THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number : 550/05
Reportable

In the matter between :

THE GOVERNMENT EMPLOYEES PENSION FUND	FIRST APPELLANT
PROVINCIAL GOVERNMENT OF GAUTENG	SECOND APPELLANT

and

ROUAN BUITENDAG	FIRST RESPONDENT
CHRISTIAAN JACOBUS BUITENDAG	SECOND RESPONDENT
YOLANDA NELL	THIRD RESPONDENT

CORAM : HARMS, ZULMAN, CONRADIE, CLOETE *et* PONNAN JJA

HEARD : 5 SEPTEMBER 2006

DELIVERED : 27 SEPTEMBER 2006

Summary: Government Employees Pension Fund : Board has a discretion to decide which 'dependants' shall be paid the gratuity payable on the death of a deceased member and in what proportions; decision to award the gratuity to the husband and/or stepson of the deceased member set aside on review where board ignorant of the existence of major children of the deceased member who qualified as 'dependants'; the obligation on an employer to provide information to the Fund defined.

Neutral citation: This judgment may be referred to as Government Employees Pension Fund v Buitendag [2006] SCA 121 (RSA).

JUDGMENT

CLOETE JA/

CLOETE JA:

[1] The bone of contention in this matter is a gratuity of R232 323,96, which became payable as a result of the death of Mrs Marie-Louise Oosthuizen ('the deceased'). The natural adult children of the deceased by her first marriage ('the children') were the applicants in the court *a quo* and are the respondents on appeal. The Government Employees Pension Fund ('the Fund'), the body established by s 2 of the Government Employees Pension Law, 1996[1] ('the Law'), was the first respondent in the court *a quo* and is the first appellant on appeal. The Provincial Government of Gauteng ('the Provincial Government') was the second respondent in the court *a quo* and is the second appellant on appeal. The third respondent in the court *a quo* was the deceased's husband, Mr N Oosthuizen ('the husband'). The fourth respondent in the court *a quo* was Mr C M Oosthuizen, the husband's son by a previous marriage and therefore the deceased's stepson ('the stepson') who was born on 17 January 1980.

[2] The deceased was employed by the Provincial Government and was a member of the Fund. When she died, the gratuity became payable.[2] On 20 April 2000 the Board[3] of the Fund, acting on information supplied by the Provincial Government, awarded the gratuity to the husband, or to the husband and the stepson in equal shares (it is not clear what the position was). When it made the award, the Fund was unaware of the existence of the children. The children brought motion proceedings in which they claimed an order reviewing and setting the decision of the Board aside; and in the alternative, damages from the Provincial Government equal to one quarter or one fifth of the gratuity on the basis that the Provincial Government had negligently failed to inform the Fund of their existence.

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[1] Proclamation 21 published in Government Gazette 17135 of 19 April 1996.
[2] In terms of Rule 14.5.2, part of which is quoted in para [4] below, contained in Schedule 1 to the Law.
[3] Section 6 of the Law provides inter alia that the Board shall manage the Fund. Section 6A of the Law provides that all powers of the Board are vested in the Minister of Finance until the Board is appointed, and that was the position at all times material to these proceedings.

[3] Despite the relief being couched in the alternative, the court *a quo* (R Claassen J) granted relief against both the Fund and the Provincial Government. The award was set aside with the following directions to the Fund:

'2.2.1 [The children] are to be considered as dependants of the deceased.

2.2.2 The relationship between the deceased and the [stepson] regarding her duty to maintain the [stepson] is to be investigated; and thereafter

2.2.3 [The Fund] is to exercise its discretion as to how the gratuity should be allocated.'

The order then went on:

'3. Any amount payable to [the children] in terms of [the Fund's decision] under paragraph 2 above shall be paid by [the Provincial Government] to the [children].

4. [The Provincial Government] is to pay the costs of this application.'

The Fund and the Provincial Government were both granted leave to appeal to this court by the court *a quo*.

