse as well as a dependant as defined by the Act. She had received a lump sum payment of R 3 920.000.00 from a death insurance policy, R 441 960.50 from an Old Mutual Life policy and a R 10 000.00 funeral benefit. Fourth respondent was unemployed, and was dependent on the deceased.

[14.2] Both sixth and seventh applicants were employed, but had, to some extent at least, been dependent on the deceased. Both had received R 220 980.25 from the proceeds of an Old Mutual life policy after his death. They had also been nominated to each receive 50% of the proceeds of the trust.

[14.3] The Fund noted (erroneously) that the deceased had not nominated any beneficiaries of the pension benefit.

[15] Based on the aforementioned facts, the Fund concluded that the sixth and seventh applicants' maintenance needs had been met by the proceeds of the trust and the life policy payment. The Fund believed that fourth respondent's maintenance requirements had to take precedence over the claim of the sixth and seventh applicants. On those grounds the Fund awarded 100% of the pension benefit to the fourth respondent.

[16] Applicants were aggrieved by the decision, and they applied to the PFA to set aside the award. On 13 July 2018 the PFA dismissed the decision of the Fund to award the entire pension benefit to fourth respondent. In doing so, the PFA considered the following factors:

[16.1] The sixth and seventh applicants were legal dependants of the deceased as envisaged by section 1 of the Act, by virtue of the fact that the deceased had provided regular maintenance to them by paying their life insurance policies, medical aid, cell phone accounts, petrol and the like. He had also made regular cash payments to the sixth and seventh applicants. The fact that the relationship between the deceased and his children was a close one was also relevant to the award.

[16.2] Fourth respondent, the PFA said, was 39 years old, was gainfully employed, and had prospects of remarrying. The Fund had failed to take into consideration the fact that fourth respondent had filed a claim for maintenance in excess of R 10 million against the deceased estate. It had also failed to consider the estate's liquidation and distribution account, and the distribution of assets to the various beneficiaries.

[16.3] The PFA found that the Fund had not conducted a proper investigation in terms of section 37 C. Consequently, the PFA found that the Fund had unduly fettered its discretion. The matter was referred back to the Fund for reconsideration.

[17] On 27 September 2018 the Fund requested further information from the applicants, including a copy of the liquidation and distribution account, details of the maintenance claim that fourth respondent had lodged against the estate, and information regarding a Discovery Life policy. It also sought information regarding the trust's capital value and whether the trust was making maintenance payments to the sixth and seventh applicants. The information

was provided to the Fund, notwithstanding which, on 13 November 2011, the Fund made exactly the same decision as it had made previously, allocating 100% of the pension benefit to the fourth respondent.

FACTORS CONSIDERED BY THE FUND IN COMING TO THE SECOND DECISION

[18] In making the second decision, the Fund considered, in addition to the facts already known to it, that the fourth respondent had remarried on 7 July 2018. The Fund had also realized that the deceased had in fact nominated the trust as beneficiary of 50% of the pension benefit, a factor which the Fund says it considered in coming to the second decision. It further took into consideration that the sixth and seventh applicants were due to receive a further R 2 967 590.00 each from the trust. The Fund again concluded that fourth respondent's maintenance requirements were such that the entire pension benefit should be paid to her, and that sixth and seventh applicants' maintenance requirements were capable of being met by the trust.

THE ARGUMENTS

[19] Applicants say that the Fund failed to give proper consideration to the deceased's wishes as expressed in the nomination form. They also suggest that the Fund failed to make the necessary enquiries into the value and solvency of the trust, more especially given the fact that there was a cash shortfall of some R 11 million in the trust, and that assets would have to be liquidated to restore the trust to solvency. The Fund simply accepted, without any basis in fact, that the trust would be able to meet the sixth and seventh

applicants' maintenance needs, applicants argue. The applicants also say that the Fund failed to conduct proper enquiries into the maintenance requirements of the fourth respondent, more especially as fourth respondent had already received some R 4.3 million from the deceased's life policies. The Fund had also, applicants say, failed to properly consider that fourth respondent was relatively young, had remarried, and was employed.

