



**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT**

Reportable

Case no: 364/2022

In the matter between:

MUNICIPAL GRATUITY FUND

APPELLANT

and

THE PENSION FUNDS ADJUDICATOR

FIRST RESPONDENT

MUTSILA, TSHIFHIWA SHEMBRY

SECOND RESPONDENT

Neutral Citation: *Municipal Gratuity Fund v The Pension Funds Adjudicator and Another* (Case no 364/2022) [2023] ZASCA 116 (31 July 2023)

Coram: DAMBUZA ADP, MOCUMIE and MBATHA JJA and NHLANGULELA and DAFFUE AJJA

Heard: 16 May 2023

Delivered: This judgment was handed down electronically by circulation to the parties' representative via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time of hand-down is deemed to be 11:00 am on 31 July 2023.

Summary: Pension Fund Act 24 of 1956 – whether the Pension Funds Adjudicator had jurisdiction to consider a complaint by a claimant who lodged their complaint directly with the Pension Funds Adjudicator – whether the *audi alteram partem* rule was violated in that the Municipality Gratuity Fund was not provided an opportunity to make representations to the Pension Funds Adjudicator.

ORDER

On appeal from: The Gauteng Division of the High Court, Pretoria (Baqwa and Janse van Nieuwenhuizen JJ and Seboko AJ, sitting as a court of appeal):

- 1 The appeal is upheld, with each party to pay its own costs.
- 2 The order of the full court is set aside and replaced with the following:
 - (a) The appeal is upheld with each party paying its own costs;
 - (b) The order of the court a quo is set aside and replaced with the following:
 - (i) The determination of the Pension Funds Adjudicator dated 8 September 2014 is set aside.
 - (ii) Each party shall pay its own costs.'

JUDGMENT

Daffue AJA (Dambuza ADP, Mocumie and Mbatha JJA and Nhlangulela AJA):

Introduction

[1] The ultimate question to be decided in this appeal is whether a determination of the Pension Funds Adjudicator (the Adjudicator) in terms of which death benefits due to the dependants of the late Mr TE Mutsila (the deceased) should be set aside. During his lifetime, the deceased, an employee of the Ba-Phalaborwa Municipality, was a member of the Municipal Gratuity Fund (the Fund), the appellant in this appeal. The Fund was at the time administered by Sanlam Life Insurance Ltd. The deceased passed away on 15 December 2012. Upon his death, a dispute arose concerning the allocation of the death benefits to his dependents. The second respondent, Ms Tshifhiwa Shembry Mutsila (Ms Mutsila), the deceased's widow, was dissatisfied with the approach adopted by the Fund in allocating the death benefits to certain beneficiaries whom she considered not to qualify for the death benefits. She decided as advised in a letter by the Fund to file a written complaint with the Adjudicator who made a determination, inter alia, setting aside the Fund's allocation of the death benefits.

The common cause facts

[2] The deceased was a member of the Fund. At the time of his death, he was married in community of property to Ms Mutsila. Five children were born out of this marriage, of which three were still minors when their father died. Following the death of the deceased, the total death benefits payable to his beneficiaries amounted to R 1 614 434.96. Prior to his death, on 12 January 2009, he had nominated Ms Mutsila and their five children as the beneficiaries of his death benefits in the Fund. It also turned out that shortly before he died, on 1 October 2012, the deceased had taken out a 'Future Builder Family Funeral Plan' (Funeral Plan) with Metropolitan Life.

[3] In terms of the Funeral Plan, the deceased arranged funeral benefits for himself, his life partner Ms Masete and her three children. Also included in the Funeral Plan were three of his own children with Ms Mutsila, his mother, Ms Elizabeth Mutsila and Ms Betty M Masete, described in the Funeral Plan as his mother-in-law. Although the Funeral Plan provides for funeral benefits in respect of the three Masete children, only the youngest two are relevant to the present dispute.