[4] Before dealing with the contentions of the Fund and the Provincial Government on appeal (the children delivered heads of argument but did not appear for financial reasons) it is necessary to analyse the relevant provisions of the Law and the Rules (which comprise Schedule 1 to the Law). The short title of the Law states its purpose as follows:

'To make provision for the payment of pensions and certain other benefits to persons in the employment of the Government, certain bodies and institutions, and to the dependants or nominees of such persons; to repeal certain laws, and to provide for matters incidental thereto.'

Section 3 of the Law reads:

'The object of the Fund shall be to provide the pensions and certain other related benefits as determined in this Law to members and pensioners and their beneficiaries.'

The problem is that neither the Law nor the Rules explicitly provide for the payment of a gratuity to the dependants of a deceased member.[4] Section 22 of the Law provides:

'22.1 If a gratuity is payable on the death of any member to the dependants of such a member or to his or her estate, that member may, on the prescribed form and subject to the prescribed conditions, notify the Board of his or her wish that the said gratuity be paid on his or her death to the beneficiaries mentioned in that form and be divided among such beneficiaries in the proportion mentioned in that

[4] Despite two amendments to the Law and seven amendments to the Rules, this remains the position.

form.

22.2 Notwithstanding anything to the contrary in any law contained, the Board may on the death of a member who so notified the Board pay at its discretion the gratuity concerned in accordance with the member's wish.'

Neither this section, nor any other section of the Law, explicitly confers any rights on dependants. Rule 14.5.2 provides:

'If a member with at least ten years' pensionable service dies, a gratuity shall be paid….'

and then the basis of the calculation of the gratuity is set out. The identity of the recipient is not.

[5] A 'dependant' is defined in s 1 of the Law as follows:

'dependant, in relation to a member or a pensioner, means—

(a) any person in respect of whom the member or pensioner is legally liable for maintenance;

(b) any person in respect of whom the member or pensioner is not legally liable for maintenance, if such a person—

(i) was, in the opinion of the Board at the time moment[5] of the death of the member or pensioner in fact dependent upon such member or pensioner for maintenance;

(ii) is the spouse of the member or pensioner, including a party to a customary union according to indigenous law and custom, or to a union recognised as a marriage under the tenets of any religion; or

(c) a posthumous child of the member or pensioner; and

(d) a person in respect of whom the member or pensioner would have been legally liable for maintenance had that person been a minor.'

There is, however, no order of precedence amongst the dependants in the definition section or in any other section, nor is any general discretion explicitly conferred on the Board by any provision of the Law or Rules as to the award of a gratuity where there is more than one dependant. By way of contrast, where there is more than one spouse, Rule 18.4 provides in regard to a spouse's pension:

'If a deceased member or pensioner leaves behind more than one spouse, the Board decides to which of them and, if to more than one, in which ratio the spouse's pension shall be paid: Provided that such ratio shall not be changed thereafter.'

[6] It was nevertheless common cause between the children and the Fund that

[5] *Sic*; the word 'moment' was deleted by s 1(a) of Act 21 of 2004.

the Board has a discretion to choose which dependants will receive a gratuity and in what proportions. It seems to me that, by necessary implication, this must be so. I say this for the following reasons. If a gratuity cannot be paid to a dependant, it will have to fall into the deceased member's estate. But the stated purpose of the Law is to benefit inter alia dependants of a member ─ not his or her estate. In addition, in terms of s 28,[6] a gratuity payable to a dependant is deemed not to be property in the estate of the member and is accordingly protected from estate duty. Furthermore, s 22.1 presupposes that a gratuity may be payable to dependants of a member; and if the Board has a discretion to override the express wishes of a member contained in a nomination, as it does in terms of that section, it would be logical for it to have a discretion to determine which dependants shall benefit where no nomination has been made. And then finally, the legislation which preceded the Law conferred, and the Pension Funds Act[7] confers, a wide discretion of the nature sought to be implied. The legislation which preceded the Law comprises the Government Service Pension Act[8] and the Regulations made thereunder.[9] Section 1 of that Act defined who a 'dependant' was in relation to any member or any person entitled to an annuity or benefits.[10] Regulation 14(2) provided:

'If a member who has completed at least 10 years' pensionable service dies, there shall be paid to the dependants of the member designated by the Director-General or, if no dependants are so designated, to his estate, a gratuity . . .'

