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

CASE NUMBER: 075889/2024

HEARD ON: 19 MARCH 2025

JUDGMENT: 26 MAY 2025

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: NO

DATE: 26 May 2025

SIGNATURE:

In the matter between:

TAKALANI FORTUNATE MUDAU

FIRST APPLICANT

ANZATSHILIDZI MUDAU

SECOND APPLICANT

AMPFARISO MUDAU

THIRD APPLICANT

KHATHUTSHELO PERCY MAFUNISA

FOURTH APPLICANT

RONWA MAFUNISA

FIFTH APPLICANT

AND

TELKOM RETIREMENT FUND

FIRST RESPONDENT

MOMENTUM METROPOLITAN LIFE LIMITED

SECOND RESPONDENT

PENSION FUND ADJUDICATOR

THIRD RESPONDENT

JUDGMENT

STRIJDOM, J

1. This is an appeal in terms of section 30P of the Pension Funds Act 24 of 1956 (“the Act”) against the determination of the Pension Fund Adjudicator dated 24 May 2024.
2. The application is opposed by the first respondent, the (Telkom Retirement Fund. “the Fund”).
3. The applicants seek the following relief:
 - 3.1 That the Pension Fund Adjudicator’s determination dated 24 May 2024 with reference number P[...] be set aside.
 - 3.2 That the annuity under the administration of the second respondent in the name of AN Netshimbupfe (“the deceased”) be terminated.
 - 3.3 The balance of the pension funds plus interest be paid to the beneficiaries as per the beneficiary nomination form signed by the deceased.
4. At the commencement of the application it was submitted on behalf of the first respondent that the applicants are time barred from instituting an appeal in terms of section 30P of the Act. It was later conceded that the appeal was instituted timeously.
5. It was further contended by the first respondent that the supplementary affidavit filed by the applicants and two affidavits attached to the applicant’s replying affidavit are not properly before Court.¹ I ruled that the said affidavits are not properly before me for the reason that the applicants have not made an application for leave to submit further affidavits as contemplated in High Court Rule 6(5)(e).

¹ Caselines: 001-82 para 29

6. The late Mrs Netshimbupfe (“the deceased”) was an employee of Telkom Limited (“the employer”) and by virtue of her employment, the deceased became a member of the Telkom Retirement Fund (“the first respondent.”)
7. During the year 2017 the deceased was diagnosed with cancer and received chemotherapy and radiation treatment. Her condition worsened in the year 2020 and the cancer developed to stage 4.
8. As the deceased was not fit for work, she resigned from her employment by opting for voluntary severance package.
9. On retirement the deceased was offered counselling which was facilitated by first respondent, the counselling was offered to educate the deceased on the options available on her retirement. After the counselling session on the 12th of March 2020 the deceased was furnished with forms to complete with the assistance of a financial advisor/employee of the first respondent.
10. On 12 June 2020 the deceased made a codicil to her Will and sets forth her wishes regarding the distribution of her assets. Her condition worsened and as a result she passed away on 25 July 2020.
11. The applicants’ main contention is that since the deceased was aware that she was terminally ill, she would not have elected to purchase an annuity and must have been coerced or misled into doing so. Consequently, the applicants seek that the remaining pension benefits be immediately paid to them in terms of the deceased’s wishes as recorded in a nomination form.
12. The following facts are common cause between the parties:
 - 12.1 The deceased was a member of the Fund by virtue of her employment with Telkom SA. Her membership with the Fund commenced on 1 July 1996.

- 12.2 The deceased's service with the employer was terminated voluntarily with effect from 1 April 2020.
- 12.3 At the date of termination the deceased was 59 years old and qualified for early retirement in terms of Fund Rule 5.2.2.
- 12.4 On or about 12 March 2020, the deceased submitted a withdrawal claim form to the Fund.
- 12.5 In terms of the withdrawal claim form, the deceased purportedly elected to receive a portion of her benefit to the value of R150 000,00 as a lump sum with the remainder to be used to purchase an annuity. The withdrawal claim form is attached to the founding affidavit as "ANN3".²
- 12.6 The fund made payment to the deceased in the amount of R125 751,84 (R150 000 before taxable deductions) as a lump sum. The remainder of the benefit namely R1 666,416,13 was used to purchase an annuity in line with the withdrawal claim form.
- 12.7 On 15 July 2020, the Fund confirmed the above payment to the deceased by way of a letter marked "TRF3" to the answering affidavit.
- 12.8 On 13 July 2020 the Fund made payment of the deceased's monthly pension for the period April to July 2020 as a lump sum amounting to R40,185,00.
- 12.9 The deceased passed away on 25 July 2020.
- 12.10 On 20 October 2023, the applicants lodged a complaint with the Pension Funds Adjudicator ("the adjudicator").

