



**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR  
HELD IN CAPE TOWN**

CASE NO: PFA/NC/8674/06/CN

In the complaint between:

**MASE E. ITUMELENG**

**Complainant**

and

**SALA PENSION FUND**

**1<sup>st</sup> Respondent**

**SOL PLAATJE MUNICIPALITY**

**2<sup>nd</sup> 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. This complaint relates to the distribution of the proceeds of a death benefit, particularly the fund’s payment of the benefit into the deceased’s estate after the expiry of a period

of twelve months from the date of the deceased's death.

2. The complaint was received by this office on 22 May 2006 and a letter acknowledging receipt thereof sent to the complainant on 14 June 2006. On the same date a letter was dispatched to the respondents requesting them to submit their responses by no later than 5 July 2006. The response from the fund, dated 24 July 2006, was received on 27 July 2006 and was subsequently forwarded to the complainant for a reply. The reply was received on 28 August 2006.
3. After considering all the written submissions received, it is considered unnecessary to hold a hearing in this matter. The determination and the reasons therefor are set out below.

#### THE COMPLAINT

4. The complainant, who was the customary law wife of the late Mr. Karabo E Seretse ("the deceased"), a member of the SALA Pension Fund ("the fund") during his lifetime, is dissatisfied with the fund's decision to pay the entire proceeds of the death benefit that became available upon the deceased's death into the deceased's estate.
5. According to the complainant, she and the deceased had been living together as husband and wife for a period of 12 years prior and up to the date of the deceased's

death in May 1997, and she was fully dependent on him for support. She further states that as the deceased's sole dependant, she should have been paid the entire death benefit. The complainant blames the Sol Plaatje Municipality ("the deceased's employer") in whose service the deceased had been, for failing to inform the fund that she was the sole dependant of the deceased, and contends that had the employer done so, the fund would have paid the whole death benefit amount to her.

6. The complainant states, in her reply dated 8 August 2006, that she had during May 1997 personally submitted a copy of her identity document as well as a sworn statement indicating that she and the deceased had been staying together as husband and wife for 12 years, to the deceased's employer's HR section, in support of her claim for the death benefit.

#### THE RESPONSE

7. Only the fund, and not the employer, has filed a response. The fund states that the deceased passed away on 10 May 1997 and that the death benefit was paid into his estate on 21 May 1998. It further states that the employer had recommended, in the Benefit Claim Form that was submitted to it on 5 June 1997, that the benefit be paid into the deceased's estate. According to the fund, in the 12-month period preceding the payment of the benefit into the deceased's estate it requested the deceased's employer to furnish it with information regarding the deceased's potential dependants and other

beneficiaries. It also states that before paying the benefit to the estate it sent a letter, dated 11 May 1998, to the employer reminding it that until such time as the deceased's dependants came forward, the claim would be kept open for 12 months after which the benefit would be paid into his estate.

8. According to it, the trustees did not become aware, nor were they informed, of any surviving spouse, dependants or beneficiaries of the deceased. The fund goes on to submit that, since the information requested from the employer was not forthcoming and no dependants had come forward throughout the 12-month period, the trustees exercised their discretion and in good faith paid the benefit into the deceased's estate. It further submits that it only became aware of the complainant's existence when it received a fax from her representative on 22 September 2004.
  
9. The fund concludes that it does not dispute the complainant's status as the deceased's customary law wife and dependant, but contends that since the complainant had not lodged her claim timeously, her remaining right of recourse is against the deceased's estate.

DETERMINATION AND REASONS THEREFOR

(i) Section 30I (1)

10. Although the fund has not raised the provisions of section 30I(1) as a defence, the peremptory provisions of section 30I(1) preclude this Tribunal from investigating and adjudicating upon any complaint if the act or omission to which it relates occurred more than three years prior to the date of receipt of the written complaint.

11. There are sound reasons for imposing a limit on the time during which litigation may be launched, and the Constitutional Court has pronounced on this. In *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) the Court said (at paragraph [11]):

“Rules that limit the time within which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigation damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can be obtained have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They serve a purpose to which no exception in principle can cogently be taken.”

12. The act or omission to which this complaint relates occurred on 21 May 1998. At the latest, the complaint should have been lodged by 21 May 2002.

Thus, this complaint is time-barred by the provisions of section 30I(1).

13. However, at the time that the complaint was lodged, section 30I contained a subsection (3) which was subsequently removed by the Pension Funds Amendment Act no 11 of 2007. The 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, extend such period;
- (b) condone non compliance with any time limit prescribed by this Chapter.”

14. Sub-section (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 that 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 complaints lodged prior to the commencement date of the

Amendment Act, which was 13 September 2007.

15. The Supreme Court of Appeal (or Appellate Division as it was then known) has pronounced upon the standard that must be met for condonation to be granted in circumstances like these. In *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (A) the court said (at 532B-E):

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has discretion, to be exercised judicially upon a consideration of all facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant is the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent’s interest in finality must not be overlooked.”