[20] The Fund says in answer that there is no evidence that sixth and seventh applicants were dependent on the deceased. The Fund says this despite having held on two occasions that, whilst sixth and seventh applicants were dependent on the deceased, their needs would be served by the trust. Furthermore, it is submitted by the Fund that it is not required to consider the solvency of the estate when making a decision. This submission is strange considering the Fund's own stance that section 37 C is intended to "protect dependency", and that it fulfils the social function of ensuring that dependants are protected, even against the wishes of the deceased, if necessary. If the estate (or the trust) is not solvent, it cannot maintain the sixth and seventh applicants, a factor that must surely be considered.

THE FACTORS TO BE CONSIDERED

[21] *The Act defines a dependant as follows:*

"dependant", in relation to a member, means -

- (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;*

[22] There cannot be any dispute that, on this definition and given the facts as established by the Fund itself, that sixth and seventh applicants were dependants as defined in the Act.

[23] Section 37 C (1) (a) of the Act reads as follows:

“(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 of or all such dependants.

[24] The Fund has a discretion to award any proportion of the pension benefit to any dependant, even in the face of a nomination by the deceased, depending on what is equitable in each case. What ‘equitable’ means is not defined by the Act. However the PFA has identified the following factors that should be considered in the decision making process (although it is not an exhaustive list)³:

³ Sithole v ICS Provident Fund and another [2000] 4 BPLR 430 (PFA)

- [24.1] The age of the dependants;
- [24.2] Their relationship with the deceased;
- [24.3] The extent of the dependency;
- [24.4] The wishes of the deceased;
- [24.5] The financial affairs of the dependants and their earning potential.

EVALUATION

[25] I find it striking that there is such a dearth of information regarding the financial affairs of the fourth respondent on the one hand, and the sixth and seventh respondents on the other. One would have expected the Fund to have obtained financial statements, bank statements, proof of income, proof of expenses, and suchlike from all the parties. I would also have expected the Fund to investigate the impact of fourth respondent's marriage on her financial affairs. Instead, all I have is an unsubstantiated statement that the Fund believes that fourth respondent is in need of maintenance. There is no evidence that the Fund investigated whether fourth respondent still has the insurance money, whether she has invested the money, and whether she receives any dividend from any investment.

[26] The same concerns apply equally to the sixth and seventh applicants. What is their monthly income? What are their monthly expenses? The Fund knew that the trust had a cashflow problem and could not make payments to

sixth and seventh applicants. The Fund should have investigated whether they had managed to make up the shortfall left by the deceased's passing. Instead of conducting a detailed investigation into the financial affairs of both sides, the Fund seems to have taken a very superficial approach, amounting essentially to a thumb suck.

[27] A fundamental difficulty with the Fund's decision is that the Fund accepted that the fourth respondent was unemployed, and had been so since the deceased's death. That this belief was incorrect is evident from emails attached to the replying affidavit, which prove that fourth respondent was employed as an estate agent, and had been since 2015. The Fund made its decision based on flawed information.

[28] The Fund furthermore argues that the mere fact that fourth respondent has filed a maintenance claim of over R 10 million against the estate, is in itself proof that she was dependent on the deceased. That is a specious argument. The mere fact that a maintenance claim has been lodged does not mean that is well founded, and definitely does not mean that fourth respondent was, or is dependent on the deceased estate. In my view the Fund should have conducted a proper assessment of the fourth respondent's needs. It would then have realized that she was in fact employed, a factor which would likely have had a substantial impact on the Fund's decision.

[29] The most important factor that the Fund seems to have ignored when it made the second decision, was that the fourth respondent had remarried. Obviously her remarriage would have changed her financial situation and her

maintenance requirements. Simply ignoring fourth respondent's changed circumstances is unreasonable and irrational.