Section 37C(1) of the Pension Funds Act[11] provides:

'(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:

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[6] Section 28 provides: 'Notwithstanding anything to the contrary in any law contained, any benefit or any right to a benefit, due and payable in terms of this Law to the beneficiary of a member, on or as a result of or after the death of that member shall for the purposes of the Estate Duty Act, 1955 (Act 45 of 1955), be deemed not to be property as defined in section 3(2) of that Act.'

[7] 24 of 1956.

[8] Act 57 of 1973.

[9] Contained in *Government Gazette* 3940 published on 22 June 1973.

[10] Namely, 'the widow or minor child of such member or person, including his minor stepchild or a minor child who has been legally adopted by him, and also any person who, in the opinion of the Director-General, was totally or partially dependent on such member or person for maintenance at the time of his death.'

[11] As substituted by s 5(a) of Act 22 of 1996.

(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 board, to one of such dependants or in proportions to some of or all such dependants.'

[7] The Provincial Government contended that the children are not 'dependants' as defined in the Law. Ms Regina Kgasi, the deponent to the affidavits delivered on behalf of the Provincial Government, said in reply to Ms Scheepers who deposed to the affidavits delivered on behalf of the Fund, that:

'Ms Scheepers argues in this paragraph that the Applicants are major children of the deceased and that they are therefore "*dependants*" of the deceased. I dispute the legal correctness of this argument in view of the evidence that none of the Applicants were financially dependent on the deceased at the time of her death.'

Counsel representing the Provincial Government put forward submissions in support of this contention in the heads of argument. The submissions are untenable. They amount to this: that in the case of children, paragraph (a) of the definition must be confined to minors, and paragraph (d) must be interpreted as relating to major children who are not self-supporting. In that way, the written submission proceeded, the common law requirement that a dependant must be in need of support to qualify for support, is preserved: a minor child who is self-supporting could not fall under paragraph (a) and a major child who is self-supporting would not fall under paragraph (d). But there is no warrant for limiting the provisions of either paragraph (a) or paragraph (d), which are in clear terms. Nor, given the purpose behind the law, is there any reason for excluding major children who are self-supporting: as I have already pointed out, the purpose of the law is to benefit 'dependants', not the member's estate and there will be many cases where a member has no 'dependants' as contemplated in paragraphs (a) to (c) of the definition. And why, it may be asked, should the Law be interpreted as favouring a spouse for whom (by definition)[12] the member is not legally liable for maintenance, and who may be in receipt of a spouse's pension, at the expense of the major children of the member?

[12] In terms of the preamble to paragraph (b).

[8] I therefore conclude that the children were 'dependants' and were entitled to be considered by the Board of the Fund when it exercised the discretion as to which dependants should receive the gratuity, and in what proportions. The next question is whether the fact that their existence was unknown to the Board when it exercised this discretion, entitles a court to set the Board's decision aside.

[9] When the Board's decision to allocate the gratuity was made, the Promotion of Administrative Justice Act 3 of 2000 had not yet come into operation. Accordingly, any rights in the children to have that decision set aside must be sought in item 23(2)(b) of Schedule 6 to the 1996 Constitution, which provided that ss 31(1) and (2) of the Constitution had to be read as follows:

'Every person has the right to —

(a) lawful administrative action where any of their rights or interests is affected or threatened;

(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;

(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and

(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened.'

The crucial phrase for present purposes is 'lawful administrative action'.

[10] The Fund — correctly — admitted that the children were dependants, as defined in the Law, and could have been considered when the allocation of the gratuity came to be made. Counsel for the Fund made two submissions on why the Board's decision should not be set aside. The first was that in accordance with the policy of the Board the children would not have received anything anyway. But that allegation appears nowhere in the answering affidavit, supplementary affidavit or further supplementary affidavit delivered on behalf of the Fund. All that Ms Scheepers, the deponent to these affidavits, said in the supplementary affidavit, almost in passing, was:

'With regard to dependants it is the practice of the Fund administration that regard is had to actual financial dependency. With regard to major children it is required that they should be registered students.'

