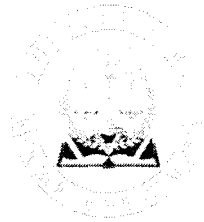


IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)



Case number: 80105/2015

Date: 7/3/17

DELETE WHICHEVER IS NOT APPLICABLE

- (1) REPORTABLE: YES/NO
- (2) OF INTEREST TO OTHERS JUDGES: YES/NO
- (3) REVISED

7-3-2017 *M. G. Mny*
DATE SIGNATURE

In the matter between:

SENTINEL RETIREMENT FUND

APPLICANT

AND

C V BOLD

FIRST RESPONDENT

M A LUKHAIMANE N.O.

SECOND RESPONDENT

HARMONY GOLD MINING COMPANY LTD

THIRD RESPONDENT

JUDGMENT

TOLMAY, J:

INTRODUCTION:

[1] This is an application in terms of section 30P of the Pension Funds Act, 24 of 1956 ("the PFA") in which the applicant ("Sentinel"), a pension fund registered in terms of section 4 of the PFA, seeks to set aside a determination made by the second respondent, the Pension Funds Adjudicator ("the Adjudicator"), which she made in terms of section 30M of the PFA.

[2] The Adjudicator made the determination pursuant to a complaint lodged with her by the first respondent ("Mr Bold"). Mr Bold was a member of Sentinel, and an employee of the third respondent ("Harmony"). Mr Bold lodged a complaint with the Adjudicator in terms of section 30A of the PFA, essentially relating to Sentinel's decision not to grant him a disability benefit. The Adjudicator upheld his complaint and it is this determination which is the subject of this application.

[3] The Adjudicator abides by the decision of the Court. Harmony did not oppose the application.

[4] After considering the matter the Adjudicator made the following order:

"6.1.1 The first respondent is ordered to award the complainant a disability benefit, taking into consideration the incorrect benefit

already paid to him, within 4 weeks from date of this determination, and

6.1.2 Alternatively, the second respondent should re-appoint the complainant to perform administrative duties.”

[5] It is common cause between the parties that the Adjudicator acted *ultra vires* in making the order set out in par 6.1.2. It is also common cause that Mr Bold never requested reinstatement, nor did it form part of his complaint. As a result it must follow that par 6.1.2 of the order must be set aside.

[6] Pertaining to the Adjudicator’s order contained in 6.1.1, the Adjudicator provides the following reasons for her order in her determination:

“The medical evidence indicated that the complainant is totally and permanently disabled to perform heavy physical work such as that performed by a diesel mechanic and in a similar occupation. However during 2014, the second respondent sought to re-assign the complainant to perform the usual functions of a charge hand motor mechanic. Due to the physical impairments he had incurred, he would not be in a position to perform such functions. The complainant was dismissed on the grounds of medical impairment. However, the complainant had not performed such work for a period of 11 years and did administrative work for this period. He was not medically unfit to

continue doing the administrative work. Thus, he was eligible for an in-service disability benefit as he was totally and permanently disabled to perform the usual functions as a charge hand motor mechanic that the second respondent sought to re-assign him to do and not administrative work within the mining industry that he had been engaged in for the past eleven years (see IMP v Altron Group Pension Fund [2003] 5 BPLR 4677 (PFA)).”

- [7] While the Adjudicator’s reasoning may have been correct, it is important to note that no finding was made indicating that the Board of Trustees of Sentinel’s (“the Board”) decision was unreasonable or that the Board failed to properly exercise its discretion.

THE MATERIAL FACTS:

- [8] Mr Bold was employed by Harmony as a diesel mechanic from 1990 until his employment was terminated on medical grounds on 12 August 2014. During 1995 Mr Bold was involved in a motor vehicle accident and sustained injuries that rendered him unable to cope with the heavy physical duties that a diesel mechanic is ordinarily tasked with.
- [9] It is common cause that Harmony had accommodated Mr Bold due to the injuries he sustained by assigning him to perform sedentary or administrative duties. Mr Bold had performed such sedentary work for 11 years after the accident. Despite his functions having changed, Mr Bold was still employed as a diesel mechanic, received the same

remuneration as he always had and paid the same pension contributions to Sentinel.

[10] It is the uncontested version of Mr Bold that in 2014 his foreman had decided that he had to perform the heavy physical duties of a diesel mechanic for which he was employed. Despite attempting to do so, Mr Bold was unable to cope and was subsequently dismissed. Mr Bold's Medical Incapacitation Form confirms that the medical practitioner found him to be permanently unfit for his normal duties due to an occupational related incident. There is no explanation on the papers for the decision by Harmony to insist that Mr Bold perform the actual duties of a diesel mechanic, after allowing him to do administrative, sedentary work for 11 years. He was only required to perform the heavy duty work of a diesel mechanic in the weeks preceding the termination of his employment and up to the completion of his application for a permanent disability benefit.

