THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA MAIN SEAT

CASE NO: 4544 / 2023

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

07 August 2024 [redacted]
DATE ....
SIGNATURE

In the matter between:

SOUTH AFRICAN RETIREMENT ANNUITY FUND	**APPLICANT**

And

PENSION FUNDS ADJUDICATOR	**FIRST RESPONDENT**
SOPHIA EM VILJOEN	**SECOND RESPONDENT**

J U D G M E N T

RATSHIBVUMO J:

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 08H00 on 07 August 2024.

[1] Introduction

It is common cause that one of the purposes of the Pension Fund Act no. 24 of 1956 (the Act), was to protect the dependants of a pension fund member (the member) in that any benefit payable by the pension fund (the Fund), upon the death of the member, shall be paid directly to the dependant(s) of the member. To that extent, section 37C of the Act provides,

> "(1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, <u>any benefit</u> (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) <u>payable by such a fund upon the death of a member, shall,</u> subject to a pledge in accordance with section 19(5)(b)(i) and subject to the provisions of sections 37A(3) and 37D, <u>not form part of the assets in the estate of such a member</u>, but shall be dealt with in the following manner:
>
> (a) <u>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</u> or, as may be deemed equitable by the fund, to one of such dependants or in proportions to some of or all such dependants.[1]
>
> (b) …
>
> (c) <u>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</u> 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, <u>the benefit</u> or the remaining portion of the benefit after payment to the designated nominee, <u>shall be paid into the estate</u>

[1] Para. (a) was substituted by s. 5 of Act 22/96 and s. 51 of Act 45/2013 w.e.f. 28 February 2014.

<u>of the member or, if no inventory in respect of the member has been received by the Master</u> of the Supreme Court in terms of section 9 of the Administration of Estates Act, 1965 (Act No. 66 of 1965), <u>into the Guardian's Fund or unclaimed benefit fund.</u>" [My emphasis].

[2] The dispute however centred around the interpretation of the passage above on when does the twelve months start to run. Does it start when the member dies or it starts when the fund is made aware of the member's death? The interpretation becomes relevant when the Fund becomes aware of the member's death, more than twelve months later, as it happened *in casu*. The South African Retirement Annuity Fund (the Applicant), took a view that as it became aware of the death after the twelve months had lapsed, there was no obligation on it to trace the member's dependants and to pay the death benefit due to them. It took the decision to pay the death benefit into the deceased member's estate.

[3] Aggrieved by this decision, the Second Respondent, who was the deceased member's dependant and spouse, complained to the office of the Pension Fund Adjudicator, the First Respondent. In interpreting the statutory provision above, the First Respondent decided that the duty on the Applicant to trace the dependants starts the moment the Fund is made aware of the deceased member's death, and that it does not start from the actual date of death. On 23 June 2023, she proceeded to hand down the order in the following terms:

3.1 The decision by the Fund to pay the death benefit into the deceased's estate, is hereby set aside.

3.2 The Fund is directed to immediately commence with investigations in terms of section 37C of the Act, determine the deceased's beneficiaries and their benefit entitlement within six weeks of this determination;

3.3 The Fund is ordered to notify the beneficiaries of its decision in terms of the allocation of the death benefit in paragraph [3.2] above, within one week of completion thereof; and

3.4 The Fund is ordered to pay the death benefit to the deceased's beneficiaries as identified in paragraph [3.2] by no later than 31 August 2023.

[4] The Applicant took a dim view of this interpretation as in its view, it goes against the literal interpretation of the statutory provision. It is on that basis that it brought this application in terms of section 30P of the Act to have the decision of the First Respondent set aside. The application is opposed by the Second Respondent.

[5] Condonation.

Section 30P of the Act provides,

"30P 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."

[6] The application was issued on 29 September 2023, almost three months after the ruling by the First Respondent. The application was clearly out of time given the provisions above to the effect that any application should be brought within six weeks from the date of the ruling sought to be reviewed, was made.

It is for this reason that the Applicant seeks an order condoning its non-compliance with the legislative provision. The duration by which the issuing of the application was delayed does not appear to be magnitude, or there is no such submission made before the court. It also does not appear like any party suffered substantial prejudice, other than the fact that any delay is generally prejudicial to the prospective dependants, and in this case, the Second Respondent. The condonation is not opposed by the Second Respondent. For these reasons, condonation should be allowed.