[30] Moreover, the Fund took the view that it had no obligation to investigate the trust's solvency. It accepted that the trust was possessed of assets and that it could therefore provide for sixth and seventh applicants' needs. This argument does not take account of the fact that the trust had a substantial cash shortfall. Simply because the trust is possessed of assets does not make it solvent. The Fund's contention is belied by the fact that the Fund knew that the trust could not support the sixth and seventh respondent's maintenance needs. On 22 October 2018 sixth applicant wrote to the Fund in reply to certain queries. She specifically told the Fund that the trust had R 416.00 available in its account, that it had a cashflow problem, and that it was not making any contributions to sixth and seventh respondents' maintenance. This communication was evidently ignored when the Fund made its decision.

[31] The Fund's basic approach to the matter was flawed. Its view, that the solvency of the trust was irrelevant, and the argument that the maintenance claim proved fourth respondent's dependency were both irrational, in my view.

[32] Finally, although I accept that the Fund is not bound by the wishes of a deceased person, the wish expressed in a nomination form or in a will is not to be lightly ignored. It is one of a number of factors to be taken into account, but it is a substantial factor. Therefore, before the Fund decided to ignore the nomination, it should have considered whether there were compelling reasons to do so. If it would result in an injustice or be inequitable should the deceased's

wishes be given effect to, then the Fund would be justified in deviating from the deceased's wishes. Here there is no evidence that the Fund placed any weight at all on the nomination.

IS THE DECISION REVIEWABLE?

[33] I am mindful of the fact that I may not substitute my discretion for that of the Fund. The Fund correctly points out that a Court cannot interfere with a decision simply because it disagrees with the finding. Unless the attack on the decision can be brought under one of the grounds in PAJA, the decision must stand. I am reminded of the words of Schatz J in ***Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another*** when he warned against the dangers of imposing one's own decision on the matter:⁴

"[A] judicial willingness to appreciate the legitimate and constitutionally-ordained province of administrative agencies; to admit the expertise of those agencies in policy-laden or polycentric issues; to accord their interpretations of fact and law due respect; and to be sensitive in general to the interests legitimately pursued by administrative bodies and the practical and financial constraints under which they operate. This type of deference is perfectly consistent with a concern for individual rights and a refusal to tolerate corruption and maladministration. It ought to be shaped not by an unwillingness to scrutinize administration action, but

⁴ [2003] 2 ALL SA 616 (SCA); See also the endorsement of this *dictum* by the Constitutional Court in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC)

by a careful weighing up of the need for and the consequences of judicial intervention. Above all, it ought to be shaped by a conscious determination not to usurp the functions of administrative agencies; not to cross over from review to appeal."

[34] However, it is my view that the second decision is reviewable on a number of grounds:

[34.1] Firstly, by ignoring the solvency of the trust, and the fact that it could not make payment to sixth and seventh applicants, the Fund did not take cognisance of a relevant consideration, which is a ground for review under section 6 (2) (e) (iii) of PAJA. By deducting that the sixth and seventh applicants' maintenance requirements had been met simply because the trust was possessed of assets, the Fund took into account an irrelevant consideration, which is a ground for review under the same section.

[34.2] The Fund did not take into account that the fourth respondent had remarried. This is a relevant consideration which was ignored, which also justifies a review under section 6 (2) (e) (iii) of PAJA.

[34.3] The purpose of section 37 C of the Act is to ensure that those who require maintenance are cared for. In this case, the sixth and seventh applicants' maintenance needs were ignored. The decision was not rationally connected to the purpose of the empowering provision, which is the protection of dependants who require maintenance, nor was it rationally connected to the facts that were at the Fund's disposal. The

second decision should therefore be set aside by virtue of section 6 (2) (f) (i) (bb) and (cc).