² Caselines: 001-65

12.11 On 24 May 2024, the adjudicator handed down the impugned determination.

12.12 On 9 July 2024, the applicants lodged the present application to set aside the impugned determination as contemplated by section 30P of the Act.

13. It was submitted by counsel for the applicants that the deceased elected the annuity she elected because she was deceived into believing that it was the right product considering her circumstances, in a nutshell she was sold this product by the representative of the first respondent not that she chose it.

14. It was further contended on behalf of the applicants that the Will of the deceased is one of the relevant factors and evidence of background facts confirming that the deceased was of the belief that her pension fund will be distributed as per nomination form.

15. The founding affidavit is deposed to by applicant's attorney, who does not have personal knowledge of the relevant facts that the applicants seek to introduce. The allegations in the founding affidavit, to a large and material extent amount to inadmissible hearsay.

16. The facts were told to the attorney by people who have personal knowledge of the event in question. In para 27 of the replying affidavit the attorney states that he "has consulted with all the deceased's dependants and corresponded with all the respondents from the inception of the complaint, I have gained significant understanding on the matter hence I deposed in this application."³

17. The probative value of the allegations in the founding and replying affidavits depend on the credibility of the applicants and not their attorney. There are no confirmatory affidavits deposed to by the deceased's dependants (applicants) in support of the factual allegations in the founding affidavit. No

³ Caselines 001-82 RA para 27

satisfactory explanation has been provided for why the applicants have not given the evidence. Nothing prevented the applicants from deposing to the founding affidavit.

18. The Law of Evidence Amendment Act⁴ defines hearsay evidence as “evidence” whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence. In terms of section 3 of the Law of Evidence Amendment Act, hearsay evidence is inadmissible and shall not be admitted save for certain sections which do not apply in this matter.

19. In my view the hearsay evidence contained in the founding affidavit is inadmissible.

20. At paragraphs 3.1 and 3.2 of the adjudicator’s determination, the adjudicator records the complaint as follows:

20.1 The complainants wish to be paid in terms of the deceased’s wishes as captured on the beneficiary nomination form; and

20.2 The deceased could not have purchased an annuity as she was terminally ill and knew that an annuity would not benefit her.”

21. Since this is an appeal in the wide sense it constitutes a re-hearing of the applicant’s complaint. It was decided in **Meyer v Iscor Pension Fund**⁵ that the dispute submitted to the High Court is still a “complaint” as defined in the Act and must be substantially the same complaint that was submitted to the adjudicator.

22. Section 13 of the Act provides:

“13. Binding force of rules – subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members,

⁴ Act 45 of 1988

⁵ 2003 (2) SA 715 (SCA) at pages 725-726

shareholdres and officers thereof, and on any person who claims under the rules whose claim is derived from a person so claiming.”

23. In **Tek Corporation Provident Fund and Others v Lorentz**⁶ it was held that:

“... what the trustees may do with the fund’s assets is set forth in the rules. If what they propose to do (or have been ordered to do) is not within the powers conferred upon them by the Rules, they may not do it ...”

24. It is common cause that the deceased retired from service voluntarily at the age of 59 and qualified for early retirement in terms of Fund Rule 5.2.2 which provides:

“5.2.2 A member may after having attained the age of 55 years and before attaining the normal retirement age retire from service:

- (a) If he so decides; or
- (b) If he is dismissed from Service by the Employer for a reason other than a reduction or reorganization of staff.

On Retirement from the Fund, such Member shall become entitled to a Pension secured by the balance of his Member’s Share, after any commutation in terms of Rule 5.6.”

25. The term “pension” is defined in the Rules as:

- 25.1 the pension payable in terms of the Rules; or
- 25.2 the annuity or annuities, purchased from a registered insurer in terms of rule 7.2.

26. On 12 March 2020, the deceased submitted a withdrawal claim form to the Fund wherein she elected to receive a portion of her benefit, to the value of R150 000 as a cash lump sum with the remainder to be used to purchase an annuity. This election is in line with the peremptory wording of Rule 5.2.2

⁶ [1994] 4 ALL SA 297 (A) at para 28

which provides that a member shall become entitled to a pension after retirement from the Fund and after any commutation in terms of Rule 5.6.