[7] Background

The Applicant is a retirement annuity fund that was started in 1961.It is underwritten and administered by Old Mutual Life Assurance Company (South Africa) Limited. It is also registered with the Financial Sector Conduct Authority. It operates as a legal entity in its own right and is administered by a board of trustees.

[8] Mr. M Viljoen (the deceased member) became a member of the Applicant in 2006. He died on 26 December 2019 leaving a death benefit of R52 120.53 (before tax), held by the Applicant. At the time of his death, the deceased had not nominated a beneficiary to receive the death benefit and he left no will. At the time the Applicant was informed of his death, no executor has been appointed to his estate, which is estimated to be below R250 000.00 in value. The Applicant learned about the death of the deceased member for the first time on 28 March 2022, when the Second Respondent submitted a claim to it.

[9] The Second Respondent, Ms. SEM Viljoen, was a spouse to the deceased member. She resides within the area of this court’s jurisdiction. She was a housewife throughout her life who depended wholly on the deceased member. Her only source of income is the social relief grant she receives from the South

African Social Security Agency – SASSA, owing to her old age. This information was advanced by the Second Respondent to the Applicant in an attempt to demonstrate that she was a dependant of the deceased. She did not immediately bring it to the attention of the Applicant that the deceased had died because she was not aware that he was its member. Her claim was only submitted on her behalf by the brokers whom she approached after she was referred to them.

[10] Whereas the Applicant acknowledges that section 37C(1)(a) of the Act mandates it to investigate and trace all the deceased member's dependants and to pay them the death benefit due to them; in this instance, it did not attempt to trace them. The reason for not doing so is that in its understanding of the relevant statutory provision, that duty only arises if it (the Applicant) learns of the death within twelve months of the death of a member. Since in this case it only learned of the death after the twelve months had lapsed, it decided not to investigate, but to rather pay the death benefit into his estate.

[11] The Pension Fund Adjudicator's ruling.

The Pension Fund Adjudicator was cited in this application as the First Respondent. She elected not to oppose or take part in the proceedings. Her ruling was attached to the founding affidavit. In the ruling, it appears plainly clear that before penning down her decision, the First Respondent afforded the Applicant and the Second Respondent opportunities to present their submissions. At the end, the decision boiled down to the proper interpretation of section 37C(1)(c) of the Act.

[12] The question before the First Respondent was, when does the twelve months, within which the Fund is required to finalise the tracing and investigation of the deceased member's dependants, start counting? Is it from

the date of death of the deceased member, or the date the Fund becomes aware of his/her death. The Applicant was adamant that the literal interpretation of the statutory provision was the proper approach. It submitted that section 37C(1)(a) & (c) of the statute obliges it to pay the death benefit to the estate if no dependant of the deceased member is traced within twelve months from the date of his death. This remains its contention in this application.

[13] The First Respondent was alive to the contentious statutory provision which was fully quoted in her ruling. She went on to express the following,[2]

> "The general rule expressed in section 37C(1) of the Act that the death benefit does not form part of the estate is subject to three exceptions. The Fund can pay a death benefit into the deceased's estate only under the following circumstances:
>
> - It has not identified any dependant and there is no nominated beneficiary, but the estate's liabilities exceed its assets; or
> - The deceased has no dependants and did not designate a nominee in writing; or
> - The deceased has designated a nominee only to receive a portion of the death benefit, and the remaining balance must be paid to the estate (see *Jacobs NO v Central Retirement Annuity Fund and Another* (2001) 1 BPLR 1488 (PFA))."

[14] The First Respondent further reasoned that section 37C of the Act required the Fund to be proactive in locating the member's dependants and investigate the extent of their dependency. In reaching this conclusion, she relied on an earlier decision of *Itumeleng v SALA Pension Fund*.[3] In her analysis, it came out clear that the Fund would not know if there are dependants without conducting an investigation. She concluded as a result, that the twelve-months period starts running from the time the Fund learns about the death of a member. In reaching this conclusion, the First Respondent relied on a

[2] See paragraph 5.7 of the First Respondent's ruling.
[3] [2007] 3 BPLR 311 (PFA).

decision by the High Court in *Masindi v Chemical Industries National Provident Fund*[4] where the court held,