[34.4] The Fund argued that it merely had to show that it took the decision “honestly”. That is, in my view, not the test to be applied. The Fund has to act reasonably and rationally. I find that the Fund’s decision was so unreasonable that no reasonable person could have so exercised the power. Therefore, the decision stands to be set aside on the grounds in section 6 (2) (h) of PAJA.

IS THE RELIEF SOUGHT COMPETENT?

[35] In its heads of argument the Fund raised, for the first time, the argument that the trust is not a dependant as defined by the Act, and that the relief sought is not legally competent. This argument is met by the provisions of section 37 C (2) (a):

“(2)(a) For the purposes of this section, a payment by a registered fund for the benefit of a dependant or nominee contemplated in this section shall be deemed to be a payment to such dependant or nominee, if payment is made to-

(i) a trustee contemplated in the Trust Property Control Act, 1988, nominated by-

(aa) the member;

*(bb) a major dependant or nominee, subject to subparagraph
(cc); or*

*(cc) a person recognised in law or appointed by a Court as the
person responsible for managing the affairs or meeting the
daily care needs of a minor dependant or nominee, or a
major dependant or nominee not able to manage his or her
affairs or meet his or her daily care needs;*

*(ii) a person recognised in law or appointed by a Court as the person
responsible for managing the affairs or meeting the daily care
needs of a dependant or nominee; or*

(iii) a beneficiary fund.”

[36] It is consequently not the trust that is the dependant, but the person who receives a benefit by way of payment to the trust. Payment to the trust is regarded as a payment to the dependant. There is no merit to this argument.

[37] The Fund’s further argument was that applicants’ notice of motion was defective, as it sought (in prayer 2) an order setting aside the decision to award 100% of the benefits of the estate late Rudolph Marthinus Van der Merwe to fourth respondent (my emphasis). The Fund says that the “benefits of the estate....” should be recovered from the executor of the estate and not from the Fund. The prayer referred to is not a model of clarity, but the import is clear. Applicants are seeking the setting aside of the decision to award 100% of the

pension benefit to fourth respondent. The meaning ascribed by the Fund to prayer 2 is incorrect.

[38] Finally, prayer 3.2 of the notice of motion seeks an order that fourth respondent should pay 50% of the benefits that she has received from first and/or second respondents to the trust. The Fund takes the point, quite correctly, that fourth respondent has received no money from the PFA. It is common cause that fourth respondent received the payment from the Fund. The Fund argues that this error renders the relief sought legally incompetent. I again make the point that although the notice of motion is not clearly worded, there can be no doubt as to the relief sought by the applicants. In my view the Fund's submission is mere semantics.

THE REMEDY

[39] I am therefore of the view that the decision made by the Fund on 13 November 2018, to award 100% of the pension benefit of the late Rudolph van der Merwe to fourth respondent must be set aside. What then is to happen to the matter? Section 8 of PAJA provides for the remedies which a Court is entitled to grant:

"8. Remedies in proceedings for judicial review

(1) The court or tribunal, in proceedings for judicial review in terms of section 6(1), may grant any order that is just and equitable, including orders –

- (a) directing the administrator –*
 - (i) to give reasons; or*
 - (ii) to act in the manner the court or tribunal requires;*
- (b) prohibiting the administrator from acting in a particular manner;*
- (c) setting aside the administrative action and –*
 - (i) remitting the matter for reconsideration by the administrator, with or without directions; or*
 - (ii) in exceptional cases –*
 - (aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action; or*
 - (bb) directing the administrator or any other party to the proceedings to pay compensation;*
- (d) declaring the rights of the parties in respect of any matter to which the administrative action relates;*
- (e) granting a temporary interdict or other temporary relief; or*
- (f) as to costs.*

(2) The court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant any order that is just and equitable, including orders –

(a) directing the taking of the decision;

(b) declaring the rights of the parties in relation to the taking of the decision;

(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or

(d) as to costs.”