[4] Ms Masete and Ms Mutsila both applied to the Fund for payment of the death benefits to themselves as well as their children, i.e. Ms Mutsila's five children and Ms Masete's two children. The Chief Executive Officer (CEO) of the Fund, Mr Jacobson, conducted an investigation whereafter he presented a report to the Fund's board of trustees. He recommended that preference should be given to factual dependants and that Ms Masete and her children were factually dependent upon the deceased in an amount of R2 000 per month. He concluded that Ms Mutsila, who was employed as a teacher, was financially independent.

[5] Following upon Mr Jacobson's report, the Fund resolved, on 9 April 2014, after 'careful consideration of the requirements of s 37C' to distribute the death benefits. It allocated 22.5% to Ms Mutsila and 27.5% to Ms Masete, whilst the children's benefits varied between 2.5% and 14% of the total benefits, depending on their respective ages. On 11 April 2014, Ms Mutsila's attorneys were informed of the Fund's determination. They were also advised that the Fund's decision could be challenged through the Adjudicator.

[6] On 14 May 2014, Ms Mutsila filed a complaint with the Adjudicator. She attached to her complaint the notice of motion and founding affidavit in an application brought by Mr Malema Joseph Mphafudi (Mr Mphafudi), the biological father of Ms Masete's two minor children, in the Limpopo Division of the High Court, Polokwane (the custody application). In that application, Mr Mphafudi claimed the primary residence of the two minor children, subject to Ms Masete's reasonable contact and that she be ordered to pay R50 per month per child. Ms Masete, who did not deny that Mr Mphafudi was the biological father of her children, alleged in the custody application that he had failed to make meaningful contributions towards the maintenance of his two children and that he had not made any contribution since December 2011/January 2012. At the hearing of this appeal, neither of the parties were able to shed light as to the progress made in the custody application.

[7] On 15 May 2014, the Adjudicator informed the Fund in writing of the complaint. The Fund responded on 30 May 2014, suggesting that the evidence in the custody application might have a direct impact on the consideration of the complaint and the distribution of the death benefits. It suggested that consideration of the complaint should be held in abeyance until the conclusion of the custody application, and that the Fund be allowed an opportunity to respond 30 days after the conclusion of that application. Contrary to the Fund's suggestion, the Adjudicator considered the complaint and made a determination. The Adjudicator, inter alia, set aside the Fund's determination and ordered it to pay R300 000 to Ms Mutsila.

The Adjudicator's determination

[8] The Adjudicator's determination was couched as follows:

'In the result, the order of this Tribunal is as follows: -

6.1.1 The decision of the board of the first respondent is hereby set aside; and

6.1.2 The first respondent is ordered to pay the amount of R 300 000 in advance to the complainant for the repayment of her housing loan with ABSA Home Loan Division as resolved on 9 April 2014, within two weeks from the date of this determination;

6.1.3 The board of the first respondent is directed to properly investigate and effect an equitable distribution of the balance of the proceeds of the death benefit to all the deceased's dependants within three weeks after a decision by the High Court, under case number 653/2014 has been handed down; and

6.1.4 The first respondent is ordered to provide this Tribunal and the complainant with its report and also confirm the authenticity of the information and/or documents in its possession, within two weeks after finalising its investigations in paragraph 6.1.3 above.'

The Fund did not resolve to pay R300 000 to Ms Mutsila to enable her to settle the Absa home loan as incorrectly stipulated in paragraph 6.1.2 of the Adjudicator's determination. Therefore, the Adjudicator committed a factual misdirection in this regard.

Litigation history

[9] The Adjudicator's determination triggered the litigation that followed which eventually ended up in this Court. On 24 October 2014, the Fund filed an application out of the Gauteng Division of the High Court, Pretoria to set aside the determination in terms of s 30P of the Pension Funds Act 24 of 1956 (the Act). The Fund was unsuccessful in the high court (the court of first instance). The Fund's application for leave to appeal was dismissed, but it obtained leave from this Court to appeal to the full court of that Division (the full court). It lost again, and as was the case in the court of first instance, it was penalised with an attorney and client costs order.

[10] Now, nearly nine years after the Adjudicator's determination, this Court is called upon to adjudicate an appeal against the decision of the full court, special leave having been granted by this Court. The Adjudicator is not participating in the appeal as was the case in the courts below, but the appeal is opposed by Ms Mutsila.