These statements do not support counsel's submission — in particular, it is not explained how 'regard' is had to actual financial dependency, nor is it stated unequivocally what happens if the 'requirement' that major children be registered students is not met. Nor is there any indication of what the practice of the Fund is where all dependants are self-supporting. If it was the Fund's contention that the children would have received nothing, I would have expected a clear statement to that effect in the answering affidavit.

[11] The second submission by counsel for the Fund was that the decision of the Board was unassailable because it was taken on the facts then available to it. The Fund blamed the Provincial Government for not providing it with the full facts, and the Provincial Government blamed the Fund for not making proper inquiries from third parties. This dispute is irrelevant in the context of the application for review by the children (although I shall have to return to it when considering the question of costs). The fact is that the Board was ignorant of the existence of the children when it made the allocation; and this was obviously a material fact.

[12] In *Pepcor Retirement Fund v Financial Services Board*[13] this court said:

'[47] … [A] material mistake of fact should be a basis upon which a Court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should (subject to what is said in para [10] above) be reviewable at the suit of, *inter alios*, the functionary who made it — even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decisions in *Fedsure*,[14] *Sarfu*[15] and *Pharmaceutical Manufacturers*[16] requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, i e on the basis of the true facts; it should not be confined to cases where the common law

[13] 2003 (6) SA 38 (SCA).
[14] *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC).
[15] *President of the Republic of South Africa v South African Rugby Football Union* 2001 (1) SA 1 (CC).
[16] *Pharmaceutical Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

would categorise the decision as *ultra vires*.'[17]

This court went on in *Pepcor* to give the following warning (in para 48):

'Recognition of material mistake of fact as a potential ground of review obviously has its dangers. It should not be permitted to be misused in such a way as to blur, far less eliminate, the fundamental distinction in our law between two distinct forms of relief: appeal and review. For example, where both the power to determine what facts are relevant to the making of a decision, and the power to determine whether or not they exist, has been entrusted to a particular functionary (be it a person or a body of persons), it would not be possible to review and set aside its decision merely because the reviewing Court considers that the functionary was mistaken either in its assessment of what facts were relevant, or in concluding that the facts exist. If it were, there would be no point in preserving the time-honoured and socially necessary separate and distinct forms of relief which the remedies of appeal and review provide.'

The limits of the principle set out in Pepcor, particularly in view of the warning contained in that decision, have yet to be defined by the courts; but it is instructive to have regard to the decisions of this court where the principle has been applied. In *Pepcor*,[18] the decision maker would not have made the decision had he known of the true facts; in *Bullock*,[19] the whole foundation of the decision was the incorrect advice given to the decision maker; and in *Oudekraal*[20] the fact not known to the decision maker (or not taken into account by him) was obviously of cardinal importance to the decision he was called upon to make.

[13] The approach which must be followed in deciding whether the decision of the Board should be set aside, was set out in *Pepcor* as follows:

'[49] Whether a review should succeed in a matter such as the present will depend on a consideration of the public interest in having the decision corrected and other factors, and in particular, the interests of the person in whose favour a decision has been made. Ultimately, a value judgment, balancing all the relevant factors, will be required.'

[14] I turn to consider the factors relevant in the present case. I shall deal with the public interest; the position of the children, the husband and the stepson; and finally,

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[17] See also *Bullock NO v Provincial Government, North West Province* 2004 (5) SA 262 (SCA) para 16 and *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 (6) SA 222 (SCA) para 25 and n 16.
[18] See paras 5 and 6.
[19] See para 18.
[20] See paras 20 and 25.