[40] Applicants seek that the decision of the Fund be set aside in terms of section 8 (1) (c) (ii) (aa) of PAJA, and that it be substituted by an order that 50% of the pension benefit must be awarded to the trust. This relief can only be awarded in exceptional circumstances.

[41] Generally speaking, when an administrative action is reviewed, the matter would be sent back to the decision maker for reconsideration. This is so for good reason. A Court is not always possessed of all the facts. It also does not necessarily have the expertise that the administrator does in the particular field. However, there are exceptions to the general proposition. In

Johannesburg City Council v Administrator, Transvaal and another⁵

Hiemstra J held:

“Ordinarily, when an administrative decision is set aside, the matter is sent back for reconsideration, but not necessarily so. An early guideline is the case of Norman Anstey and Co v Johannesburg Municipality, 1928 WLD 235 where Greenberg J., said at paragraph 242:

‘I think the Court is only entitled to order the issue of a certificate or licence when it is clear on the facts that the local authority would be bound to grant the certificate or licence.’

[42] In ***Gauteng Gambling Board v Silverstar Development Ltd and others***⁶ the Supreme Court of Appeal said the following:

“The power of a court on review to substitute or vary administrative action or correct a defect arising from such action depends upon a determination that a case is ‘exceptional’: section 8(1)(c)(ii)(aa) of the Promotion of Administrative Justice Act 3 of 2000. Since the normal rule of common law is that an administrative organ on which a power is conferred is the appropriate entity to exercise that power, a case is exceptional when, upon a proper consideration of all the relevant facts, a court is persuaded that a decision to exercise a power should not be left to the designated functionary. How that conclusion is to be reached is not statutorily ordained and will depend on established principles

⁵ 1969 (2) SA 72 (T);

⁶ 2005 (4) SA 67 (SCA)

informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.”

[43] In ***Trencon Construction (Pty) Ltd v Industrial Corporation of South Africa Ltd and another***⁷ the Constitutional Court reiterated that substitution of a decision remained an extraordinary remedy.

[44] In ***Trencon***⁸ the Court, in considering the various factors to be taken into account, said that two factors should carry greater weight. Firstly, it has to be determined whether the Court was in as good a position as the administrator to make the decision, and secondly, whether the decision of the administrator was a foregone conclusion. These two factors must be weighed cumulatively. Unless those two questions are answered in the affirmative, a Court may not make a substitution order. Thereafter other considerations may play a role: for instance the effect of a delay, bias or incompetence of the administrator. Each case must be considered on its own facts, and ultimately the test is whether a substitution order is just and equitable.

[45] In a number of cases the Courts have taken decisions in the place of the decision maker, where time considerations so required.⁹ However, even if time were a factor in a case, unless the end result of the decision was a foregone conclusion, a Court would not make its own decision.

⁷ 2015 (5) SA 245 (CC); See *Allpay Consolidated Investment Holdings and others v Executive Officer of the South African Social Security Agency and others* [2013] ZACC 42

⁸ From para. 48 and further

⁹ *Maske and Gilbert v Aberdeen Licensing Court*, 1930 AD 30; *Gildenhuys v Parys Liquor Licensing Board and another* 1957 (4) SA 142 (O)

[46] There can be no argument that this matter has been unnecessarily delayed, and that it should be resolved as soon as possible. Of importance also, particularly to this matter, is whether the administrator has revealed an unjustifiable determination to adhere to a wrong decision.¹⁰ If the facts reveal that the administrator is unlikely to apply a fresh and open mind to the decision, it is a relevant factor to bear in mind. In this case I strongly suspect that the Fund is vehemently wedded to its decision to award the entire pension benefit to fourth respondent.