The basis of the challenge to the Adjudicator's award

[11] It is apposite to set out anteriorly the statutory basis upon which a party aggrieved by a determination of the Adjudicator may approach a court for relief. Section 30P of the Act, under the title 'Access to court', reads as follows:

'(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.' (My emphasis.)

[12] It is clear from the wording of ss 30P(2) that the application to the high court is effectively a reconsideration of the complaint. This Court confirmed in *Meyer v Iscor Pension Fund*,¹ that the high court is not limited to a decision whether the Adjudicator's determination was right or wrong. It is also not confined to the evidence, or the grounds upon which the Adjudicator's determination was based, as the court can consider the matter afresh and make any order it deems fit, subject thereto that 'the High Court's jurisdiction is limited by ss 30P(2) to a consideration of "the merits of the complaint in question".'²

[13] The Fund raised two principal bases for its challenge: (a) the Adjudicator did not have jurisdiction to determine Ms Mutsila's complaint, and (b) the Fund had not been afforded an opportunity to be heard before the Adjudicator decided the complaint. Furthermore, the Fund also contended that the Adjudicator could not consider the complaint, relying on a defence of *lis pendens* (pending action), insofar as ss 30H(2) of the Act stipulates that:

'The Adjudicator shall not investigate a complaint if, before lodging of the complaint, proceedings have been instituted in any civil court in respect of a matter which would constitute the subject matter of the investigation.'

[14] With regard to the first basis, the Fund asserted that Ms Mutsila should have lodged her complaint with it in terms of ss 30A(1) of the Act prior to approaching the Adjudicator. If the complaint had been lodged with it, it would have responded thereto in accordance with ss 30A(2) and placed all relevant facts gathered from its extensive investigation on record. It argued that this jurisdictional requirement had not been met. Second, the Fund contended that when the Adjudicator informed it about the

¹ *Meyer v Iscor Pension Fund* [2003] 1 All SA 40 (SCA); 2003 (2) SA 715 (SCA) para 8.

² *Ibid.*

complaint, it was not granted an opportunity to deal with the merits of the complaint, therefore the *audi alteram partem* principle was not complied with. For that reason, the Fund took issue with the Adjudicator's finding that it had failed to undertake a proper investigation to determine the deceased member's beneficiaries and maintained that such finding was flawed.

Discussion

Did the Adjudicator have jurisdiction?

[15] The jurisdictional issue raised by the appellant is an afterthought and devoid of any merit. I state so because s 30A of the Act which deals with 'Submission and consideration of complaints' reads as follows:

- '(1) Notwithstanding the rules of any fund, a complainant may lodge a written complaint with a fund for consideration by the board of the fund.
- (2) A complaint so lodged shall be properly considered and replied to in writing by the fund or the employer who participates in a fund within 30 days after the receipt thereof.
- (3) If the complainant is not satisfied with the reply contemplated in subsection (2), or if the fund or the employer who participates in a fund fails to reply within 30 days after the receipt of the complaint the complainant may lodge the complaint with the Adjudicator.
- (4) Subject to section 30I, the Adjudicator may on good cause shown by any affected party-
 - (a) extend a period specified in subsection (2) or (3) before or after expiry of that period; or
 - (b) condone non-compliance with any time limit specified in subsection (2) or (3).'

[16] In this case, Ms Mutsila had complained with the Fund about the proposed distribution of the deceased's death benefits. A round-table discussion to resolve the impasse was held thereafter, but to no avail. It is evident that the draft distribution proposal was discussed during the meeting in terms whereof Ms Mutsila was informed that she would receive approximately R440 000. Her attorneys placed on record her dissatisfaction with the Fund's decision in their letter dated 11 March 2014 to which the Fund responded the next day.

