

Court case: Pension fund ordered to consider relevant facts

[Swart NO and Others v Lukhaimane NO and Others \[2021\] ZAGPPHC 124](#)

R set up an inter vivos trust (the trust) during his life. His two children from a previous marriage (S and V, applicants 6 and 7) are the beneficiaries of the trust and also two of the five trustees. R married the fourth respondent (B) in 2011, and subsequently passed away in 2014. R nominated the trust and B for 50% each of the benefits of just over R1.6m from a provident fund (FAW), the second respondent. FAW awarded 100% of the benefit to B, acting under [section 37C of the Pension Funds Act, 24 of 1956](#). S and V complained to the Pension Fund Adjudicator (L, the first respondent) who set the decision aside on the grounds that FAW did not take all relevant information into account in making the award, and referred the matter back to FAW for reconsideration and a fresh decision. FAW, once again, awarded 100% of the benefit to B. S and V approached L's office again, but L advised that she is functus officio in the matter and that S and V should bring a review application in the High Court. This led to the application by S and V and the other three trustees in their capacity as trustees, and S and V in their personal capacities as beneficiaries of the trust and dependants of R. The application was based on the provisions of the [Promotion of Administrative Justice Act, 3 of 2000 \(PAJA\)](#). The applicants argued that FAW did not take into consideration that they are dependants of R and that the trust suffered a cash shortfall and could therefore not satisfy their maintenance requirements. FAW also did not consider the fact that B has remarried, was employed, lodged a claim for maintenance against R's deceased estate in excess of R10m, and received more than R4m in life policy pay-outs after R's death.

The court (Swanepoel AJ) held that the provisions of PAJA applied to decisions by FAW to award benefits under section 37C. The court also criticised FAW for not ascertaining all facts and circumstances before making the award and then compounding the error by taking the same decision after L referred the matter back, again without making full enquiries to ascertain all the relevant facts and circumstances. This behaviour was irrational and rendered the actions taken susceptible to review by the court. The court considered taking the decision in the place of FAW, but eventually ordered that the matter be referred back to FAW to reconsider the award of benefits and directed FAW to ascertain and consider specific facts and circumstances in the process of making the award.