[11] On 13 August 2014, Mr Bold submitted an application for permanent disability together with medical reports to Sentinel, in terms of which he applied to be found permanently disabled as a diesel mechanic.

[12] The Board concluded that Mr Bold was not permanently disabled to perform his own and similar occupation in terms of the rules of the fund. The Board's reasoning was that Mr Bold had been employed in

an administrative capacity for 11 years and was not permanently disabled to perform administrative functions.

[13] Mr Bold was dissatisfied with the Board's decision and submitted a complaint to the Adjudicator in terms of the PFA. Mr Bold's complaint essentially was that he qualified for the disability benefit and should have accordingly been paid same by Sentinel. The complaint was forwarded to all relevant parties and Sentinel provided a response to the complaint.

[14] In the response the Board stated *inter alia* that Sentinel's claims committee deferred the matter to an occupational therapist who stated that Mr Bold was totally and permanently disabled to perform the functions of a diesel mechanic, but was not totally and permanently disabled to perform administrative duties.

[15] The matter was then referred to Sentinel's Occupational Health Consultant who filed a report and all the other medical reports obtained pertaining to Mr Bold was included in this report.

[16] It is common cause that Mr Bold received an employer's package from Harmony and that the package was subject to the condition that an employee who is a member of Sentinel will only be eligible for the package if he had unsuccessfully applied to Sentinel for a disability benefit.

- [17] Sentinel maintains that if Mr Bold receives both the disability benefit and the employer's package he will be dually benefitted. Sentinel further submits that if Mr Bold persists in seeking a disability benefit, he must tender return of the employer's package to Harmony.
- [18] A perusal of the papers reveals that Mr Bold tendered return of the employer's package. The papers do not set out what the amount is that he received, if he succeeds, any order made by this Court should provide for the return of any amount received by him in this regard.
- [19] The Adjudicator found in favour of Mr Bold as per her determination dated 24 August 2015. Sentinel now seeks to have the determination set aside and Mr Bold's complaint dismissed.

NATURE AND SCOPE OF SECTION 30P PROCEEDINGS:

- [20] Section 30P of the PFA provides as follows:

"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."

[21] The approach to be adopted by a Court in considering a section 30P application and the nature of such applications has been dealt with in several judgments. In the case of **Cape Town Municipality v South African Local Authorities Pension Fund and Another**¹ the Supreme Court of Appeal provided that the appeal under section 30P is a complete rehearing and a fresh determination on the merits of the matter with or without additional evidence or information and an aggrieved party is entitled to have the legal dispute that was dealt with by the Adjudicator reconsidered *de novo* by the Court.

[22] In **Meyer v ISCOR Pension Fund**² the Court stated:

¹ 2014 (2) SA 365 (SCA) at pg 372, para 28.

² 2003 (2) SA 715 (SCA) at p 725I – 726A.

“From the wording of s 30P(2) it is clear that the appeal to the High Court contemplated is an appeal in the wide sense. The High Court is therefore not limited to a decision whether the adjudicator’s determination was right or wrong. Neither is it confined to the evidence or the grounds upon which the adjudicator’s determination was based. The Court can consider the matter afresh and make any order it deems fit. At the same time, however, the High Court’s jurisdiction is limited by s 30P(2) to a consideration of ‘the merits of the complaint in question’. The dispute submitted to the High Court for adjudication must therefore still be a ‘complaint’ as defined. Moreover, it must be substantially the same ‘complaint’ as the one determined by the adjudicator.”

- [23] As stated in **De Beers Pension Fund v Pension Funds Adjudicator and Another**³, an application in terms of section 30P is *sui generis* and a Court, in addition to its powers of review, exercises jurisdiction analogous to the original jurisdiction. Consequently a Court has the power to consider the complaint afresh and make any order that it deems appropriate.

THE PENSION FUND’S RULES

- [24] The binding nature of a pension fund’s rules is statutorily confirmed in section 13 of the PFA.⁴

³ 2003 (2) All SA 239 (C) at p 245 – 256.

⁴ Section 13 reads:

[25] The relevant rule dealing with the circumstances under which a member may receive a disability benefit provides as follows⁵:

“7. DISABILITY BENEFIT IN SERVICE

7.1...

7.2 Terms and Conditions

7.2.1 *The DISABILITY COVER options available for inclusion in the SPECIAL RULES shall be determined annually by the TRUSTEES in consultation with the ACTUARY and shall be notified in writing to the EMPLOYER or MANAGEMENT COMMITTEE (if applicable) and MEMBERS annually in advance.*

7.2.2 *The TRUSTEES shall, in their sole discretion, determine when a MEMBER becomes totally and permanently disabled to perform his/her own and any similar occupation in a specific environment. The burden of proof*

“Subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund and the members, shareholders and officers thereof, and on any person who claims under the rules or whose claim is derived from a person so claiming.”

See also : *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA) at 894, paragraph 15; *Mostert NO v Old Mutual Life Assurance Co (SA) Ltd* 2001 (4) SA 159 (SCA) at 175, paragraph 30

of such permanent disability shall rest with the MEMBER.

7.2.3 *The TRUSTEES shall determine when the DISABILITY COVER shall become payable.*

7.2.4 *The TRUSTEES may, in their sole discretion, insure all or part of the DISABILITY COVER AMOUNT with a REGISTERED INSURER.”*
(Court’s emphasis)

[26] Rule 7.2.2 is explicit in its requirements:

1.1 It is within the Board’s sole discretion to determine whether a member has become disabled; and

1.2 In exercising its discretion the Board must be satisfied that:

1.2.1 The member has become totally and permanently disabled to perform his own occupation; and

1.2.2 Any similar occupation.

[27] In a letter dated 25 February 2015 addressed to Mr Bold, the Board provides the following reasoning for the repudiation of his claim:

“According to the rules of the fund you have to proof that you are totally and permanently disabled for our [sic] own and similar occupation in a specific environment.

Diesel Mechanic is classified as heavy physical work and Administrative as sedentary work. Seeing that your last eleven years were in an administrative position, the Board of Trustees acted on this as your occupation.

Due to the fact that you would be able to continue with the occupational functions that you have performed the last eleven years you are not totally and permanently disabled for your own and similar occupations in a specific environment.”

ISSUES TO BE DETERMINED:

[28] The Court is not limited to the question whether the Adjudicator's determination was right or wrong and should consequently determine whether the Board exercised its powers properly in terms of the rules when it decided not to award Mr Bold a lifelong permanent disability benefit. It is necessary to consider whether the Board properly exercised its discretion when it made the decision to repudiate Mr Bold's claim.

[29] It is common cause that in terms of the rules, it is within the Board's sole discretion whether or not to award permanent disability benefits to a member. It is also common cause that as was decided in **Gerson v Mondi Pension Fund & Others**,⁶ that the Court has no jurisdiction to enquire into the correctness of the conclusion arrived at, but the jurisdiction of the Court is limited to the question whether the discretion has indeed been exercised. In this regard the following was said in **Gerson** (*supra*):

"15. *In the determination of Stacey (Koevort) v Old Mutual Protekor Pension fund and Another the erstwhile pension funds adjudicator sets out the law on this point:*

'As already alluded to in the preliminary ruling, the effecting of an equitable distribution requires of the board of trustees to take into consideration all the relevant factors and discard irrelevant ones. The board may also not unduly fetter its discretion, nor should its decision reveal an improper purpose. If it has acted as aforesaid, no reviewing tribunal will lightly interfere with their decision. It should be noted that even if I may not necessarily agree with the decision of the board, that in itself is not a ground for setting aside the board's decision. This is because it is not my role as a reviewing tribunal to decide on what is the fairest and most generous distribution. The test in law is whether the

⁶ 2013(6) SA 162 (GSJ) at p 168 par 14, 15 & 28

board has acted rationally and arrived at a proper and lawful decision." (Court's emphasis)

[28] *In determining the applicant's complaint to the adjudicator, the adjudicator had no power simply to substitute his or her discretion for that of the board. Section 30E of the Act provides that the adjudicator shall investigate any complaint and 'may make the order which any court of law may make'. Since a court of law could not without more substitute its discretion for that of the board, it follows that neither could the adjudicator. This court is in that respect in the same position as the adjudicator.*" (Court's emphasis)

[30] It is recognised by the Courts that the Board's decision can be interfered with where it is demonstrated that it had taken into account irrelevant, improper or irrational factors, or where its decision can be said to be one that no reasonable body of trustees properly directing themselves could have reached.⁷

[31] Counsel for Mr Bold referred to the English Court of Appeal in **Edge and Others v Pensions Ombudsman and Another** where the proper exercise of a discretionary power and what is meant by reasonableness is dealt with. The Court in the above case espoused earlier judgments which stated that the ordinary duty which the law imposes on a person who is entrusted with the exercise of a

⁷ *Edge and Others v Pensions Ombudsman and Another* 1999 (4) All ER 546 (CA) at p 559 para D – F.

discretionary power, is that he exercises the power for the purpose for which it is given, giving proper consideration to the matters which are relevant and excluding from consideration matters which are irrelevant.

