

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/643/02/KM

In the complaint between:

THANDIWE MIRIAM MNTSEU
Complainant

and

MINeworkers PROVIDENT FUND

Respondent

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT OF
1956**

Introduction

[1] This complaint is brought in terms of section 30A of the Pension Funds Act 24 of 1956 (“the Act”). It concerns the non-payment of a benefit allegedly due to the complainant in consequence of the death of Salvador Jose Boca (“the deceased”), who the complainant contends was a member of the respondent.

[2] In determining this matter, I have relied exclusively on the documentary evidence and written submissions lodged by the complainant. As will appear more fully below, the respondent has failed, despite numerous requests, to furnish a response, or any other information.

The parties

[3] The complainant is Thandiwe Miriam Mntseu, the wife of the deceased.

[4] The respondent is the Mineworkers Provident Fund (“the fund”), a defined

contribution pension fund registered under the Act.

The facts according to the complainant

- [5] The deceased was allegedly a member of the respondent at the time of his death, and it is further alleged that a death benefit is payable to the complainant in terms of the rules of the fund. The complainant records the employer of the deceased as “Freddies Min [sic] no 5 #”, although on annexure “C” to the complaint (a benefit statement issued by the respondent) the employer is recorded as Free State Geduld Mine. It is not clear whether the deceased was still employed, or a member of the respondent, at the time of his death from gastro-enteritis on 24 September 1998. Reference is made in the complaint to his “being terminated”, so his status at that time remains uncertain.

Failure of the fund to respond

- [6] The fund has been afforded numerous opportunities to respond to the complaint, the chronology of which is set out hereunder. I would point out that the various requests for a response fall under two distinct time periods. The first batch of correspondence from this office occurred during the end of the term of the previous Adjudicator, Mr Murphy. There is then a significant gap for the period for which there was no Adjudicator, and hence no possibility of an order against the fund for failure to comply with requests for information. The second set of requests for a response commenced after I took up office in March 2004, and as part of my functions, undertook a determined effort to address the backlog existing in this tribunal.
- [7] I set out the attempts to obtain a response from the fund as follows:

Before I assumed office:

- 7.1 On 6 June 2002 a member of my administrative staff, Ms Higgs, addressed a fax to the respondent, annexing a copy of the complaint received, requesting it to respond to the allegations contained in the complaint within 30 days of receipt of the letter.
- 7.2 On 17 July 2002 a further fax was addressed by Ms Higgs, to Mr Mahlangu, the principal officer of the respondent, requesting him to respond by 8 August 2002.
- 7.3 On 19 August 2002, a further fax was sent by Ms Higgs to Mr Mahlangu requesting an urgent response by 30 August 2002.
- 7.4 On 20 November 2002 a request was received from Mr Moshatane, an account executive with the respondent, for an extension until 2 December 2002 to “allow our legal representative to formulate an appropriate written response”.
- 7.5 This request was granted by Ms Schroeder, another administrative assistant on my staff, in a fax dated 22 November 2002.
- 7.6 The 2nd of December 2002 came and went and nothing further was heard from the respondent. Ms Higgs then addressed a further fax to the respondent, requesting a response by 20 February 2003.
- 7.7 On 12 December 2003, Ms Higgs wrote again to the respondent asking that it furnish the information by 19 December 2003.

After I assumed office:

- 7.8 Ms Higgs addressed a fax to Mr Mahlangu on 1 June 2004, itemizing the previous correspondence, and requesting a response by 15 June 2004.
- 7.9 The deputy adjudicator, Mr Jeram, then sent a fax to Mr Mahlangu on 5 August 2004 asking that the matter now be dealt with as a matter of urgency, and that a response be filed by 25 August 2004.
- 7.10 One of my senior assistant adjudicators, Ms MacKenzie, then phoned Ms Phadu of Lekana Employee Benefits, the administrator of the respondent, and requested a response by 8 November 2004. This was confirmed in a fax by Ms Higgs, sent the same day. A copy of the fax was sent to Mr Mahlangu at the respondent.
- 7.11 Ms MacKenzie addressed a final fax to both Ms Phadu and Mr Mahlangu on 11 November 2004, advising that the fund ran the risk of a default determination being granted, should sufficient cause be shown in the complaint.
- 7.1 This was followed up by a phone call from Ms MacKenzie to Mr Mahlangu on 17 November 2004, in the course of which he undertook to file the response by the following Monday (22 November 2004). Ms MacKenzie also phoned Ms Phadu on the same day and left an urgent message to return her call. To date the call has not been returned.

Determination and reasons therefor

[8] The above history paints a breathtaking picture of lack of interest, non-cooperation, and shocking administration on the part of the fund and its administrator. It is self evident that no purpose will be served by further requests or demands for information. Unfortunately this is one of those cases, as is often the situation in pension fund complaints, where the fund is the party in possession of the information necessary to support a cause of action. In particular, the complainant is not in possession of a copy of the rules of the fund as they obtained at the time that the deceased passed away. The rules are indispensable for establishing the entitlement, if any, to a death benefit. Moreover, the fund, specifically its board of management, is the repository of the discretion conferred in s37C to allocate any death benefit payable in respect of the deceased to his beneficiaries in the proportions that it deems equitable. Even if a death benefit is payable in the present circumstances, it is not my function to usurp that discretion.

[9] Had a sufficient *prima facie* case been made out for relief in respect of the amount claimed, and in respect of the particular complainant, I would not hesitate to make a default determination against the fund for that amount. As matters stand however, for the reasons set out above, I am constrained to order that the fund exercise its discretion in terms of section 37C of the Act within a specified period in the event that a death benefit is payable. It is not my function to make an investigation into the deceased's possible dependants, the amount of the death benefit, or the equitable distribution thereof among dependants.

[10] My order is therefore as follows:

10.1 The respondent is ordered to exercise the discretion conferred on it in terms of section 37C of the Pension Funds Act 24 of 1956 in respect of any death benefit payable under its rules as a consequence of the death of Salvador Jose Boca;

10.2 The discretion referred to above is to be exercised no later than **11 February**

2005.

- [11] This matter will be referred to the Registrar of Pension Funds for any sanction he may consider appropriate against both the principal officer and the trustees, on the one hand, and the administrator, on the other.
- [12] I also bring to the attention of these parties the provisions of section 30V(d) of the Pension Funds Act. As their conduct demonstrates contempt of this office, they will be liable on conviction to a time of imprisonment of up to 3 years.

Signed at CAPE TOWN on this 12th day of January 2005.

Vuyani Ngalwana

Pension Funds Adjudicator

Registered address of the fund

Mineworkers Provident Fund
5th Floor
Southern Life Centre
45 Commissioner Street
Johannesburg
2000

Section 30M filing: Magistrate's Court

The complainant was unrepresented in this matter

The respondent has not entered an appearance in this matter