> "Whilst section 37C(1) does not expressly state that the 12 month' investigation period to trace the dependants of a deceased only commences once the Fund has obtained knowledge of the death of the deceased, the only logical interpretation of this section is that a Fund cannot comply with its obligation if the legislative requirement for its imposition, namely the death of a member, is not made known to the Fund. In *Government Employees Pension Fund Provincial Government of Gauteng v Buitendag & Others*[5] it was held that the employer in that matter had the obligation to provide the Fund with information pertaining to the dependents of the deceased. By implication, the employer had to inform the Fund of the death of the deceased as well. The 12 month' period could only have commenced to run from the time that the respondents became aware that the deceased had died."

[15] Discussion.

I find the interpretation in *Masindi* to be logical and in line with the purport of the Legislature when it enacted section 37C of the Act. Any other interpretation would be absurd and defeating the purpose and the spirit of the Act, which is to protect the member's dependants and give them access to the benefits, without having to compete with other creditors who lay their claims against the estate. I also hold a view that if the Applicant's interpretation was to prevail, the Fund would end up with far shorter than the envisaged twelve months to trace and investigate the dependants, upon death of a member as practically, it is near impossible for a Fund to know of the death on the day a member dies. One would expect that after the burial and mourning period, the Fund would be notified of the death, through the member's employer. In those instances, that could be a month or maybe two after the death, meaning the Fund would be left with ten or eleven months to trace and investigate the dependants.

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[4] [2017] JDR 0480 (GJ) at paragraph 27.
[5] [2007] 1 All SA 445 (SCA) at paragraph 20.

[16] The interpretation in *Masindi* also appears to be in line with approved general approach in many other similar provisions, to the effect that the countdown only commences when one is made aware of the root cause, as opposed to the date of the root cause, irrespective of whether one has been alerted of that root cause. For example, prescription may not start running on the date the debt becomes due if the creditor is not aware of the facts that give rise to the debt.[6]

[17] When counsel for the Applicant was invited to comment on the practice adopted in respect of the prescription of a debt, he submitted that the provision in the Prescription Act confirms his argument in that the Legislature was conscious of the possibilities that the death of a member may not become known to the Fund early enough, as much as it knew that a creditor may not become familiar with the facts that give rise to the debt. The Legislature however, so it argues, chose not to make a similar provision when it comes to the Pension Fund Act, as it did in the Prescription Act, which suggests that this could not have been an error or omission on its part.

[18] In as much as the Supreme Court of Appeal (the SCA) in *Buitendag*, held that the employer had the obligation to provide the Fund with information pertaining to the dependents of the deceased and to inform it of the death of the deceased, it appears that the Legislature may not have envisaged the situation where it could be practically possible for the Fund to be unaware of the death of a contributing member for longer than twelve months. It understandable for the Legislature not to foresee this in that, practically, the employer should be amongst the first to realise when a member ceases to work and/or contribute to the Fund. This would naturally force it to investigate the cause thereof and

[6] See section 12(3) of the Prescription Act, No. 68 of 1969 which provides, "[a] debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises…"

bring it to the attention of the Fund. If this does not happen, and the Fund is not informed that a member has ceased from making regular contributions, it exposes the employer or ‘the Fund’s failure in carrying out the mandatory duties referred to by the SCA in *Buitendag*.

[19] Both the Applicant and the Second Respondent expressly made it clear that they do not challenge the constitutional validity of the provisions of section 37C(1)(c) of the Act. They only want the court to confirm the correct interpretation thereof. There seems to be consensus that the above statutory provision is capable of more than one interpretations. The first interpretation is the one advanced by the Applicant and the other one, by the Second Respondent, which is in line with the First Respondent’s ruling. I hold a view that the interpretation advanced by the Applicant lacks logic for going against the purpose and the spirit of the Act.

[20] In *De Beer N.O. v North-Central Local Council and South-Central Local Council (Umhlatuzana Civic Association Intervening)*,[7] the Constitutional Court held that, where a statutory provision is capable of more than one reasonable construction, one of which would lead to constitutional invalidity and the other not, a court ought to favour the construction which avoids constitutional invalidity, provided such interpretation is not unduly strained.

