IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MTHATHA

Case no: 1728/2010
Date Heard:22/02/2011
Date Delivered:

In the matter between:

BABALWA RUTH TITI **APPLICANT**

Versus

FUNDS AT WORK UMBRELLA PROVIDENT FUND **RESPONDENT**

JUDGMENT

SMITH J:

[1] This matter concerns the validity of the respondent's decision to allocate pension fund benefits due to the applicant's brother contrary to his written instructions.

[2] The applicant's brother, **Nceba Titi,** was a member of the respondent pursuant to his employment at Fortgale Motors, Mthatha. The respondent is a provident fund, established in terms of the provisions of the Pension Funds Act, 24 of 1956 (hereinafter the "Act")

[3] It is common cause that on 13 February 2009 **Nceba Titi** completed a "*BENEFICIARY NOMINATION FORM*" wherein he nominated the applicant and his two children, being a son and a daughter, as his beneficiaries of his fund benefits upon his death. He did not stipulate the proportions in which the funds were to be divided between the nominated beneficiaries.

[4] The nomination form furthermore contained the following qualification:

> "Important note:
>
> Section 37 C of the Pension Funds Act governs the distribution and payment of benefits on a member's death. You may nominate any person to receive any part of the benefit payable; however, the board of trustees have a duty in terms of the Act to apportion benefits equitably between your beneficiary <u>at their discretion</u>. Your nomination will serve to assist the board of trustees in making these decisions."

[5] **Nceba Titi** died on 13 September 2009. During March 2010 the respondent's board of trustees, without prior notice to the applicant, allocated an amount of R61 589. 50, which represented the benefits in the latter's fund, in the following proportions:

Yanga Qina (minor son) 39%: R24 020.02

Esinako Qina (minor daughter) 61%: R37 569. 78.

[6] The board of trustees resolved not to make any allocation to the applicant, "*as there is no evidence that she was dependent on*

the deceased and the benefit is too small to make a reasonable allocation."

[7] In making the above-mentioned allocation the board purportedly acted in terms of s. 37 C of the Act. That section reads as follows:

> **"37C Disposition of pension benefits upon death of member**
>
> (1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit (other than a benefit payable as a pension to the spouse or child of the member in terms of the rules of a registered fund, which must be dealt with in terms of such rules) payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19 (5) *(b)* (i) and subject to the provisions of sections 37A (3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:
>
> *(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 board, to one of such dependants or in proportions to some of or all such dependants.
> [Para. *(a)* substituted by s. 5 *(a)* of Act 22 of 1996.]
>
> *(b)* If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member, and the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the benefit or such portion of the benefit shall be paid to such nominee: Provided that where the aggregate amount of the debts in the estate of the member exceeds the aggregate amount of the assets in his estate, so much of the benefit as is equal to the difference between such aggregate amount of debts and such aggregate amount of assets shall be paid into the estate and the balance of such benefit or the balance of such portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee.
> [Para. *(b)* substituted by s. 21 of Act 54 of 1989.]
>
> *(b* A) If a member has a dependant and the member has also designated in writing to the fund a nominee to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the fund shall within twelve months of the death of such member pay the benefit or such portion thereof to such dependant or nominee in such proportions as the board may deem equitable: Provided that this paragraph shall only apply to the designation of a nominee made on or after 30 June 1989: Provided further that, in

respect of a designation made on or after the said date, this paragraph shall not prohibit a fund from paying the benefit, either to a dependant or nominee contemplated in this paragraph or, if there is more than one such dependant or nominee, in proportions to any or all of those dependants and nominees.
[Para. *(b* A *)* inserted by s. 6 *(a)* of Act 51 of 1988 and substituted by s. 21 of Act 54 of 1989 and by s. 5 *(b)* of Act 22 of 1996.]

(c) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member and if the member has not designated a nominee or if the member has designated a nominee to receive a portion of the benefit in writing to the fund, the benefit or the remaining portion of the benefit after payment to the designated nominee, shall be paid into the estate of the member or, if no inventory in respect of the member has been received by the Master of the Supreme Court in terms of section 9 of the Estates Act, 1965 (Act 66 of 1965), into the Guardian's Fund.

