**IN THE HIGH COURT OF SOUTH AFRICA**

**(WITWATERSRAND LOCAL DIVISION)**

**CASE NO: 04/31647**

In the matter between:

**BERGE, RENEE JILL** Applicant

and

**ALEXANDER FORBES RETIREMENT FUND (PENSION SECTION)** First Respondent

**THE PENSION FUNDS ADJUDICATOR** Second Respondent

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**J U D G M E N T**

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**MOSHIDI, J:**

INTRODUCTION:

[1] This is an application in terms of section 30P of the Pension Funds Act, No. 24 of 1956 (**the Act**) to set aside the first respondent's trustees' final resolution/distribution of the death benefit based on its resolution dated 23

October 2002 as well as relief setting aside the second respondent's ruling and dismissal of the applicant's complaint handed down on 11 November 2004. The applicant has simultaneously asked for costs of the application against the first respondent and as far as the second respondent was concerned, costs only in the event of opposition. The second respondent has not opposed the application.

THE PARTIES:

[2] The applicant is Jill Renee Berge, the only biological relative and daughter of Mr Erling Ingvald Berg (the deceased) who was born on 8 June 1940 and who died on 3 December 2000. He died of myocardial infarction.

The first respondent is the Alexander Forbes Retirement Fund (Pension Section), a pension fund duly registered and constituted in terms of the Act.

The second respondent is the Pension Fund Adjudicator appointed by the Minister of Finance under section 30C of the Act.

Section 30P(1) of the Act provides as follows:

> "**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 Supreme Court which has jurisdiction, for relief, and shall at the same time give written notice of his/her intention so to apply to the other parties to the complaint**."

*In casu*, there is no dispute to the jurisdiction of this Court to entertain the application. In addition, in terms of subsection (2) of section 30P of the Act, this Court is empowered to hear evidence and to make any order it deems fit. It is also not in dispute that the application was brought within the time prescribed by section 30P(1) of the Act.

COMMON CAUSE FACTORS:

[3]

3.1 At the time of his death, the deceased was employed by Haggie Rand and was a member of the first respondent's pension fund. Also at the time of his death, the total death benefits payable by the first respondent amounted to the sum of R1 044 727,60 (One Million Forty Four Thousand Seven Hundred and Twenty Seven Rand and Sixty Cents);

3.2 The deceased had been married three times in his lifetime. As at the date of his death he was married to Molly Berge (Molly). They were married out of community of property on 29 June 1990. They had no children. Molly was the stepmother of the applicant;

3.3 Tracy Milledge (Tracy) was one of the stepdaughters of the deceased. She was a major, and employed and not financially dependent on the deceased;

3.4 There was no objection to Tracy sharing in the death benefit mentioned in paragraph 3.1;

3.5 The deceased did not complete a nomination of beneficiary form with the first respondent in regard to the death benefit;

3.6 In his last valid will, drawn up in April 1999, the deceased excluded Molly. He instead left his entire estate in the Republic of South Africa to the applicant and Tracy in equal portions. The total value of the assets was approximately R240 000 (R120 000). The assets overseas, in Norway, valued at approximately R500 000, were left to the applicant;

3.7 Prior to his death, the marriage relationship between the deceased and Molly was an unhappy one, although not culminating in a divorce action;

3.8 The applicant exercised her rights in favour of not making available to the first respondent her banking statements and details.

[4] In October 2002, the trustees, after a provisional determination which was circulated for comment to all the interested parties, and after extensive investigations, meetings and consultations, made a final distribution of the death benefit. The final distribution was 82% (R856 676,63) (Eight Hundred

Fifty Six Thousand Six Hundred Seventy Six Rand and Sixty Three Cents) to Molly; 10% (R104 472,76) (One Hundred and Four Thousand Four Hundred Seventy Two Rand and Seventy Six Cents) to the applicant and 8% (R83 578,21) (Eighty Three Thousand Five Hundred Seventy Eight Rand and Twenty One Cents) to Tracy.

[5] The applicant was unhappy with the final distribution. In the instant application, the applicant sought an order in the first place to set aside the final distribution and replacing such with an order overturning the trustees' decision and awarding the applicant 70% of the death benefit, and 15% each to Molly and Tracy.