the interests of the Fund. The fund has some 1,2 million members and 400 000 pensioners. It is in the public interest that decisions of the Board in relation to the administration of the Fund should be properly taken on the facts material to the decision: if that were not so, manifest injustices would go uncorrected. It is in the interests of the children that they be considered, as they are entitled to be, when the gratuity earned by their late mother is allocated. Nor were they in any way responsible for misleading the Board. A letter dated 17 November 1999 was sent to the Provincial Government by an insurance broker representing the deceased's executrix, who was one of the children. In the letter the broker asked for details of 'the amount payable as a death benefit from the deceased's retirement fund' and 'the name of the person to whom the death benefit is payable.' A copy of the letter was forwarded to the Fund by Ms Kgasi without acknowledgement or reply to the broker who wrote it. The consequence was that the children remained unaware of the existence of the Fund. Should the Board alter the allocation already made, the husband (and the stepson, if part of the gratuity was paid to the husband on his behalf) will have to return what has been overpaid. But that is no reason to deprive the children of the right to be considered for payment of a portion of the gratuity. Both the husband and the stepson were joined as respondents in the court *a quo* and neither suggested that he would suffer any particular prejudice were the award to be altered. If the allocation is allowed to stand, the Fund will be prejudiced. Such prejudice consists in the Board not having had an opportunity to evaluate all the facts material to its decision, with the result that the Board's function was compromised. The Fund can recover any overpayment of the gratuity from the husband by deducting it from the widower's pension which it is currently paying him.[21] There is no evidence to suggest that the Fund could not recover any overpayment from either the husband or the stepson; but if there is a shortfall for this reason, the Fund can pursue whatever remedies it has against the Provincial Government. All in all, it would in my view be a miscarriage of justice if the decision of the Board were not set

[21] In terms of s 21 of the Law which provides, to the extent relevant for present purposes, that:
'(b) [A]ny amount which has been paid to any … beneficiary in accordance with the provisions of this Law and to which such … beneficiary was not entitled … may be deducted from the benefit payable to such … beneficiary under this Law in a lump sum or in such instalments as the Board may determine.'

aside.

[15] I therefore conclude that the appeal by the Fund must be dismissed. There is however a problem with paragraph 2.2.2 of the order in the court *a quo*, quoted above. The order requires the 'relationship between the deceased and the [stepson] regarding her duty to maintain [him]' to be investigated. But no question of a 'duty to maintain' arises. The stepson qualifies to be considered as a dependant if he was in fact dependent on the deceased at the time of her death even although she had no duty to maintain him. This paragraph in the order must accordingly be deleted. If it is uncertain whether the stepson was in fact dependent on the deceased at the time of her death, it is for the Provincial Government to ascertain the facts for the reasons appearing in paras [18] to [20] below.

[16] I turn to consider the appeal by the Provincial Government. I do not propose examining all the issues which it raises. It can be disposed of quite simply. The claim against the Provincial Government was obviously brought on the basis that if the decision of the Fund stood, the children would suffer damages in the amount of the gratuity they would have received had the Provincial Government informed the Fund of their existence. But once the Fund is free to make a new allocation, that basis falls away. We were informed by counsel who appeared at the hearing of the application in the court *a quo* that the children's case against the Provincial Government was presented as the notice of motion foreshadowed would be ─ in the alternative. As I have already said, if an amount is now awarded to the children or any of them, it is for the Fund to recover the overpayment from the person(s) who received it (the husband and/or the stepson); and if the Fund cannot do so, it can pursue whatever remedies it has against the Provincial Government. There was simply no foundation for the order of the court *a quo* directing the Provincial Government to pay any amount allocated by the Fund, to the children. The appeal by the Provincial Government against paragraph 4 of the order of the court *a quo* must accordingly succeed.

[17] That brings me to the question of costs. In the appeal by the Fund, there is no reason why the costs should not follow the result. The Provincial Government did not ask that the children should be ordered to pay its costs of appeal, but did appeal against the order directing it to pay the costs of the proceedings in the court *a quo*. The Fund asked that the costs in the court *a quo* should be paid by the Provincial Government, on the basis that it was the fault of the Provincial Government that the full information necessary for the exercise of the Board's direction to award the gratuity was not before the Board. The Provincial Government, as I have said, denied that it had this obligation. It is desirable that the relationship between the Fund and the Provincial Government and their rights and obligations *inter se* be dealt with in a little detail, as these aspects were the subject matter of several affidavits and allegations verging on the acrimonious.