[21] The interpretation advanced by the Applicant would not only defeat the purpose of the Legislature in enacting section 37C(1) of the Act; but would also fail in ensuring that the Fund carries out its mandate to trace the dependants and investigate their dependency on the deceased member. The Fund could simply sit back instead of being proactive, until the twelve months is over; only for it to claim that it did not investigate because it only became

[7] [2001] ZACC 9; 2002 (1) SA 429 (CC); 2001 (11) BCLR 1109 (CC) at paragraph 24.

aware of the death after twelve months had lapsed. There are no safeguard measures through which the Fund can be held accountable for doing nothing to investigate while years go by without any further contribution from a member who, by anyone's judgment, it would mean that he has died or ceased to work. The lacuna in the Act, real or perceived, cannot be used as a means to condone the failure by any party to heed the mandate given by the same statutory provision. If this is allowed, the statute shall become self-destructive for failing to police adherence to its provisions.

[22] The Applicant's interpretation is not consistent with the general purpose of the Act that mandates the Fund to be proactive in tracing and investigating. It is too rigid, and in the process, it forgets the purpose for the existence of the same statutory provision it attempts to interpret. It is for this reason that in *Fundsatwork Umbrella Pension Fund v Guarnieri and Others*[8], the SCA said, where there is doubt about the identity of the dependants who are to receive a distribution, or as to the correct distribution among those dependants, the board is not bound by the twelve months period, but may delay for a time necessary to resolve the issue.

[23] In light of the above, I conclude that the order made by the First Respondent is consistent with the purpose of the Act. The interpretation preferred by the Applicant has a potential to prejudice the dependants of the deceased member. For these reasons, the application to set aside the decision of the First Respondent has to fail.

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[8] 2019 (5) SA 68 (SCA).

[24] As for costs, counsel for the Second Respondent referred this court to the words of the Constitutional Court in *Mudau v Municipal Employees Pension Fund*[9] where it said,

> "We were informed that counsel for Mr Mudau, Mr S Khumalo SC, Mr K Magan, Ms L Mbatha and Mr B Letuka represented Mr Mudau *pro bono*. They did so with aplomb and commendable ability. This act of public service is recognised and acknowledged as an important contribution to advancing the objective of access to justice for all. Section 92(1) of the Legal Practice Act provides that, even when legal services are rendered for free, when costs become payable to a litigant, the award of costs that this court makes in favour of that litigant is deemed to have been ceded to the legal practitioner. This provision finds application in these proceedings insofar as it relates to the costs of counsel and the costs award should therefore include these costs, with the costs of two counsel being warranted."

[25] The words above were directed to the services offered by the same counsel who appeared for the Second Respondent in this case. This court was also informed that he and the instructing attorneys offered their services to the Second Respondent, who is an unemployed widow, *pro bono*. I think it is befitting to repeat every word expressed by the Constitutional Court given the commitment and hard work they dedicated to this matter. The award of costs that this court makes in favour of that litigant is deemed to have been ceded to the legal practitioner as provided in Section 92(1) of the Legal Practice Act, No. 28 of 2014.

[26] For the aforesaid reasons, I make the following order.

[26.1] The Applicant's failure to comply with section 30P of the Pension Fund Act is condoned.

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[9] 2023 (10) BCLR 1165 (CC); [2023] 11 BLLR 1109 (CC); (2023) 44 ILJ 2641 (CC) (2 August 2023) at paragraph 78.

[26.2] The application is dismissed with costs on party and party scale C.

[26.3] The order of the First Respondent is confirmed.

[26.4] The Applicant is ordered to comply with the First Respondent's order as per paragraphs 3.1 to 3.4 of this judgment, within 60 days from the date of this order.

[redacted]

TV RATSHIBVUMO
JUDGE OF THE HIGH COURT

FOR THE APPLICANT	**: ADV. E FAGAN SC**
INSTRUCTED BY	**: WALKERS INC** **C/O: KRUGER & PARTNERS INC** **MBOMBELA**
FOR THE RESPONDENT	**ADV. S KHUMALO SC**
INSTRUCTED BY	**: RW ATTORNEYS** **C/O: MAKHOBA ATTORNEYS INC** **: MBOMBELA**
DATE HEARD	**: 23 JULY 2024**
JUDGMENT DELIVERED	**: 07 AUGUST 2024**