[6] I shall deal later and briefly with the applicant's dissatisfaction and grounds for challenging the final distribution. The applicant later lodged a complaint with the second respondent (the Adjudicator) in which she complained that the trustees of the first respondent had been biased and had improperly exercised their powers in awarding 82% of the benefit to Molly while allocating only 10% to her. The second respondent duly considered the matter and later held that the trustees aforesaid had acted equitably in the distribution of the benefit and that there were no grounds for him to interfere in the decision. In the instant application, the applicant also sought an order setting aside the decision of the second respondent on the ground that the second respondent failed to properly consider the matter and misinterpreted the test applicable.

[7] In making the final distribution of the death benefit, the trustees of the first respondent were guided by the provisions of section 37C of the Act, which provides as follows:

> "**(1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19(5)(b)(i) and subject to the provisions of section 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 benefits 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.**"

Section 37C also has to be read with the definition of dependant contained in section 1 of the Act which provides as follows:

> "**'Dependant', in relation to a member, means –**
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> **(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 –**
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> **(i) was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;**
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> **(ii) is a spouse of the member, including a party to a customary union according to Black law and custom or to a union recognised as a marriage under the tenets of any Asiatic religion;**
>
> **(iii) is a child of the member, including a posthumous child, an adopted child and an illegitimate child;**

**(c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died.**"

THE APPLICANT'S COMPLAINT AGAINST THE FIRST RESPONDENT:

[8] I will now deal briefly with the applicant's complaints based on a number of allegations. The applicant contended that the trustees of the first respondent failed to exercise their discretion properly, fairly, equitably and judiciously in making the final distribution of the death benefit. It was contended, *inter alia*, that the trustees were from the onset biased in favour of Molly against the applicant; the true relationship between the deceased and Molly and between the deceased and the applicant was ignored; that the trustees who did not possess the expertise of a divorce lawyer, erred in basing their decision largely on the possible maintenance payable by the deceased to Molly in the event of a divorce; that the trustees totally disregarded the deceased's wishes of disinheriting Molly as contained in his last will; and that many factors considered by the trustees were incorrect and/or not properly considered and/or weighed in the decision-making. In turn, the trustees of the first respondent responded fully to the averments of the applicant, some of which averments were of a rather serious nature. One of the applicant's grounds for the review was that the trustees ignored the fact that it was not their function to place a beneficiary in a better position than she/he would have been in had the deceased been alive and continued to support such beneficiary.

THE APPLICABLE LAW:

[9] Based on the above exposition of the facts of the matter, the pertinent question was whether grounds existed for this Court to interfere with the decision of the trustees and the second respondent and set aside their respective decisions. The *onus* was on the applicant on a balance of probabilities, to prove that such decisions were wrongly taken. *In casu*, I was not provided with a copy of the rules of the first respondent. However, it was sufficiently clear that the trustees of the first respondent had a discretion in determining the distribution of the death penalty as envisaged in section 37C of the Act. It was indeed not argued otherwise. As far back as **Britten and Others v Pope** 1916 AD 150 at 157, the following was said:

> "**Now it has been repeatedly laid down that where a matter has by law been left to the discretion and determination of a public officer or body, and where discretion has been duly exercised, and a decision arrived at, a Court of Law cannot interfere with the result on the merits.**"

The discretion must be exercised fairly and reasonably. In **Estate Geeki v Union Government and Another** 1948 (2) SA 494 NPD, at 502:

> "**In considering whether proceedings of any tribunal should be set aside on the ground of illegality or irregularity, the question appears always to resolve itself into whether the tribunal acted ultra vires or not.**"

See also **Pretoria Licensing Board v Mader** 1944 TPD 419 at 437.

The applicant alleged bias. The test is a strict one. The applicant must show actual bias in the sense that the trustees had a closed mind and that they were not open to persuasion and had pre-judged the issues – see **President of the Republic of South Africa and Others v South African Rugby Football Union and Others** 1999 4 SA 147 (CC) at paragraphs [35] to [38]. *In casu*, the applicant's averments based on alleged bias were regrettably, and at most, unfounded. To the contrary, she was not entirely cooperative with the trustees. She refused to make available for scrutiny her bank statements.

The trustees of the first respondent had a broad discretion under section 37C of the Act. They duly considered the object and social purpose of section 37C. Molly was a legal dependant of the deceased. She did not inherit from the deceased's estate, as did the applicant. The applicant, unlike Molly, was younger, employed and earned a relatively good salary. The contention that the allocation of the death benefit rendered Molly better off than she would have been had the deceased survived was highly speculative and totally impossible to determine.