[8] The applicant contended that the decision of the board of trustees was subject to judicial scrutiny and reviewable in terms of the provisions of the Promotion of Administrative Justice Act no. 3 of 2000 (hereinafter "PAJA"), on the following grounds:

i) The decision was taken unilaterally and without giving her notice or affording her a hearing;

(ii) The nomination by **Nceba Titi** was effectively a *stipulatio alteri* in her favour which she had accepted. The respondent's board of trustees was therefore not at liberty to depart from his written instructions.

[9] At the hearing of the matter however, *Mr Noxaka,* who appeared for the applicant, stated that he relied only on the *audi alteram partem* argument and elected, for the purposes of this application, not to persist with the *stipulatio alteri* argument. He

submitted therefore that the impugned decision should be set aside and the matter referred back to the respondent's board of trustees with directions to afford the applicant a proper hearing.

[10] *Mr Noxaka* furthermore submitted that the decision of the respondent fell within the ambit of the definition of "*administrative action*" in terms of PAJA. Section 1 defines *"administrative action*" as:

> 'Any decision taken or failure to take a decision by -
>
> b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of empowering provision, which adversely affects the rights of any person and which has a direct external legal effect…"

[11] *Mr Noxaka* submitted that the source of the respondent's powers, when deciding whether or not to override the explicit stipulations of members, derives solely from the provisions of s. 37C of the Act. Therefore, being an entity established in terms of the provisions of the Act, it is exercising a public function when administrating the funds of its members.

[12] *Mr Noxaka* relied for his submission in this regard on the unreported decision of **Cebisa Kalimashe v Eskom Pension and Provident Fund** (Case no 561/08 Mthatha High Court), where Nhlangulela J found that the Eskom Pension and Provident Fund

exercises a public function "*as the administrator of insurance policies given by the insurer in lieu of the invested fund serves to protect its members by ensuring that the fund is operated in the best interest of members, including ensuring that payment of insurance contributions by Eskom is regular".*

[13] *Mr Hobbs,* who appeared for the respondent, submitted that that matter is distinguishable on the basis that the learned Judge had found that Eskom is a public company which performs a public function, namely the supply of electricity throughout the Republic.

[14] While I agree with *Mr Hobbs* that the issue was somewhat more straightforward in that case, I am nevertheless of the view that the respondent, when acting in terms of the provisions of the Act and administering the funds on behalf of its members, is exercising a public power. The decisions which it is empowered to take in terms of s. 37C of the Act, and in particular the power to effectively override the express wishes of its members, may conceivably affect members of the public. Any decision made in pursuance thereof and which could negatively impact on members of the public would therefore be subject to judicial scrutiny and review in terms of the provisions PAJA. The applicant was therefore entitled to fair administrative action and more particularly, in terms of s. 3(2)(b) of PAJA, entitled to:

> "(i) Adequate notice of the nature and purpose of the proposed administrative action; and
>
> (ii) a reasonable opportunity to make representations."

[15] This argument is however a double edged sword. *Mr Hobbs* has, in my view, correctly argued that if PAJA is of application then the whole of that act and not only selected provisions thereof must be applied. He referred in particular to s. 7(2)(a) and (b) thereof which provide as follows:

> "(a) Subject to paragraph (c) no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for any other law has first been exhausted.
>
> b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act."

[16] *Mr Hobbs* has also correctly pointed to the fact that there is no application for condonation of the failure to exhaust internal remedies in terms of the provisions of s. 7(2)(c) of PAJA.

[17] It is indeed so that the Act provides comprehensively for internal remedies for an aggrieved person. Section 30A provides as follows:

> "(1) Notwithstanding the rules of any fund, the complainant may lodge a written complaint with the fund for consideration by the board of the fund.
>
> (2) A complaint so lodged shall be properly considered and replied to in writing by the fund or the employer who

participates in a fund within 30 days after receipt thereof."

[18] If the complainant is not satisfied with the reply, it may refer the matter to an adjudicator who is appointed in terms of s. 30C of the Act. The adjudicator has comprehensive powers to deal with complaints serving before him or her and in terms of s. 30D is enjoined to dispose of such complaints in a procedurally fair, economical and expeditious manner.

[19] Section 30E provides that

> "(1) In order to achieve his or her main object, the adjudicator-
> (a) Shall, subject to paragraph (b), investigate any complaint and may make the order which any court of law may make."