[18] The Board can require any employer, including the Provincial Government, to provide it with information in terms of s 7(3) of the Law, which provides (to the extent relevant):

'The Board may, with a view to the effective and efficient administration of the Fund, determine the nature, form, manner in which . . . the employer shall in respect of members in its employment, perform any act pertaining to the pension interests of members . . . .'

The information required by the Board when a gratuity is claimed, has to be set out in Form Z102A. That form has to be completed and signed on behalf of the employer. Two signatures are required, one of which has to be that of an assistant director or person of equal rank. Paragraph 23(a) calls for particulars of dependants, as follows (the copies of the form in the record are in Afrikaans, which I have translated):

'Particulars of dependants (only in cases of retirement or death). If no dependants, state "none".

Name Initials Relationship Type of dependant eg student Birth date'.

Since 1996 there has been a manual (now in its third edition) prepared by the Fund and given to employers, which explains how the form is to be completed. The instruction in respect of para 23(a) says inter alia:

'The particulars of the spouse, minor children as well as any other person who, according to the provisions of the rules concerned, qualify as dependants must be stated in full.'

[19] The form sent to the Fund by the Provincial Government referred only to the husband and stepson in para 23(a). Ms Kgasi, the senior official of the Provincial Government who countersigned it, who as I have said was the deponent to the affidavits filed on behalf of the Provincial Government and whose interpretation of 'dependant' I have dealt with above,[22] did not (despite the instruction in the manual) appreciate what information was required in the form. The form was sent to the Fund together with an application by the husband for a widower's pension on Form Z143. That latter form was filled in by the husband. It required 'particulars of minor children: (own children/stepchildren and adopted children) as well as all other dependants' (my translation). This section was left blank by the husband. The husband delivered no affidavit, so it is not known why he did not mention the stepchild. It seems likely that he did not refer to the stepchild or the children because he did not appreciate the meaning of 'dependants'. Other documents were also sent by the Provincial Government to the Fund, none of which mentioned the children.

[20] It was the duty of the Provincial Government to provide information to the Fund in respect of persons who qualified as dependants, as defined. With effect from 1 January 2000 the Provincial Government has been obliged to comply with para H.1(p) in s V111 of the Public Service Regulations, 1999[23] which reads:

'A head of department shall keep a record of each employee reflecting, as a minimum, the following particulars with regard to the employee:

(p) all other particulars required for determining benefits and remuneration, including particulars as to marital status and dependants.'

The deceased died before the regulation in question came into force. But the Provincial Government was nevertheless required, because of the provisions of s 7 of the Law and the form which the Fund required it to complete, to provide the Fund with the information required by it. The submission on its behalf — that it is only obliged to provide the Fund with such information as may appear in its files — is incorrect and most unfortunate. An employer is obliged to provide correct and

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[22] Para [7].

[23] Made by the Minister for the Public Service and Administration and contained in *Government Notice* R679 published in *Government Gazette* 20117 on 1 July 1999.

complete information to the Fund and if this necessitates the making of inquiries, it is for the employer to make those inquiries. The burden this entails must not be overstated because it would be quite proper and indeed desirable for the employer, once it has ascertained who qualify as beneficiaries, to inform them that they could make representations and bring whatever facts they might consider relevant to the attention of the Fund directly. Ms Scheepers said that the Fund will take into account facts brought to its attention by interested parties directly, and this is clearly a correct approach.

[21] I return to the question of costs. Had the Fund conceded the relief sought against it in the court *a quo* and merely filed affidavits to assist the court in establishing the facts, there would have been much to be said for an order directing the Provincial Government to pay its costs. But the Fund opposed the application on the merits. The consequence is that it should pay its costs and the children's costs.

[22] The Provincial Government asked for its costs in the court *a quo* to be paid by the children. I consider that no order should be made in respect of these costs because it was the misconception of the Provincial Government's employee as to her responsibility to provide information to the Fund, and the misinterpretation by its employee of the definition of dependants, that caused the problem which lay at the heart of these proceedings.