[47] Nevertheless, applying the aforesaid considerations to this case, I am not convinced that I am in as good a position to make a decision on the award of the pension benefit as the Fund would be. I say so because of a number of questions that the Fund has not investigated thus far, or has investigated, but only superficially. The answers to these questions are unknown, but are directly pertinent to any decision concerning the pension benefit:

[46.1] What are the actual maintenance requirements of the sixth and seventh applicants?

[46.2] Is the trust solvent, and is it capable of carrying the maintenance burden of the sixth and seventh applicants?

[46.3] What are the actual maintenance requirements of the fourth respondent considering the fact that she has already received a substantial sum in cash from the proceeds of the life assurance policies,

¹⁰ See Johannesburg City Council (*supra*)

that she has been employed since 2015, and that she was remarried in 2018?

[48] It is unfortunate that these facts have not already been established. The decision has been delayed for a number of years, and it would be tempting to put an end to the dispute by substituting the Fund's decision with an order dividing the pension benefit equally. The PFA indicated in her decision to set aside the first decision what issues should be addressed. Her finding seems to have fallen on deaf ears. Notwithstanding the PFA's finding, the Fund continued to take a superficial view of the matter, taking the second decision without properly investigating the questions raised above. Given the Fund's vehement opposition to the application, and the nature of the arguments it put forth, I am also not convinced that the Fund will bring an open mind to the matter.

[49] However, only the Fund would be in a position to make the necessary enquiries in regard to the issues raised above, and to take a decision based on the facts that it then uncovers. I do not know what the Fund will find, and I am therefore unable to say that the outcome that applicants seek is a foregone conclusion. In these circumstances I am unable to grant prayer 3, the substitution order. It is also unnecessary to grant prayer 1, wherein applicants seek an order setting aside the PFA's decision not to hear a complaint against the second decision.

[50] I am entitled to give directions to the Fund by virtue of the provisions of section 8 (1) (c) (i), and I intend to do so, to expedite the matter and to ensure that the Fund fully investigates the outstanding issues.

[51] In the premises I make the following order:

[51.2] Condonation is granted for the late filing of the applicants' replying affidavit.

[51.2] The decision of the second respondent on 13 November 2018, to allocate 100% of the pension benefit of the Late Rudolph Marthinus van der Merwe to fourth respondent is reviewed and set aside in terms of section 6 (1) of the Promotion of Administrative Justice Act, 2000.

[51.3] Second respondent is ordered to fully investigate the following:

[51.3.1] What are sixth and seventh applicants' actual maintenance requirements, if any?

[51.3.2] Is the Dolf van der Merwe Familie Trust and the Estate Late Van der Merwe solvent and capable of bearing the maintenance requirements of the sixth and seventh applicants?

[51.3.3] What are the fourth respondent's actual maintenance requirements, if any, taking into consideration her state of employment, her remarriage, and the fact that she received payment in the sum of R 4 371 960.50 after the deceased passed away?

[51.3.4] What is the status of fourth respondent's maintenance claim against the Estate Late Van der Merwe?

[51.3.5] Is the fourth respondent's maintenance claim against the estate likely to have an impact on the proceeds available to sixth and seventh applicants from the trust and the estate, and how, if at all, will the claim affect their maintenance needs?

[51.4] Second respondent shall conduct the aforesaid investigation and take a decision in terms of section 37 C (1) (a) of the Pension Fund Act, 1956 within 90 days of the granting of this order.

[51.5] Second respondent shall pay the costs of the application.

JJC Swanepoel

ACTING JUDGE OF THE HIGH COURT

GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

Electronically submitted therefore unsigned

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 12 February 2021.

APPLICANT'S COUNSEL:	Adv. GW Amm SC
APPLICANT'S ATTORNEY:	Cox Yeats
SECOND RESPONDENT'S COUNSEL:	Adv. S Khumalo
SECOND RESPONDENT'S ATTORNEY:	Shepstone & Wylie
MATTER ON ROLL:	27 January 2021 (decided on papers)
JUDGMENT HANDED DOWN ELECTRONICALLY	12 February 2021