[17] Second, on 11 April 2014, the Fund advised Ms Mutsila's attorneys in writing and in clear and unambiguous language to refer her dispute to the Adjudicator, it being

‘a specialist court focussing on pension fund issues.’³ This demonstrates that the Fund was satisfied that Ms Mutsila had complied with the requirement to submit her complaint to it, and that it considered the complaint exhaustively. Third, the Fund raised the jurisdictional issue for the first time and somewhat vaguely in its replying affidavit, thus depriving the Adjudicator who did not oppose the relief sought, of the opportunity to consider this version and to respond thereto. Fourth, Ms Mutsila had an option under s 30A, bearing in mind that the legislature has changed the wording of ss 30A(1) of the Act. Previously, the section stipulated that a complainant ‘shall’ lodge a written complaint with a fund for consideration by its board before the matter may be referred to the Adjudicator. This indicated a peremptory requirement. The subsection was amended in 2007 to substitute the word ‘shall’ with ‘may’.⁴ Fifth, in my view, the legislature did not intend to divest the Adjudicator of jurisdiction to deal with a complaint where a determination has been made by a fund, especially in a case such as this one where the highest decision-making body of the Fund – its board of trustees – has made a determination after having received and considered a complaint.

The Lis pendens challenge

[18] There was no pending litigation that prevented the Adjudicator from making a determination. The *lis pendens* defence is unmeritorious. *In casu*, the issue was whether Ms Masete and her two children were factually dependent upon the deceased. Contrary to that dispute, in the custody application the issue between Ms Masete and her husband, Mr Mphafudi, was about the primary residence and daily care of their two children.

[19] In these proceedings Ms Masete asserted that the same two children, who were legally dependent upon her husband for maintenance, were indeed factual dependants of the deceased. The Fund accepted factual dependency, although under the mistaken belief that the children were the deceased’s children. It is apparent from the affidavits that Mr Mphafudi did not maintain his children, at least not since

³ In para 3 of the determination Ms Mutsila was informed that payment would be made by the Fund ‘unless proof of appeal to a higher authority such as the Pension Funds Adjudicator or otherwise has been submitted to the Fund...’

⁴ Section 19(a) of the Pension Funds Amendment Act 11 of 2007.

December 2011/January 2012.⁵ He made two payments to Ms Masete at the end of 2014 that he referred to as maintenance payments and explained that he could not make earlier payments as he was not aware of Ms Masete's bank details.

[20] A careful perusal of the affidavits filed in these proceedings would have alerted the Adjudicator, the court of first instance and the full court to the fact that Mr Mphafudi's version supported Ms Masete's claim that she and her children were dependent on the deceased for support, which he factually did. No contrary deduction could be made. It is important to note, with reference to Ms Masete's bank statements, that at least four cash deposits were made during the period 3 May to 10 August 2012 which contained the first ten numbers of the deceased's identity number, to wit 621208 5971 008. Over and above this, other cash deposits appear on the bank statements, excluding the deposits pertaining to Ms Masete's salary which are clearly identified as such.

The audi alteram partem challenge

[21] The main object of the Adjudicator is to dispose of complaints lodged in terms of ss 30A(3) of the Act '...in a procedurally fair, economical and expeditious manner.'⁶ In order to achieve the main object, ss 30E(1)(a) provides that:

'...the Adjudicator -

⁵ The following statements are indicative of Mr Mphafudi's apparent failure to properly care for his children: 'I wish to state that this (during the December 2011 school holiday) was the last time I stayed with my children in our family home at Seshego. My children did not return to my place after this visit.' (para 5.11 p 159); although Mr Mphafudi stated that he continued to support his children even when they were not staying with him, he did not set out any facts in support hereof (para 5.14 p 160); clearly at all relevant times since 2011 the marital life between Ms Masete and Mr Mphafudi were in a bad state; Mr Mphafudi requested Ms Masete to bring the children back to him in January 2014, but she refused as they have been taken care of by their grandmother, Ms Betty Masete (who is mentioned in the funeral plan of the deceased) (para 5.15 p 161); finally and in response to Ms Masete's answering affidavit, Mr Mphafudi stated in reply that: '(i)n as far as maintaining my children is concerned I have always been willing to maintain them but the respondent could not allow me to. I attach hereto a copy of a deposit slip of an amount of R1 200 being maintenance money which I have paid into the Respondent's bank account which I found from her answering affidavit. She has continuously refused to allow me to maintain these children and little did I know that she was eyeing the Mutsila money... I wish to clearly state that I have always wanted to maintain my children and I will continue to maintain them as long as I am allowed to do so by the respondent. (replying affidavit paras 8.2 & 8.3 pp 194 & 195). Ms Masete made it clear in her answering affidavit that Mr Mphafudi 'has never contributed to the maintenance of the children.' She then attached a copy of her bank statement indicating that the deceased had financially taken care of her and her children (para 8 p 178 read with the bank statements, pp 183 – 185).