Condonation

16. I now turn to consider if any of the relevant factors as set out in the *Melane* case are applicable herein.

The length of the delay

17. The delay in the lodging of this complaint, a period of four years, is quite long.

The explanation therefor

18. The complainant has not furnished any explanation for the delay in lodging the complaint. However, it cannot be said that prior to lodging this complaint she simply sat back and took no steps to claim the proceeds of the death benefit. She alleges in her reply that as early as May 1997, she contacted the deceased's employer and submitted documents in support of her claim.

19. When regard is had to a letter dated 23 May 1997 in which her erstwhile attorneys approached the deceased's employer for a loan to assist her with the burial expenses, and a letter of the same date from the town secretary recommending the granting of the said loan, it is highly probable that the complainant did indeed submit the documents to the employer.

20. Thus, even if no explanation has been furnished for the delay, the documents annexed to her reply corroborate her version that she timeously took steps to lodge her claim.

Prospects of success on the merits

21. As will become apparent in the course of this determination, the complainant enjoys favourable prospects of success against the fund.

22. The complainant claims to be the customary law wife of the deceased. Even if it turns out that she was not his customary law wife, her status as the deceased's long term live-in partner who was fully dependent on him for support has not been disputed. Thus, whether she was his customary law wife or was co-habiting with him, she was his dependant as envisaged in the definition of "a dependant" as set out in paragraph (b) (i) or (b) (ii) of the Act. Thus, she was entitled to be considered in the distribution of the death benefit in preference over the deceased's estate. In any event, the fund has conceded that the complainant was indeed the deceased's customary law wife and had lived together with him for 12 years prior to his death.

23. According to the fund, the benefit was paid to the deceased's estate after no dependants or beneficiaries had come forward during the 12-month period. It also states that the employer had recommended that the benefit be paid into the estate, and had also not furnished it with any information regarding the deceased's potential beneficiaries. It concludes that the board of trustees had acted *bona fide* and on the information at their disposal at the time in deciding that the benefit be paid into the

deceased's estate.

24. The fund seems to overlook the fact that section 37C(1)(a) places a duty on the board to conduct a diligent investigation into the circle of the deceased's dependants and beneficiaries. A diligent investigation entails taking all reasonable steps to trace the dependants. As was stated in one of the previous determinations of this Tribunal, namely *CALA Dairies CC v Orion Money Purchase Provident Fund & Another (1)* [2001] 11 BPLR 2676 (PFA) ("the *CALA Dairies* case"), while an umbrella fund is entitled to rely on information provided to it by the participating employer, that does not relieve the fund of its duty to conduct its own investigation and to satisfy itself that all dependants have indeed been traced.

25. Thus, the complainant enjoys strong prospects of succeeding in a claim based on the fund's breach of the duty placed on it by section 37C(1)(a).

#### The importance of the case

26. Although this matter affects only the complainant and can thus not be regarded as a matter of public interest, it raises the important issue of the breach of the duty to conduct a diligent investigation that is imposed on the board by the provisions of section 37C(1)(a). It is in the interests of all the stakeholders in the retirement fund industry to ensure that the duty placed on the board is emphasized.

27. The importance of the case and the favourable prospects of success on the merits more than compensate for the length of the delay. On consideration of all the above factors, I find that good cause exists for condoning the late lodging of this complaint.

(ii) The merits

28. It is common cause that the complainant was the deceased's dependant as defined in paragraph (b)(i) or (b)(ii) of the Act. Thus, she would have qualified to be considered in the distribution of the benefit.

29. Section 37C(1)(c) provides that the benefit shall be paid into the deceased's estate under certain specified circumstances, namely if the fund has not become aware of, or has not traced, any dependant of the member within 12 months of the death of the member and the member has not designated a nominee; or if the member has designated a nominee to receive only a portion of the benefit.

30. The fund claims that it *bona fide* paid the benefit to the deceased's estate after the expiry of 12 months when the employer failed to furnish it with information relating to the deceased's dependants, and no dependants came forward during that period. The fact that the board is afforded a period of 12 months within which to conduct a diligent and proper investigation does not mean that the board is compelled, regardless of

whether or not a proper and full investigation has taken place, to distribute the benefit upon the expiry of the said period. One of my predecessors had the following to say in this regard in *Dobie NO v National Technikon Retirement Pension Fund* [1999] 9 BPLR 29 (PFA) at 38G-J:

“Whether the board has acted properly under section 37C(1)(a) will not necessarily be determined with reference to a time-frame. The question always will be whether the board took all reasonable steps to comply with its duty to trace dependants. The board must properly apply its collective mind to the matter. A board which sits back and does nothing for 12 months and then distributes the benefit to a single dependant of whom it is aware will not be insulated against a claim of maladministration or impropriety lodged by an undiscovered dependant who could have been traced had reasonable steps been taken. By the same token, there can be no complaint of maladministration or impropriety solely on the grounds that the distribution took place within the 12 month period, if the board could not reasonably have been expected to trace the dependant in question. The inquiry always shall be whether the board acted reasonably in distributing the benefit when it did. Relevant considerations in this regard will include: the needs of the beneficiaries identified, the personal circumstances of the deceased, the relationship between the deceased and the identified dependants, the practical ease with which the dependants could have been traced and so on.”

