IN THE HIGH COURT OF SOUTH AFRICA

[GAUTENG DIVISION, PRETORIA]

CASE NUMBER: 35511/2012

DATE: 16 JULY 2015

In the matter between:

[S……] [R……] [S……]	**APPLICANT**
And	
GOVERNMENT EMPLOYEES PENSION FUND	**FIRST RESPONDENT**
CYNTHIA PANA NAKEDI	**SECOND RESPONDENT**
EXECUTOR, ESTATE LATE [O…..] [S…….]	**THIRD RESPODENT**
MASTER OF THE HIGH COURT, PRETORIA	**FOURTH RESPONDENT**

JUDGMENT

A.J. LOUW AJ

[1] In this matter Mr Heymans appeared for the Applicant, Mr Kabini appeared for the First Respondent and Mr Holland-Muter for the Second Respondent.

[2] When the matter was called Mr Heymans informed me that the First Respondent made an allocation of the lump sum gratuity amount arising from

the death of the late [O.G. S…….]. The allocation as made by the First Respondent were accepted by the Applicant and the Second Respondent and I was requested to record the allocation made. In the circumstances only costs of the application remained in dispute. I will briefly refer to the facts insofar as it may be relevant for purposes of costs and will include a recordal of the allocation made in the order.

[3] The late [O... S……] was the husband of the Applicant. I will hereinfurther refer to [O.G. S……] as "the late S……..]". The late S…….] passed away on the 9th December 2010.

[4] The late S…….] was employed by the Department of Statistics of the South African Government Services and was in employment of the Government since the 11th June 1984. The Applicant was married to the late S……] since the 15th November 1996 and in terms of a nomination by the late S…….], the Applicant was the sole beneficiary of the gratuity amount payable on the late [S……'s] death. On the 9th March 2011 the

First Respondent in writing in a letter informed the Applicant of certain pension benefits and also promised that arrangements had been made to pay the gratuity amount (after a tax deduction) amounting to the sum of R2 095 231.83 into the account of the Applicant. As the nominated beneficiary of the late [S……..], the Applicant at all times was entitled to claim payment of the gratuity amount.

[5] In terms of the Government Employees Pension Law Proclamation 21 of 1996 ("the Act") of the First Respondent, the board of trustees of the First Respondent shall manage the fund. (See Section 6 of the Act). In terms of Section 22 of the Act a member such as the late [S…….] is entitled to nominate to whom his gratuity be paid on his death. A member of the First Respondent may nominate a beneficiary or a number of beneficiaries. A member is also entitled to apportion the gratuity amongst a number of beneficiaries. Section 22(2) of the Act expressly reserves the right to the board of trustees of the First Respondent to exercise a discretion as to whether the payment of the gratuity would be made in accordance with the member's wish.

[6] On the 11th March 2011 the First Respondent paid an amount of R2 141 996.70, being the gratuity amount referred to before as well as interest, into the account of the Applicant and immediately thereafter reversed the payment. Because she could not convince the First Respondent to make payment of the gratuity amount she instituted these proceedings on the 21st June 2012. The relief sought was for payment of the amount of R2 141 996.70 alternatively that the First Respondent furnishes reasons for its decision to reverse the payment and for ancillary relief.

[7] The First Respondent's reluctance to make payment of the full amount of the

gratuity to the Applicant arises from the fact that the First Respondent was of the view that the daughter of the Second Respondent was also a child of the deceased. The Applicant had no knowledge of the existence of this child until after the death of the late [S……..] The First Respondent was of the view that payment must be made of part of the gratuity to the said child. A dispute arose about the paternity of the minor child. It was the First Respondent's view that the Applicant must compel the Second Respondent to subject the Second Respondent's minor child to DNA testing.

[8] When the matter came up for adjudication before Neukircher, AJ, on 4 March 2013, she made an order that the Second Respondent be joined as Second Respondent and that the executor of the estate of the late [S……] be joined as the Third Respondent and lastly that the Master of the High Court be joined as Fourth Respondent.

[9] Eventually the matter was enrolled for hearing before me. The allocation of the gratuity was made on the morning of the hearing before me. It is accordingly clear that despite the fact that the First Respondent had the discretion to allocate the gratuity in any well-reasoned fashion it would decide upon, the matter did not get finalised because the First Respondent failed to make any allocation.

[10] The Applicant was entitled to bring the application in view of the delay by the First Respondent to make up its mind. It never was the obligation of the Applicant to compel the Second Respondent to subject her minor daughter to DNA testing. Eventually, as a result of Neukircher, AJ making an order in that

regard, the minor child was subjected to DNA testing and it transpired that she indeed is the daughter of the late [S…….]

[11] The late [S…….] also had another son (K…… A……. S……..) from a previous marriage.

