



**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR  
(HELD IN JOHANNESBURG)**

**CASE NO: PFA/MP/10472/2006/SM**

In the complaint between:

**WR MKHATSHWA (OBO) TC SIBANDE**

**Complainant**

**and**

**MINEWORKERS PROVIDENT FUND**

**Respondent**

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**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION  
FUNDS ACT, 24 OF 1956 (“the Act”)**

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## INTRODUCTION

- [1] The complaint concerns the delay in the payment of a death benefit by the respondent following the death of the complainant's husband, Mr LB Licula ("the deceased").
- [2] The complaint was received by this office on 16 January 2007. A letter acknowledging receipt thereof was sent to the complainant on 6 March 2007. On 12 September 2007 a letter was dispatched to the respondent giving it until 11 October 2007 to file its response to the complaint. This office also dispatched further letters to the respondent on 3 December 2007 and 4 April 2008 as no response was received after the first letter was sent out. However, the respondent omitted to file a response.
- [3] After considering the written submissions before this tribunal, it is considered unnecessary to hold a hearing in this matter. As the background facts are well known to all the parties, only those facts that are pertinent to the issues raised herein shall be repeated. The determination and reasons therefor appear below.

## FACTUAL BACKGROUND

- [4] The complainant is the wife of the deceased who passed away on 23 November 2001. The deceased was employed by Strathae Colliery ("the employer") and was a member of the respondent from September 1997 until he passed away.

- [5] Upon his death, the complainant became entitled to receive a death benefit from the respondent.

### COMPLAINT

- [6] The complaint is that the board of the first respondent is delaying the payment of the deceased's death benefit. The complainant contends that she has been trying to get payment of the death benefit since December 2001 but the respondent kept on advising her that the matter is receiving attention.

### DETERMINATION AND REASONS THEREFOR

#### *Time barring*

- [7] Whilst the respondent has not raised the issue of time barring in terms of section 30I(1) of the Act as a defence, I believe it is incumbent upon me to address this issue. At the time that the complaint was lodged, section 30I of the Act contained a subsection (3) which was subsequently removed by the Pension Funds Amendment Act 11 of 2007. This subsection read as follows:

“The Adjudicator may on good cause shown or of his or her own motion-

- (a) either before or after expiry of any period prescribed by this Chapter, extent such period;

(b) condone non-compliance with any time limit prescribed by this Chapter.”

[8] Subsection (3) therefore contained a power for the Adjudicator to condone non-compliance with the three year time-bar, provided good cause existed. Although that discretion has been removed, the complainant is entitled to have her complaint adjudicated on the legal framework applicable at the time she lodged her complaint. Our courts will only hold that a statutory provision which interferes with vested rights or imposes a liability or a burden is retrospective in operation where the legislature either expressly indicates this or clearly intended the statute to have that effect (see *Njobe v Njobe & Dube NO 1950 (4) SA 545 (C)* at 552). Therefore, the discretion to condone non-compliance with the time limits set out in section 30I must be exercised in respect of the complainant’s complaint as it was lodged prior to the commencement of the Amendment Act, which was 13 September 2007.

[9] *In casu*, the complainant’s cause of action arose in November 2001 following the death of her husband. Any claim for a death benefit should have been lodged at that time. However, the complaint was only lodged in January 2007 and was therefore received almost four years out of time.

[10] Although the complainant’s complaint is time-barred in terms of section 30I(1) of the Act, it is clear from the evidence before this tribunal that she has attempted to resolve the matter by making several enquiries with the respondent. The complainant submitted that the respondent kept on advising her that the matter is receiving attention. Thus, much of the delay in this matter was occasioned by the

conduct of the respondent in failing to attend to the complainant's claim and making sure that a death benefit is paid out to her. Further, I am of the view that the prospects of success are very strong in this matter as the respondent failed to file a response disputing any aspect of the complainant's complaint. Therefore, in light of the foregoing, coupled with the fact that the prospects of success are strong, I find that there is good cause to condone non-compliance with the time limits.

Merits

- [11] The issue that falls for determination is whether the respondent failed to comply with its duties in terms of the Act and its rules with regard to the payment of a death benefit to the complainant.
- [12] As stated above the respondent failed to file a response to the complaint despite been invited to do so on several occasions. In this regard I set out the following record of attempts to procure a response from the respondent. A letter was dispatched to the respondent on 12 September 2007 requiring a response to the complaint by 11 October 2007. A further letter was sent to the respondent on 3 December 2007, as no response was received by 11 October 2007, setting a further deadline of 12 December 2007. Further, a final letter was sent to the respondent on 4 April 2008 setting a deadline of 14 April 2008 for it to file a response. This office also sent an electronic mail to the respondent on 7 April 2008 regarding this matter. It is further important to point out that the respondent undertook to file a response by 11 April 2008 after an electronic mail was sent to it. However, the respondent still

omitted to file any response in this regard.