31. It is clear from the following assertions from the fund, made in justification of the board's decision to pay the benefit to the deceased's estate, that it has misconstrued the role of the board as imposed on it by section 37C(1)(a): that the trustees “were not informed” about the surviving spouse; that “the trustees [had] also received a recommendation from the employer to pay the benefit to the member's estate;” that the

employer had not furnished it with the requisite information; and that no dependants had come forward over the period of 12 months.

32. Section 37C(1)(a) places the duty to conduct a diligent investigation on the board of trustees alone, and not on the participating employer. Even though the fund, which is an umbrella fund, is entitled to rely, to a certain extent, on the participating employer to furnish it with personal information regarding its personnel, that does not mean that the board can abdicate its duty to trace dependants to the participating employer. The duty is on the board to satisfy itself that all dependants have been traced: (see the *CALA Dairies* case at 2680D-E).

33. The steps taken by the fund to trace the deceased's dependants leave a lot to be desired. To begin with, the reminder letter that the fund claims was sent by its administrator to the employer on 11 May 1998 is addressed to "The Town Clerk, Galeshewe City Council", and is not marked for the attention of any person in particular. Therein reference is made to the benefit claim form that was received by the fund's administrator. What is striking about the matter is that the benefit claim form was signed by a person whose designation is that of a Personnel Assistant in the service of the employer. The administrator's sending the reminder letter to the "Town Clerk" instead of the employer's Human Resource Manager, or the personnel assistant who had submitted the claim form was quite short-sighted. It is no surprise that the letter did not elicit any response.

34. Even if the administrator's letter had been addressed to a specific person and had still not elicited any response, the employer's failure to furnish the fund with the information requested by it did not entitle the fund to sit back and wait for potential dependants to come forward. By simply waiting for potential beneficiaries to come forward when attempts to elicit information from the employer failed, the board misconstrued its role to actively search for and locate all the possible dependants and beneficiaries. Upon realising that the employer was not co-operating, the fund ought to have taken the more pro-active role of, at the least, taking out an advertisement in a newspaper circulating in the area where the deceased resided or was employed, calling upon all potential beneficiaries to lodge their claims.

35. The board's conduct of failing to take reasonable steps to satisfy itself that the deceased had no dependants falls short of the standard of the reasonable board of trustees that is required by section 37C(1)(a). The conduct is also wrongful and culpable. Undoubtedly, the complainant has suffered loss as a result of the board's failure to conduct a proper and full investigation before paying the benefit to the deceased's estate, in that had the board not acted as aforesaid, it would have successfully traced the complainant, which would have entitled her as his spouse and sole dependant to payment of the entire proceeds of the death benefit.

36. The appropriate remedy is to place the complainant in the position that she would have been in had the board of the fund conducted a proper investigation. Rule 6.1.1 (a),

which governs the payment of death benefits before retirement in cases where the member has dependants, provides for the payment of a cash lump sum equivalent to a gratuity of 6.72% of the member's final salary, multiplied by his period of pensionable service, plus five times  $1/55^{\text{th}}$  of his final salary multiplied by his period of pensionable service, plus a life assurance benefit in an amount equal to twice the member's final salary.

37. Furthermore, sub-rule 6.1.2 provides for the payment of a spouse's pension to the deceased's spouse, which pension is equivalent to 60% of the retirement pension to which the member would have been entitled at his normal retirement date, based on the pensionable service that the member would have completed at the normal retirement date, but assuming that no further salary increases would have been received.

38. Thus, the complainant would have been entitled to payment of the cash lump sum as calculated in terms of sub-rule 6.1.1(a) and the spouse's pension as calculated in terms of sub-rule 6.1.2.

RELIEF

39. The order of this Tribunal is the following:

39.1 The South African Local Authorities Pension Fund (“the 1<sup>st</sup> respondent”) is directed to calculate and commence paying to the complainant a spouse’s pension in terms of rule 6.1.2, with effect from the first working day of the month following the date of this ruling.

39.2. The 1<sup>st</sup> respondent is further directed to, within 4 weeks of the date of this ruling, pay the complainant’s arrear monthly spouse’s pension as a lump sum, calculated from 1 June 1997 to date, less any amounts already paid to her and any deductions in terms of sections 37A and 37D of the Act, together with interest thereon calculated at 15.5% per annum and reckoned from the due date of each monthly pension to the date of payment.

39.3. The first respondent is further ordered to, within 6 weeks of the date of this ruling, effect a proper and equitable distribution as required by section 37C(1) of the Act, in respect of the lump sum amount calculated in terms of rule 6.1.1(a), together with interest thereon calculated at the rate of 15.5% per annum and reckoned from 1 July 1998 to the date of final payment.

**SIGNED IN CAPE TOWN ON THIS**

**DAY OF**

**2007**

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**MAMODUPI MOHLALA**

**PENSION FUNDS ADJUDICATOR**