[20] The applicant has not made any attempt to place before the court exceptional circumstances which prevented her from pursuing these effective internal remedies. She has also not applied for condonation in terms of PAJA. The statutory remedies which are available to the applicant provide for complaints and appeals to be adjudicated and finalized by the relevant functionaries within a reasonable time and in a fair and transparent manner. There can be no conceivable justification for the applicant's failure to pursue these remedies before applying for judicial review.

[21] For these reasons I am satisfied that this is an appropriate case where the applicant should be directed to first exhaust these

internal remedies before instituting proceedings in a court for judicial review.

[22] *Mr Hobbs* has also argued that the applicant should be ordered to pay costs on an attorney and client scale. His submissions in this regard were based on correspondence which the respondent's attorneys have addressed to the applicant's attorneys wherein they have drawn the attention of the latter to the remedies provided for in the Act. They also suggested that the matter be withdrawn with no order as to costs and that it be referred for adjudication to the Pension Funds Adjudicator in terms of s. 30A of the Act. The applicant's attorneys' rejection of this proposal appears to have been based on the assertion that her nomination as beneficiary was in effect a *stipulatio alteri* which had been accepted by her and that the respondent's Board of Trustees was therefore constrained to act in accordance therewith. They also appeared to have been of the view that because no legal representation was allowed if the matter is referred to the Pension Fund Adjudicator, the applicant would have been unduly prejudiced.

[23] *Mr Hobbs* submitted that in the light of the fact that the applicant had persisted with the application despite the invitation by the respondent to settle the matter, she should be mulcted with attorney and client costs.

[24] It is trite law that an order for cost on an attorney and client scale is a punitive one and should be awarded in exceptional circumstances only. See in the regard **Sentrachem Ltd v Prinsloo 1997 (2) SA 1 (A).** In the matter of **Nel v Waterberg Landbouwers Ko-Operatiewe Vereeniging 1946 AD 597** Tindall JA said the following in this regard:

> "The true explanation of awards of attorney and client cost not expressly authorized by Statute seems to be that, by reason of special considerations arising either from the circumstances which give rise to the action or from the conduct of the losing party, the court in a particular case considers it just, by means of such an order, to ensure more effectually than it can do by means of a judgment for party and party costs, that the successful party will not be out of pocket in respect of the expenses caused to him by the litigation."

[25] The applicant was obviously wrongly advised by her attorneys and the assertions of law on which the decision was based to reject the settlement proposals emanating from the Respondent's attorneys were obviously wrong. This does however, in my view, not justify the award of costs on an attorney and client scale as a punitive measure. In any litigation before a court of law one of the litigants' understanding of the law will inevitably be declared by the court to have been wrong. The fact that this may have been brought to the attention of the litigant by his successful opponent at an earlier stage of the proceedings and that the former had elected to proceed notwithstanding such notification, does in my view not justify the losing party to be mulcted with attorney and client costs.

See in this regard **Van Wyk v Millington 1941 SA 1205 (C); Silverstream Investments (Kranskop) CC v Ronbo Automotive CC 1997 (1) SA 107 (D).**

[26] On the facts before me I am unable to conclude that the applicant was not *bona fide* in bringing the application or that the proceedings are vexatious or an abuse of the legal process. For these reasons I am of the view that it is appropriate for costs to be awarded on a party and party scale.

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

(1) The application is dismissed with costs;

2) The applicant is directed to first exhaust the internal remedies provided for in the Pension Funds Act, no 24 of 1956, before instituting proceedings in a court of law for judicial review in terms of the provisions of the Promotion of Administrative Justice Act, no 3 of 2000.

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J. E SMITH
JUDGE OF THE HIGH COURT

<u>Appearance</u>

Counsel for the Applicant	:	Mr. Noxaka
Attorney for the Applicant	:	A. F NOXAKA & CO No 63 Ludidi Building Madeira Street Mthatha Ref: AFN
Counsel for the Respondent:		Mr. Hobbs
Attorney for the Respondent:		KEITH SUTCLIFF & ASS. C/o HUGHS, CHISHOLM AIREY No 14 Park Road Mthatha Tel: 047 5311 624/8 Ref: Mr. R. M. Gormley/ns/M261
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