[23] I make the following order:

1.1 The appeal by the first appellant (the Fund) is upheld to the extent that para 2.2.2 of the order of the court *a quo* is deleted.

1.2 That appeal is otherwise dismissed.

1.3 The first appellant is ordered to pay the respondents' (the children's) costs of appeal.

2.1 The appeal by the second appellant (the Provincial Government) is upheld.

2.2 Paragraphs 3 and 4 of the order of the court a quo are deleted and the following paragraph is substituted:

‘3. The first respondent (the Provincial Government) is ordered to pay the applicants’ (the children’s) costs.’

_____
T D CLOETE
JUDGE OF APPEAL

Concur: Harms JA
Zulman JA
Ponnan JA

CONRADIE JA

[24] I agree with the orders proposed by my brother Cloete and with his reasons. I think, though, that the case has another dimension worth mentioning. The Fund is an organ of state that performs an administrative function. If the children wanted a hearing they ought not to have been denied one.

[25] Apart from the widower (who was properly classifiable as a dependant) and his son (who may or may not have been a dependant) the only dependants were the children. Although they were not particularly well served by the executrix and her adviser, they did, I think, manage to bring it home to the Fund that they had something to contribute to the decision it was about to take.

[26] Ms Regina Kgasi, the deponent to the employer's affidavit, says that she received the letter requesting information about the death benefits, as well as the form Z143 completed by the widower in which he claimed payment of the pension benefits. Both were dated 19 November 2000. She attached them to the form Z102A (which she herself had filled in from information in the deceased's personnel file) and sent all three documents to the Fund. She did not bother to write to the executrix to tell her that a gratuity was due to those who qualified as 'dependants' of the deceased or that the Fund was about to take a decision on who the recipients should be.

[27] The two forms forwarded by the employer, Z143 (in respect of the pension) and Z102A (in respect of the gratuity), arrived at the Fund on 13 April 2000. Ms Esti Scheepers, the deponent to the Fund's answering affidavit, says, 'Apart from these forms submitted by the second respondent [the employer] to the first respondent [the Fund] the first respondent had no other source of information from which the existence of the children of the deceased could have been ascertained.'
She is not clear on whether the Fund received the letter whereas Ms Kgasi is clear that she sent it. We must therefore conclude that it did arrive at the Fund with the

official claim forms.

[28] It must have been evident to the Fund from these documents that the executrix was unaware of the claim made by the widower. The obvious lack of communication between the person responsible for winding up the estate and the surviving spouse suggested a need for some elementary enquiry on the part of the decision-maker. The letter amounted to a request to engage, an implicit request for a hearing. No extensive research (the resources for which the Fund is said to lack) was required. The telephone number of the executrix's representative was on the letter and it would have been no more than a moment's trouble to obtain her views on the merits of the surviving spouse's claim to the gratuity.

[29] The executrix did not leave matters there. When she received no response, she telephoned the employer and on 13 January 2000 sent it a fax confirming a conversation about the deceased's estate with one of its officials. She again requested information about the deceased's 'death benefits' and accumulated leave pay. This communication amounted to another request for a hearing. It is not known whether the employer forwarded the letter to the Fund. In my view it does not matter. The employer and the Fund were part of the same decision-making mechanism. The quality of a decision by the Fund depended as much on the diligence of the employer's officials who, at the behest of the Fund, gathered the information on which the latter made its decision, as on the astuteness of its own officials. In blaming each other for what went wrong they are misguided.

[30] The natural justice principles underlying a fair hearing are very flexible. While the Fund may not be obliged to afford a hearing to every claimant, whatever the circumstances, it is obliged to do so when a hearing is requested. How easily might this litigation not have been avoided if someone had said, 'From these documents it

looks as if I may not have all the facts. Let me pick up the telephone and make sure I have it right.'

J H CONRADIE
JUDGE OF APPEAL

CONCUR:
ZULMAN JA