The trustees of the first respondent had a discretion to distribute the death benefit to the deceased's dependants in such proportions as the trustees deemed equitable. In doing so, they considered all the relevant considerations and were not influenced by improper considerations and otherwise exercised their discretion lawfully, rationally and reasonably to make it unwarranted for this Court to interfere with the exercise of their discretion.

From the totality of the documentation, it was more than evident to me, and that is my view, that the trustees of the first respondent gave proper consideration to all the relevant factors in making their decision during the exercise of their discretion. Even though I may have exercised my own discretion slightly differently or considered that a more equitable allocation could have been made, that alone, in my view, constituted insufficient ground for acceding to the applicant's prayers in terms of the Notice of Motion.

The trustees have considered the social function and purpose of section 37C, which was to protect dependency even over the clear wishes of the deceased. The trustees clearly took particular account of the respective financial dependence of the various dependants and after a full consideration of the facts reached the conclusion that Molly had a greater dependency than that of the applicant, and that it would be equitable in the circumstances to award her the majority of the benefit. The applicant inherited the majority of the assets of the deceased estate. See in this regard **Mashazi v African Products Retirement Benefit Provident Fund Ano** 2003 (1) SA 629 (W) at 632H-633B as well as **Van der Merwe and Others v Southern Life Association and Another** (2000) BPLR 321 (PFA). And also **Musgrave v Unisa Retirement Fund** (2000) 4 BPLR 414 (PFA) at 424C-E.

On the totality of the documentation and evidence presented, the trustees of the first respondent indeed acted fairly, consulted widely, investigated the matter thoroughly, considered all the factors evenly and made a decision. They used their discretion fairly and reasonably – see in this regard **Union**

**Government v Schierhout** 1922 AD 189. The applicant was clearly unjustifiably unhappy with the decision. She merely alleged impropriety and bias on the part of the trustees without any substantiation. She failed, without just cause, to cooperate with the trustees – even though she ended up financially better off than the other beneficiaries. In fact, there was nothing at all in the evidence before me to substantiate her contentions that the trustees' distribution of the death benefit was the result of an improper exercise of their discretion or that they were in fact biased in favour of Molly and against her. In the end, the applicant has failed to discharge the *onus* resting on her entitling this Court to interfere. The application therefore must fail.

THE APPLICANT'S COMPLAINT AGAINST THE SECOND RESPONDENT:

[10] I now deal with the applicant's complaint against the second respondent. The applicant alleged that the second respondent failed to properly consider the matter and/or that he misinterpreted the test to be applied by him. I have carefully studied the second respondent's reasoning and conclusion reached. In paragraph 13 of his report dated 11 November 2004, the second respondent stated as follows:

> "**Once the trustees have conducted a proper investigation to ascertain the cycle of dependants and beneficiaries and taken into consideration all relevant factors and ignored all irrelevant factors, when they allocated the benefit, the allocation will be just and equitable. It is not my role to determine what the fairest or most generous distribution is, but rather to determine whether the trustees have exercised their discretion property and equitably in terms of law. (Jordaan v Protektor Pension Fund)**."

Further on in paragraph 20 of his report, the second respondent stated as follows:

> "**As regards the second leg of your complaint, I have this to say. In order to qualify as a "category (a)" dependant, you will have to prove that the deceased was legally liable to maintain you. Because you are a major and were also financially independent from the deceased, you have not discharged the onus of proving that the deceased was either under a legal or common law duty to maintain you.**"

CONCLUSION:

[11] Patently evident from the second respondent's ruling and dismissal of the applicant's complaint, was that he gave proper consideration to all the issues before him and adopted the appropriate test in reviewing the first respondent's trustees' distribution of the death benefit. It was clear that the second respondent properly and fairly considered the complaint as envisaged by section 30D of the Act. His decision can hardly be faulted in any way. The applicant's averments directed at the second respondent were once more, unsubstantiated. There was accordingly no basis at all for setting aside the second respondent's decision and the application in this regard, as well, should fail.

In the end, I make the following order:

1. "**The application is dismissed with costs**."

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**D S S MOSHIDI**
**JUDGE OF THE HIGH COURT**

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| DATE OF HEARING | 4TH OCTOBER 2005 |
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