



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

CASE NO: PFA/GA/9858/2006/SM

In the complaint between:

D MOODLEY

Complainant

and

MERITOR UMBRELLA PROVIDENT FUND

First Respondent

STALLION REACTION (PTY) LTD

Second Respondent

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

INTRODUCTION

- [1] The complaint concerns the delay in the payment of a withdrawal benefit by the first respondent following the termination of the complainant's employment on 23 September 2004.
- [2] The complaint was received by this office on 7 August 2006. A letter acknowledging receipt thereof was sent to the complainant on 2 October 2007. On the same date letters were dispatched to the respondents giving them until 2 November 2007 to file their responses to the complaint. This office also dispatched further letters to the first respondent on 10 December 2007 and 15 April 2008 as no response was received after the first letter was sent out. However, the respondents omitted to file any responses.
- [3] After considering the complainant's complaint, 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 was employed by the second respondent from December 2003 and was a member of the first respondent by virtue of his employment. The

complainant was dismissed from his employment on 23 September 2004 following a disciplinary hearing relating to his misconduct.

- [5] Upon the termination of his employment, the complainant became entitled to receive a withdrawal benefit from the first respondent.

COMPLAINT

- [6] The complaint is that the first respondent is delaying the payment of a withdrawal benefit to the complainant. The complainant contends that he tried on several occasions to enquire from the second respondent regarding his benefit without success. He further submitted that he approached the first respondent who gave him a withdrawal claim form to complete. However, the complainant stated that he did not receive anything since he submitted his withdrawal claim form to the first respondent.

DETERMINATION AND REASONS THEREFOR

- [7][The issue that falls for determination is whether the respondents failed to comply with their duties in terms of the Act and the first respondent's rules with regard to the payment of a withdrawal benefit to the complainant.

- [8] As stated above the respondents failed to file responses to the complaint despite been invited to do so. In this regard I set out the following record of attempts to

procure responses from the respondents. A letter was dispatched to the first respondent on 2 October 2007 requiring a response to the complaint by 2 November 2007. A further letter was sent to the first respondent on 10 December 2007, as no response was received by 2 November 2007, setting a further deadline of 18 December 2007. Further, a final letter was sent to the first respondent on 15 April 2008 setting a deadline of 30 April 2008 for it to file a response. This office also sent a letter to the second respondent on 2 October 2007 requiring a response by 2 November 2007. However, the respondents omitted to file any responses in this regard.

- [9] 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. ...”

- [10] 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. ...”

[11] 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 responses from the respondents to no avail. This is due to the fact that a failure by the respondents to file responses delays the resolution of the complaint and protracts the dispute unnecessarily. Further, it may prejudice the complainant in respect of his right to the benefit in the fund and also delays access to justice.

[12] 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.”

[13] Therefore, the main purpose of requesting responses is to ensure that the respondents are 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.

[14] 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) 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.”

[15] *In casu*, the complainant submitted that the first respondent is delaying the payment of his withdrawal benefit. He contends that he is been trying to get payment of his benefit from the respondents without success.

[16] Rule 5.10 of the first respondent’s rules reads as follows:

5.10.1 A MEMBER who resigns from SERVICE or is dismissed by his EMPLOYER for any reason, including but not limited to retrenchment, redundancy, or incapacity will become entitled to a lump sum benefit equal to his FUND CREDIT.

5.10.2 Subject to the provisions of Rule 5.10.3, the benefit in terms of this Rule, less any applicable tax, will be paid to the MEMBER as a lump sum. Payment will be made as is reasonably possible after the date of his leaving SERVICE. Once payment has been made the MEMBER will have no further claim on the FUND.

[17] It is clear that the complainant was dismissed from his employment on 23 September 2004. Therefore, a withdrawal benefit should have been paid to him within a reasonable time from that date as set out in Rule 5.10.2 of the first respondent's rules. The first respondent was given several opportunities to respond to the complainant's complaint but failed to do so. Thus, the first respondent failed to explain why a withdrawal benefit was not paid to the complainant as it failed to file a response in this regard.

[18] Further, it appears that the second respondent failed to submit a withdrawal claim form on behalf of the complainant to the first respondent following the termination of his employment. It has been held that it is the duty of an employer to complete a withdrawal notification form indicating the cause of the termination of the complainant's employment within a reasonable time (see *Rwexwana v Idaho Spur Provident Fund and Others* [2005] BPLR 640 (PFA) at paragraph 11). According to the evidence before this tribunal it appears that the second respondent as the

employer failed to comply with its duties in this regard.

[19] Therefore, as a result of the conduct of the respondents, the complainant has suffered prejudice in that he has potentially been denied access to a benefit which is due to him. Thus, I am of the view that a default determination should be issued against the respondents in terms of which they are ordered to finalise all the necessary documents to ensure that the complainant receive his withdrawal benefit. In the event that the second respondent fails to submit a withdrawal notification form on behalf of the complainant, the first respondent should be directed to accept a withdrawal form completed by the complainant and pay his benefit in terms of its rules. Further, the lack of response from the respondents makes it impossible to determine which of those parties is liable to the complainant. I shall therefore order that both parties, jointly and severally, pay the complainant the benefit to which he is entitled.

RELIEF

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

[20.1] The second respondent is ordered to complete a withdrawal form in respect of the complainant and to forward it to the first respondent within seven days of the date of this determination.

[20.2] In the event that the second respondent fail to complete the withdrawal form

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR