IN THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

In the matter of:

MARK OLIVER KAPLAN

MERLE SANDRA KATZ NNO

in their capacity as trustees of the **Daniel Kaplan Trust** First Appellant

MARK OLIVER KAPLAN

MERLE SANDRA KATZ NNO

in their capacity as trustees of the **Ilan Jonathan Kaplan Trust** Second Appellant

and

THE PROFESSIONAL AND EXECUTIVE RETIREMENT FUND

(WLD case 96/16523)

THE VIP RETIREMENT ANNUITY FUND First Respondent

(WLD case 96/16524)

LIBERTY LIFE ASSOCIATION OF AFRICA LTD Second Respondent

CORAM: HEFER, GROSSKOPF, HOWIE, PLEWMAN and STREICHER JJA

DATE OF HEARING: 3 May 1999

DATE OF DELIVERY: 14 May 1999

J U D G M E N T

HOWIE JA:

The late Arthur Ralph Kaplan was a member of two pension funds managed by Liberty Life Association of Africa Ltd ("Liberty Life"). In terms of the rules of the funds he nominated his children (two minor sons) as the beneficiaries in respect of each fund in the event of his death.

He also created a trust for the benefit of each son. On his death in July 1990 he was survived by three dependants - the two boys and his widow. (She is not their mother.) Liberty Life, instead of acting in terms of the nominations, allocated the benefits payable by the funds to all three dependants.

As a result, the joint trustees of each trust (to whom, it was common cause, the boys' benefits must be paid) sought an order in the High Court at Johannesburg, *inter alia*, declaring that the benefits fell to be paid to them to the exclusion of the widow. The principal respondents cited were the funds and Liberty Life. The deceased's widow was also cited but she did not oppose and has taken no part in the litigation. The matter was heard by Goldstein J who held that Liberty Life, in apportioning the benefits as they did, acted in accordance with the law and the trustees were therefore refused relief. With the leave of the Court below they appeal.

The judgment of the Court *a quo* is reported as Kaplan and Another NNO v Professional and Executive Retirement Fund and Others 1998 (4) SA 1234 (W).

The funds in question are registered pension fund organisations in terms of the Pension Funds Act 24 of 1956 ("the Act"). The Act does not deal with the manner of appointment of a fund manager nor does it indicate who is eligible to be appointed. In various sections reference is made to "the person managing the business of the fund" but "person" is merely defined as "(including) any committee appointed to manage the affairs of a fund". In the Interpretation Act 33 of 1957, however, "person" is defined as including any registered company. Liberty Life, a registered insurance company, was therefore eligible to be appointed and was, as indicated earlier, in fact appointed as manager of the business of the funds concerned.

The Act provides for a fund to have rules and the rules regulate, amongst other matters, the conditions under which a member or other person may become entitled to a benefit (s 11(d)). The rules of both funds enable a member to nominate beneficiaries to receive the due benefits in the event of the member's death. In the absence of a nomination the rules require that a deceased member's benefits be paid to dependants. Both the Act and the rules define the word "dependant" but it suffices to say for present purposes that the deceased's sons and his widow - his dependants at common law - are also dependants in terms of those definitions. It was common cause throughout that the deceased's nominations were validly made and that they were accepted by the funds as made in accordance with the rules. It was also undisputed that, but for the Act, the nominations would have entitled the sons to all the benefits and the trustees to the relief claimed.

The crucial question, therefore, is whether the Act overrides the nominations.

The main argument for the trustees is that the Act does not. It is said that the nominations must prevail because the Act does not cover the present situation.

Now the material terms of the Act are contained in s 37 C (1) as it read in 1990. Omitting irrelevant wording, the subsection then provided 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 in respect of a deceased member, shall . . . 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 benefit shall be paid to such dependant or, in such proportions as may be deemed equitable by the person managing the business of the fund, to such dependants.

(b) 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, and the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the benefit or such portion of the benefit shall be paid to such nominee: Provided that where the aggregate amount of the debts in the estate of the member exceeds the aggregate amount of the assets in his estate, so much of the benefit as is equal to the difference between such aggregate amount of debts and such aggregate amount of assets shall be paid into the estate and the balance of such benefit or the balance of such portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee.

(bA) . . .

(c) 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 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, the benefit or the remaining portion of the benefit after payment to the designated nominee, shall be paid into the estate of the member, or, if no inventory in respect of the member has been received by the Master of the Supreme Court in terms of section 9 of the Estates Act, 1965 (Act No. 66 of 1965), into the Guardian's Fund."

The contention for the trustees put more specifically is this. The subsection aims to exclude from the member's estate only that which would otherwise have fallen within it. The nominations, it is argued, constituted contracts for the benefit of third parties and their legal effect would have been that the benefits in issue would not have fallen into the deceased's estate. Therefore the benefits were not assets to which the subsection applied.

To my mind this argument cannot succeed. There is nothing to convey the suggested limitation of the subsection's ambit to only such benefits as would otherwise have been assets in the estate.

The plain meaning of the subsection is this. All benefits payable in respect of a deceased member, whether subject to a nomination or not, must be dealt with in terms of one or other of the quoted subparagraphs. In other words none fall into the estate save in the circumstances stated in subparagraphs (b) and (c). In addition, these nominations having been made in terms of the rules, and the rules requiring the benefits to go to the nominated beneficiaries, the trustees' case is inextricably linked to the rules. However, as the phrase "(n)otwithstanding anything to the contrary . . . contained in the rules" makes unmistakably clear, it matters not in the present situation what the rules say — the benefits must be disposed of according to the subsection's statutory scheme.

In this case the benefits had to be disposed of in terms of s 37C (1)(a). They were.

The only other submission advanced in support of the appeal was that the division was undertaken and effected in conflict with the rule *delegatus delegare non potest*.

It was not open to dispute on the papers that the Liberty Life employee who performed the allocation was properly authorised by competent and authorised superiors within the company. The argument was, however, that Liberty Life was itself a delegee and, therefore, in terms of the

maxim, incapable in law of delegating further. Alternatively, so it was submitted, if subdelegation was in order then the employee concerned was inappropriately subordinate.

There is no merit in either contention. Assuming in the trustees' favour, firstly, that the maxim applies at all in the present context, secondly, that Liberty Life was indeed a delegee, and, thirdly, that the company's internal authorisation constituted the relevant employee a delegee (as opposed to an agent), it is plain that once a "person managing the business of a fund" is a company - which cannot act other than through duly empowered officers or employees - then such manager's authority to delegate is necessarily implied. Once that is so, there is no warrant, especially in the case of a large company, to confine the delegated power to those of senior rank. (No attack was made in the papers on the competence or efficiency of the employee concerned.)

It follows that the Court *a quo* was right.

As to costs, the respondents on appeal were represented by two counsel and in the heads of argument on their behalf the costs occasioned by such employment were requested. Significantly, only one counsel represented them in the court below and only one counsel represented the trustees at all stages. Considering the nature of the legal question involved in the main issue on appeal I am not disposed to think that this is a case in which an order for the costs of two counsel is appropriate.

The appeal is dismissed with costs.

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C T HOWIE

HEFER JA,GROSSKOPF JA, PLEWMAN JA, STREICHER JA CONCUR