⁶ Section 30D of the Act.

(a) shall, subject to paragraph (b) [which is not applicable in this case], investigate any complaint and may make the order which any court of law may make...'

Also, the Act states that '[t]he Adjudicator may follow any procedure which he or she considers appropriate in conducting an investigation, including procedures in an inquisitorial manner'.⁷ Section 30F provides for an opportunity to respond before any determination is made concerning a fund or person and stipulates as follows:

'When the Adjudicator intends to conduct an investigation into a complaint he or she shall afford the fund or person against whom the allegations contained in the complaint are made, the opportunity to comment on the allegations.'

[22] It is and was the Fund's main concern that the Adjudicator failed to apply the *audi*-principle in denying it an opportunity to make representations before it made its determination. This ground of appeal requires some consideration. The Fund received from the Adjudicator notification of Ms Mutsila's complaint and responded that a final determination should be held over until finalisation of the custody application between Ms Masete and her husband. It reserved the right to respond at that stage. Contrary to the Fund's suggestion, the Adjudicator decided to consider the complaint and set aside the Fund's award and ordered it to pay an amount of R 300 000 in advance to Ms Mutsila to enable her to settle the housing loan with Absa. It also ordered the Fund 'to properly investigate and effect an equitable distribution of the balance of the proceeds of the death benefit to all the deceased's dependants within three weeks after a decision by the High Court...'. In the circumstances the Fund was not allowed an opportunity to respond fully as provided in s 30F before its award was set aside. I agree with the sentiment that the *audi*-principle was not adhered to.

Should the Adjudicator's award stand?

[23] The Fund never resolved to settle the Absa loan. It considered that in order to consider such payment, it required more information in respect of the assets and liabilities of the deceased's estate which Ms Mutsila, as executrix, neglected to provide. The Fund was of the view that if Ms Mutsila stood to inherit a substantial portion of the deceased's estate, that might have an effect on the total amount to be

⁷ Section 30J of the Act.

allocated to her. She might have been allocated a smaller amount if her dependency was shown to be less than initially awarded.

[24] Before I deal with dependency and a pension fund's duties and discretion in respect of the distribution of death benefits, it is apposite to quote the definition of a 'dependant' in s1 of the Act which provides:

“dependant”, in relation to a member, means-

- (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-

was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;

- (ii) is the spouse of the member;
- (iii) is a child of the member, including a posthumous child, an adopted child and a child born out of wedlock;
- (c) a person in respect of whom the member would have become legally liable for maintenance, had the member not died.' (My emphasis.)

[25] Subsection 37C(1)(a) stipulates how a member's death benefits shall be disposed of by a fund. It reads as follows:

'(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, subject to a pledge in accordance with section 19(5)(b)(i) and subject to the provisions of sections 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 benefit shall be paid to such dependant or, as may be deemed equitable by the fund, to one of such dependants or in proportions to some of or all such dependants.*' (My emphasis.)