[12] The First Respondent eventually made an allocation of the gratuity in terms whereof the Applicant receives 40%, 10% goes to the eldest daughter born from the marriage between the Applicant and the late S……, 18% thereof goes to the youngest daughter born out of the marriage between the late S…….. and the Applicant, 20% of the gratuity was allocated to the minor daughter from the relationship between the late S……. and the Second Respondent and 12% of the gratuity was allocated by the First Respondent to the son K…….. A…… S…….

[13] Despite the passionate plea by Mr Kabini on behalf of the First Respondent I have to conclude that the necessity for the application arose because of the reluctance of the First Respondent to make a decision regarding the allocation of the gratuity. In that regard the discretion at all times was with the First Respondent in terms of Section 22 of the Act.

[14] The Applicant's institution of the application cannot be faulted. She, after all, was the nominated beneficiary of the whole of the gratuity. The First Respondent is on record in an e-mail between Mr Moloi, the legal assistant manager of the First Respondent and Mr Kabini that it has the discretion in terms of Section 22 of the Act to make the allocation but will only do so after the court has confirmed the details of the lawful dependents and/or eligible

beneficiaries. This is simply an abdication of the obligations of the First Respondent and cannot be a basis whereupon any of the First or Second Respondents must be ordered to pay the costs of this application. Neither is it any ground to order each party to pay its own costs as was requested by Mr Kabini.

[15] It is the obligation of the First Respondent, in terms of Section 22 of the Act, to make a decision. Naturally that decision must be a fair and equitable decision but if any of the parties *(inter alia* the Applicant and the Second Respondent) is not satisfied with the decision, then that decision can be taken on review. If the First Respondent is uncertain as to whether any person is indeed the offspring of the late S……, then the First Respondent must make arrangements for DNA testing or whatever procedures it may require to help it to come to a decision. However, the First Respondent cannot abdicate its obligation on the basis that this court must make the decision.

[16] Mr Kabini argued that the First Respondent played a major role in ensuring that a fair distribution of the gratuity takes place and that it tried to avoid further litigation. The answers to these arguments are set forth above.

[17] Mr Mr Holland-Muter, on behalf of the Second Respondent, argued that no costs order ought to be made against the Second Respondent. I agree that a costs order ought not to be made against the Second Respondent.

[18] Mr Heymans, on behalf of the Applicant, argued that the funds to be paid to the Second Respondent on behalf of her minor daughter, must be protected and I must order some form of protection of that money. This submission implies that the Second Respondent may possibly not properly manage, in her

capacity as mother and guardian of the minor daughter, the funds allocated to her. I agree with Mr Mr Holland-Muter that there is no basis for such an order. In fact there is authority, which I accept to be correct, that the appointment of a *curator bonis* would interfere with the relationship between the minor and her guardian if the Second Respondent's power to manage the minor's property is removed. This can be done only if the court is satisfied that the guardian is incapable of doing so. The fear that a guardian might make an ignorant decision is insufficient for purposes of appointment of a *curator bonis* or to put some burden upon the Second Respondent with regard to the management of her minor daughter's portion of the funds. There is no basis to regard her as incapable of doing so. From the papers, she appears to be a capable person who, when it became necessary, took up the challenge of these proceedings in order to protect her minor daughter's interests. She is a police officer. I find no basis to disentitle her to personally look after her minor daughter's funds.

[19] There is authority that a court can, on application and *mero motu,* order that monies payable to minor children be administered by persons other than their guardians.

See the matter of ***Dube N.O. v Road Accident Fund*** **2014 (1) SA 577 (GSJ)** where the authorities in this regard are discussed. It is clear from that judgment as well as from the matter of ***Ex parte Oppel: In re: Appointment of Curator Ad Litem and Curator Bonis*** **2002 (5) SA 125**

(C) that the court has to consider the facts of the particular matter. As stated before, I find no reason to disentitle the Second Respondent from administering the funds of her minor daughter.

[20] I accordingly make the following order:

1. It is recorded that the Applicant and the First and Second Respondents agreed to the following allocation of the gratuity amount (that is not the monthly pension payable) as a result of the death of the late [O…….] [G……..] [S……..], ID No 6…….] and pension number in the Government Employees Pension Fund 9……:]

1.1 40% to the Applicant (S…… R…… S……), ID No 6……. plus pro rata interest;

1.2 12% plus pro rata interest to K…….. A…….. S……, ID No 8……;

1.3 10% plus pro rata interest to M…….. E…… S……, ID No 8……..;

1.4 18% plus pro rata interest to R……. O…… S……., ID No 9……;

1.5 20% plus pro rata interest to R…….. N….. ID No 0…….

2. Payment to be made by the First Respondent of the allocations no later than 60 days from filing of the claim forms with the First Respondent; and

3. The above allocation does not affect the monthly pension the Applicant receives.

4. The First Respondent is ordered to pay the opposed costs of this application of both the Applicant and the -fifst Respondent on a party and party scale.

AJ LOUW/AJ