[32] It was further argued that the English Court of Appeal endorsed the following principles which were laid down by earlier decisions of that Court as the principles with which the trustees must comply:

- a. The Trustees must ask themselves the correct questions;
- b. They must direct themselves correctly in law. In particular they must adopt a correct construction of the pension fund rules; and
- c. They must not arrive at a perverse decision, i.e. a decision to which no reasonable body of trustees could arrive, and they must take into account all relevant but no irrelevant factors.

[33] If there was a failure by the Board to comply with the aforesaid principles or if they acted contrary thereto the discretion was not exercised properly and it was argued that in this case such discretion was not properly exercised.

[34] In **Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others**⁸, which dealt with the test for reasonableness within the context of PAJA⁹ it was held that what will constitute a reasonable decision will depend on the circumstances of each case. Further, it held that the factors relevant to determining whether a decision is reasonable or not will include, *inter alia*, the nature of the decision, the range of factors relevant to the decision and the reasons for the decision.

[35] Mr Bold bears the *onus* despite the fact that Sentinel is formally the Applicant¹⁰.

[36] Mr Bold's complaint to the Adjudicator, arose from his dissatisfaction with the Board's decision that he was not entitled to the disability benefit. In order to determine whether Mr Bold was entitled to the said benefit, it is necessary to consider whether the Board properly exercised its discretion when it made the decision to repudiate his claim.

⁸ 2004 (4) SA 490 (CC) at pg 513, para 45.

⁹ Promotion of Administrative Justice Act 3 of 2000.

¹⁰ See Rule 7.2.2 (supra): As regards onus, the Supreme Court of Appeal in *Meyer v Iscor Pension Fund* [2003] 1 All SA 40 (SCA) at p 47 para 8 after dealing with the nature of a section 30P application, said the following:

"Since it is an appeal, it follows that where, for example, a dispute of fact on the papers is approached in accordance with the guidelines formulated by Corbett JA in Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) 634E-635D, the complainant should be regarded as the 'applicant' throughout, despite the fact that it is the other side who is formally the applicant to set the Adjudicator's determination aside. In case of a 'genuine dispute of fact' on the papers as contemplated in Plascon Evans, the matter must therefore, in essence, be decided on the version presented by the other side..."

[37] It is accepted, by Mr Bold's representative, and correctly so, that in terms of the rules, it is within the Board's sole discretion whether or not to award permanent disability benefits to a member.

[38] Further, it is also common cause that where a discretionary power has been conferred on the Board, the Court and the Adjudicator cannot, without more, substitute their discretion for that of the trustees.¹¹

[39] On an evaluation of the facts it transpired that the Board exercised its discretion after considering the medical reports as well as the facts of this case. Especially the fact that Mr Bold has been unable to perform the duties of a diesel mechanic for eleven years, but he was accommodated in an administrative capacity. The reports and opinions of the medical experts as well as the facts were all relevant to the ultimate exercise of the Board's discretion. There is no indication that the Board acted irrationally or took into consideration irrelevant facts. Whether one agrees with the Board's decision is of no consequence as it is not for this Court or the Adjudicator to determine whether the Board was indeed correct to come to this conclusion. In my view the Board exercised its discretion properly and did indeed arrive at a proper and lawful decision.

[40] The Adjudicator in my view erred in substituting her discretion with that of the Board and therefor her award can't stand.

¹¹ Gerson v Mondi Pension Fund and Others 2013 (6) SA 162 (GSJ) at pg 168 para 28.

CONCLUSION:

[41] In the light of the aforesaid I am of the view that the Board of Trustees did exercise their discretion properly and the Adjudicator's decision must be reviewed and set aside.

[42] I make the following order:

42.1 The determination of M A Lukhaimane N.O. under reference number PFA/NC/00014242/2015/YVT dated 24 August 2015, which was made in terms of section 30 M of the Pensions Fund's Act, 24 of 1956 in respect of a complaint lodged by C V Bold is set aside and substituted with the following:

"The complaint lodged by C V Bold is dismissed".

42.2 The First Respondent is ordered to pay the costs of the application, which will include the costs of senior counsel.


R G TOLMAY
JUDGE OF THE HIGH COURT

DATE OF HEARING: 7 FEBRUARY 2017

DATE OF JUDGMENT: 7 MARCH 2017

ATTORNEY FOR APPLICANT: SHEPSTONE & WYLIE ATTORNEY

COUNSEL FOR APPLICANT: ADV P VAN DEN BERG (SC)

ATTORNEY FOR RESPONDENT: SOONDER INCORPORATED

COUNSEL FOR RESPONDENT: ADV K A MAGAN