[26] The Fund made its finding based on legal and factual dependency as in April 2014, i.e. more than 12 months after the death of the deceased. It relied on the definition of 'dependant' quoted above. In *Fundsatwork Umbrella Pension Fund v*

Guarnieri and Others,⁸ this Court held that the persons entitled to death benefits are those who qualify once the fund had completed its enquiry into who the dependants were. In this regard the following dictum is apposite:

‘The issue in this appeal arises from the fact that s 37C of the PFA removes the allocation of pension benefits on the death of a pension-fund member from the unfettered choice of the member, whether by will or by nomination. It reflects a legislative decision that funds becoming available in that way should be available to be used for the benefit of the deceased’s dependants so that they are less likely to be a drain on the state’s resources. This serves the social purpose of providing some protection for dependants, without entirely overriding the wishes of a deceased who has nominated beneficiaries or made a will.’⁹ (Footnotes omitted.) The Court continued to make the following observations:¹⁰

‘Given all these considerations of language, purpose and practicality, in my view, the proper construction of s 37C(1)(a) is that the time at which to determine who is a dependant for the purpose of distributing a death benefit is when that determination is made, and furthermore, the person concerned must still be a beneficiary at the time when the distribution is made. That is the only way in which to ensure that the persons identified as dependants are those whose interests the section seeks to protect.’ (Footnotes omitted.)

[27] The Fund’s version, as canvassed earlier in the judgment, was available to the Adjudicator. If the Adjudicator needed documentary proof or any other information, she could and should have requested that from either the Fund or Ms Masete, especially insofar as the CEO of the Fund indicated that he was in possession of a ‘complete case file.’ She failed to do so, but rather decided to set aside the Fund’s determination whilst awaiting the outcome of the custody application. This was premature considering that the custody outcome was still not delivered.

[28] Both the court of first instance and the full court criticised the Fund for being subjective and following a one-sided approach in determining who the beneficiaries of the death benefits should be. The essential issue, to wit whether Ms Masete and her two children were factually dependent upon the deceased, was never properly challenged. Both courts failed to recognise this. In addition, they failed to consider the

⁸ *Fundsatwork Umbrella Pension Fund v Guarnieri and Others* [2019] ZASCA 78; [2019] ZASCA 78; 2019 (5) SA 68 (SCA).

⁹ *Ibid* para 5.

¹⁰ *Ibid* para 25.

narrow approach upon which the application and subsequent appeal was brought, i.e. that the Adjudicator failed to apply the *audi*-principle.

[29] Close to a decade has lapsed and the battle over the custody of the children has not come to an end. The awaited outcome on the custody application is still pending. The parties hereto, and the beneficiaries, in particular, are entitled to finality and will not achieve that if the Adjudicator's determination is allowed to stand.

[30] If the appeal is allowed, this Court may consider this matter afresh, or decide to refer it back to the Fund for reconsideration. The second option will not serve any fair and equitable purpose, bearing in mind the time lapse, the possible unavailability of witnesses and documentary proof, the fact that minor beneficiaries have become adults in the meantime and again, insofar as the parties are entitled to finality. The only equitable outcome is to accept that the Fund complied with its legislative mandate and in its discretion made a correct distribution. I am satisfied that if the totality of the evidence as summarised in the next paragraphs is considered, the Fund's determination should prevail.

[31] The Fund did not find that the deceased and Ms Masete were married in terms of customary law. It only determined the issue of factual dependency. The Fund correctly accepted that it was not bound by the deceased's nomination of beneficiaries in 2009 at which stage Ms Mutsila was still considered a beneficiary. Ms Mutsila and the deceased earned about the same net salaries and on the version presented to the Fund, she was not factually dependent upon the deceased as her net income met her total expenses. She was a teacher at the time and would be entitled to a pension benefit. Contrary to her favourable financial position, Ms Masete earned a meagre salary and proved that the deceased factually maintained her and her children.

[32] The Fund was fully aware that the deceased's immovable property was mortgaged in favour of Absa and required more information from Ms Mutsila as the executrix in the estate. It needed to know two things, i.e. whether the estate was not perhaps insolvent which would mean that the payment to Absa might be to the detriment of Ms Mutsila as a beneficiary, alternatively, if the estate had considerable

assets and Ms Mutsila as heir was about to inherit those, that might have an effect on the amount to be distributed to her.