- [13] Since this tribunal has the authority to issue determinations that have the same power as that of a civil judgment of any court in terms of section 30O of the Act, the relevant Rules of the High Court relating to default judgments should be applied. The apposite portion of Rule 19 of the Uniform Rules of the High Courts reads as follows:

**“Notice of Intention to Defend**

- (1) Subject to the provisions of section 27 of the Act, the defendant in every civil action shall be allowed ten days after service of summons on him within which to deliver a notice of intention to defend, either personally or through his attorney. ...”

- [14] Rule 31(2)(a) and 31(5)(a) of the Uniform Rules reads as follows:

“31(2)(a) Whenever in an action or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as to it seems meet.

31(5)(a) Whenever a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff, if he or she wishes to obtain judgment by default, shall where each of the claims is for a debt or liquidated demand, file with the registrar a written application for judgment against such defendant. ...”

[15] It has been held that there is nothing which precludes the court from dealing with applications in terms of Rule 31(5)(a) where the claim involves a liquidated demand (see *Standard Bank of SA Ltd v Snyders and Eight Similar Cases* 2005 (5) SA 610 at paragraph 13). Similarly, there is nothing which precludes this tribunal from issuing a default determination if the circumstances meet. Thus, this tribunal has the power to issue a default determination in cases where it has attempted to procure a response from the respondent to no avail. This is due to the fact that a failure by the respondent to file a response delays the resolution of the complaint and protracts the dispute unnecessarily. Further, it may prejudice the complainant in respect of her right to the benefit in the fund and also delays access to justice.

[16] In this regard the following passage in *Van Winsen et al Herbstein & Van Winsen: The Civil Practice of the Supreme Court of South Africa* (1997) at 33 has often been cited by the courts (see *Standard Bank of SA Ltd v Snyders and Eight Similar Cases-supra* at 615H-J). It reflects an eminently reasonable approach:

“The rules of court, which constitute the procedural machinery of the courts, are intended to expedite the business of the courts. Consequently, they will be interpreted and applied in a spirit which will facilitate the work of the Courts and enable litigants to resolve their differences in as speedy and inexpensive a manner as possible.”

[17] Therefore, the main purpose of requesting a response is to ensure that the respondent is afforded an opportunity to answer the complainant’s allegations as set out in the complaint. Any delay or failure to respond thereto is not in the interest

of justice and does not help in resolving the dispute speedily.

[18] It is further important to quote a passage from the decision of the Supreme Court of Appeal in *Lodhi 2 Properties v Bondev Development (Pty) Ltd* [2007] SCA 85 (RSA)a at paragraph 27), which reads as follows:

“A court which grants a judgment by default like the judgment we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grant the judgment on the basis that the defendant has been notified of the plaintiff’s claim as required by the rules, that the defendant, not having given notice of an intention to defend, is not defending the matter and that the plaintiff is in terms of the rules entitled to the order sought.”

[19] *In casu*, the complainant submitted that the respondent is delaying the payment of the death benefit. She contends that she is been trying to get payment of the death benefit since December 2001 and the respondent kept on advising her that the matter is receiving attention.

[20] Section 37C(1) of the Act deals with the disposition of pension benefits upon the death of a member. The relevant section in this matter reads as follows:

“37C(1)(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.”

[21] Thus, in terms of section 37C of the Act the board of the trustees has 12 months within which to trace the deceased's dependants and effect payment of the benefit. It has been held that the duty to pay is not dependent on the expiry of the 12 month period, but rather on whether the board is satisfied that it has investigated and considered the matter with due diligence and is in a position to make an equitable allocation (see *Dobie NO v National Technikon Retirement Pension Fund* [1999] 9 BPLR 29 (PFA) at 38C-G).

[22] However, *in casu*, the deceased passed away on 23 November 2001, and yet the board of trustees of the respondent has still not effected payment of the death benefit. Further, the respondent has not provided any explanation as to the delay as it failed to file a response. As a result of the respondent's dilatory conduct, the complainant has suffered prejudice in that she has potentially been denied access to a benefit which is due to her. Thus, I am of the view that a default determination should be issued against the respondent in terms of which it is ordered to exercise its discretion in terms of section 37C of the Act and effect payment thereof, within six weeks of the date of this determination.

## RELIEF

[23] In the result, the order of this tribunal is as follows:

[23.1] The respondent is directed to exercise its discretion in terms of section 37C

of the Act and effect payment of the benefit in terms of its rules (Rule 27) within six weeks of the date of this determination.

Dated at Johannesburg on this the                      day of                      2008

Yours faithfully

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**MAMODUPI MOHLALA**  
PENSION FUNDS ADJUDICATOR