27. The deceased passed away as a pensioner on 25 July 2020.

28. Rule 6.3.1 provides:

“6.3.1 On the death of a Pensioner who is not an A, B or C – Pensioner, his Pension shall cease as provided for in Rule 7.3(c)(1). The following benefits shall then be payable:

- (a) A lumpsum of R10 000-00 or such other amount as decided by the Trustees from time to time, subject to the maximum amount permitted in terms of income tax legislation; and
- (b) Subject to the provisions of Rule 7.1.3 or Rule 6.4 as applicable, a Pension to his Qualifying Spouse, commencing on the Pensioner's death, equal to 50% of the Pension payable immediately prior to the commencement of the Pension to the Qualifying Spouse and
- (c) A Pension in respect of Qualifying Children of the Pensioner equal in total to a percentage of the Pensioner's Pension immediately before his death, in accordance with the following table:

Number of Qualifying	Percentage of Pensioner's Pension
1.	9,375%
2.	18,75%
3.	28,125%

- (d) After the last payment to a Qualifying Spouse's Pension and/or Qualifying Children's Pension has been made, the Trustees shall deduct the total amount paid to the Pensioner, his Qualifying Spouse, Qualifying Children, dependants, and/or nominees including any amount which may have been paid in a lump sum, from the amount of the Member's Share at the date of Retirement From the fund. Should there be any positive difference, such positive difference shall become payable in terms of Section 37 C of the Act.”

29. According to Rule 6.3.1, after the death of a pensioner:

- 29.1 an amount of R10 000 becomes payable. It was stated in the answering affidavit that the Fund is awaiting documents to process this payment under subparagraph (a)
- 29.2 the deceased did not have a spouse, so no spousal pension is payable under subparagraph (b)
- 29.3 A child's pension is paid to the second applicant in terms of subparagraph (c).
- 29.4 The remaining residue of the benefit is to be distributed in accordance with section 37 C of the Act.

30. In terms of section 37 C of the Act, the Fund exercises a statutory discretion regarding the equitable distribution of accrued death benefits. Section 37C(1) provides:

“37 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 not form part of the asset in the estate of such a member, but shall be dealt with in the following manner ...”

31. The 4 (four) subsections under section 37C(1) deal with the following scenarios:

- 31.1 If the Fund, within 12 months, traces dependants of the member, the benefit shall be paid to such dependants as deemed equitable by the Fund to any and or all of those dependants;
- 31.2 If the Fund does not trace any dependants within 12 months, and the member has nominated beneficiaries in writing, the benefit shall be paid to such nominee's, subject to the deceased's estate being solved;
- 31.3 If a member has dependants and has also nominated beneficiaries in writing, the Fund shall within 12 months pay the benefit to such

dependant or nominee in such proportions as the board deems equitable.

31.4 If the Fund cannot trace a dependant within 12 months and the member has not nominated a beneficiary, the benefit shall be paid to the deceased member's estate.

32. The Fund has a wide discretion to pay a death benefit to some or all of the dependants and/or nominees in such proportions as it deems equitable.

33. In terms of Rule 6.3.1 the free residue of the benefit remaining after the child's pension is fully paid will be dealt with in terms of section 37C.

34. The monthly child's pension will cease when the second applicant attains the age of 25 years, at which point the difference referred to in Rule 6.3.1 (d) will be distributed in accordance with section 37 C of the Act.

35. In **Mashazi v African Products Retirement Benefit Provident Fund**⁷ it was decided that:

"Section 37 of the Act was intended to serve a social function. It was enacted to protect dependency, even over the clear wishes of the deceased. The section specifically restricts freedom of testation in order that no dependants are left without support. Section 37 (1) specifically excludes the benefits from the assets in the estate of a member. Section 37 C enjoins the trustees of the pension fund to exercise an equitable discretion, taking into account a number of factors. The fund is expressly not bound by a will, nor is it bound by a nomination form. The contents of the nomination form are there merely as a guide to the trustees, in the exercise of their discretion."

36. It was contended by the first respondent that section 37 C does not find immediate application upon the death of a pensioner and that it pertains to benefits payable upon the death of a member. It finds immediate application

⁷ [2002] 8 BPLR 3703 (W) at 3705-3706

where the death of a member is the triggering event for the payment of a benefit. In the present case, the relevant exit event is the deceased's election to receive an early retirement benefit, which occurred prior to her death. I agree with this submission.

37. There is no objective and admissible evidence to suggest that representatives of the Fund "deceitfully misled" the deceased to purchase an annuity. The applicants do not allege who "deceitfully misled" the deceased. It is not clear what the Fund, or its representatives, stand to benefit by misleading a member to purchase an annuity.

38. On a conspectus of all the evidence and common cause facts, I concluded that the adjudicator correctly determined that the Fund acted in compliance with its Rules. The adjudicator rightly concluded that there was no evidence to support the claim that the deceased was misled in purchasing an annuity.

Costs

39. The general principle that costs should follow the result, is applied.

40. In the result the following order is made:

1. The application is dismissed with costs on party and party scale B.

JJ STRIJDOM
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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