[33] The Funeral Plan issued by Metropolitan Life on 1 October 2012 did not include Ms Mutsila, contrary to the deceased's 2009 nomination of beneficiaries of his death benefits. Instead of including Ms Mutsila as a beneficiary in the Funeral Plan, the deceased included his life partner, Ms Masete and her two children, together with his own three children, his mother and Ms Masete's mother. The Funeral Plan is not proof of factual dependency, but goes a long way to prove that the deceased regarded the nominated beneficiaries as part of his family unit who were dependant on him.

[34] Ms Masete provided a version in the custody application which cannot be regarded as far-fetched and false. Therein, she explained the strained relationship between her and Mr Mphafudi, his assaults on her, that they did not stay together for a number of years and that he had not contributed to the maintenance of the children. After the deceased's death, officials of the Fund visited Ms Masete and explained that she and her children were beneficiaries of the deceased's death benefits. The version presented by Ms Masete in the custody application that she and her children had been factually maintained by the deceased was corroborated by her bank statements. As mentioned, the deceased's identity number is 621208 5971 008. The first ten numbers thereof appear on Ms Masete's bank statements in some of the cases where deposits had been effected. The mere fact that Ms Mutsila confirmed that the deceased stayed with her at their Lulekani house and that she denied the deceased and Ms Masete's cohabitation is not sufficient to negate objective documentary evidence in the form of Ms Masete's bank statements and the Funeral Plan, indicating Ms Masete as the deceased's life partner and even providing cover for her mother (regarded by the deceased as his mother-in-law).

Conclusion

[35] For all the reasons mentioned above, the appeal against the order of the full court should be upheld. The order of the court of first instance should suffer the same fate. Consequently, the Adjudicator's determination should be set aside.

Costs

[36] A final aspect to be dealt with is the punitive costs orders granted in both the court of first instance and the full court. The full court agreed with the reasoning of the court of first instance pertaining to the award of costs on a punitive scale without saying anything further in this regard, save to committing the same factual misdirection in finding that the Fund proceeded to pay Ms Masete an amount of R 300 000 despite the Adjudicator's determination. It also incorrectly mentioned, earlier in the judgment, that the Fund proceeded, after the Adjudicator's determination, 'to make a distribution in November 2014 of 30% of the funds in terms of its unreliable and/or challenged resolution, which distribution included a payment to Masete and her children....' In this regard the court of first instance commented as follows which the full court accepted as correct:

'The Applicant exhibited the same carelessness and defiance it did when it was dealing with the complaint Mrs Mutsila registered with it prior to its decision.

Such improper distribution constitutes a maladministration of the fund causing prejudice to the real beneficiaries. As a result an award of damages for maladministration causing prejudice to the deceased beneficiaries (*sic*) to be borne by the Fund can be a cause to consider.'

This incorrect factual basis caused the court of first instance to make a punitive costs order which was repeated by the full court. There was no justification for a punitive costs order.

[37] The Fund is the successful party in the appeal and in principle is entitled to the costs of the appeal as well as in the high court. However, this is an exceptional case where the successful party should not be granted costs in its favour. The dispute might have taken a totally different, much more inexpensive and less time-consuming path if the Fund had taken a decision to deal with Ms Mutsila's complaint to the Adjudicator on the merits, instead of suggesting that the outcome of the custody application should be awaited. Consequently, the appropriate order is that each party should pay their own costs in respect of the appeal as well as the proceedings in the court of first instance and the full court.

Order

[38] In the result, the following order is made:

1 The appeal is upheld, with each party to pay its own costs.

- 2 The order of the full court is set aside and replaced with the following:
- '(a) The appeal is upheld with each party paying its own costs;
 - (b) The order of the court a quo is set aside and replaced with the following:
 - (i) The determination of the Pension Funds Adjudicator dated 8 September 2014 is set aside.
 - (ii) Each party shall pay its own costs.'

J P DAFFUE AJA
ACTING JUDGE OF APPEAL

Appearances

Counsel for appellant: R Shepstone
Instructed by: Michael Popper & Associates Inc, Johannesburg
Claude Reid Attorneys, Bloemfontein

Counsel for second respondent: M Mojapeolo with F Thema and M Thulare
Instructed by: P B N Mawila Attorneys Inc, Thohoyandou
Thebe Attorneys, Bloemfontein.