



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

CASE NO: PFA/ FS/13033/07/CN

In the complaint between:

Mamonaheng J. Mafe

Complainant

and

Barloworld (SA) Retirement Fund

Respondent

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

INTRODUCTION

[1] This matter concerns the distribution of the proceeds of a death benefit that became payable by a fund to the dependants of a deceased member of the fund, particularly, the decision of the board of trustees to pay the entire death benefit

proceeds into a trust arrangement.

- [2] The complaint was received by this office on 14 March 2007, and a letter acknowledging receipt thereof sent to the complainant on 21 May 2007. On 6 June 2007 a letter was dispatched to the respondent giving it until 6 July 2007 to file a response to the complaint. The response dated 7 June 2007 was received on 28 June 2007, and was subsequently forwarded to the complainant for a reply. A reply was received from the complainant on 6 September 2007. On 29 October 2007, the respondent was requested to file a further written response in clarification of certain outstanding issues arising from the response and reply, which submissions were received on 31 October 2007.
- [3] After considering the written received, it is considered unnecessary to hold a hearing in this matter.

FACTUAL BACKGROUND

- [4] The complainant is the widow of the late Mr. CM Mafe ("the deceased"), who was a member of the respondent during his lifetime. On a date not apparent from the papers before me, the deceased had completed a written beneficiary nomination wherein he had recorded the complainant and his 3 minor children as his dependants. He had also expressed a wish, on the nomination form, that they be

awarded portions from the proceeds of the death benefit in the following proportions:

MJ Mafe (wife; born on 24/12/1956)	20%
MD Mafe (son; born on 14/06/1979)	40%
Margaret Mafe (daughter; born 23/03/1983)	20%
Patricia Mafe (daughter; born 09/10/1989)	20%

- [5] Upon the deceased's death during November 1999, a death benefit in the amount of R136 080, equivalent to six times the deceased's annual pensionable salary, became available for distribution among the deceased's dependants and nominated beneficiaries. The board of the respondent identified the complainant and the 3 minor children as the deceased's dependants. There were no nominated beneficiaries.
- [6] The board thereupon resolved to pay the entire amount of the death benefit to the Barlows Group Pension Funds Trust, the trustee of which is Syfrets Trust Limited. An initial monthly income of R700 was paid out of the trust to the complainant to cover the maintenance needs, medical expenses and educational expenses of the complainant and the three children. The trust, which was established on 9 October 2000, is to terminate when the youngest child attains the age of 25 years.

THE COMPLAINT

- [7] The complainant is aggrieved by the decision of the board of management of the respondent to pay the proceeds of the death benefit into a trust. She states, in her reply, that she was not consulted prior to the taking of the aforesaid decision, but later learned that the respondent had acted on the strength of a letter from the deceased's employer wherein it was stated that she was "uneducated and [could] not handle large sums of money."
- [8] According to her, the trust is not serving her interests and the interests of her children in that the monthly income therefrom is too inadequate. She also states that she has not submitted any claim to the trust for the children's medical and educational expenses because she had been told that to do so would erode the capital and also decrease the monthly income.
- [9] Her requested relief is that the trust be terminated and the death benefit proceeds be distributed to her and the children.

THE RESPONSE

- [10] The respondent states that the board had been informed by the deceased's employer that the complainant was unemployed and incapable of handling large

sums of money. It further states that at the time that the board decided to set up the trust, all the deceased's children were minor, ranging in age from 20 to 10 years, and that the primary concern of the trustees was to see to their general maintenance and well-being and to ensure that sufficient funds were retained and available for their ongoing maintenance and education.

- [11] According to the respondent the complainant was informed, in January 2003, that there was limited money available and that due to falling interest rates and the returns that could be achieved that had fallen in the recent years, the monthly payments and costs may be in excess of the current income in the trust.
- [12] In its further written submissions, the respondent states that although the complainant and the three children were identified as the deceased's dependants, no individual allocation was made for each dependant but the entire amount was paid into a single trust for the benefit of the family. It further states that the decision not to pay any portion of the benefit to the complainant although she was a major was based on a letter that was received from the deceased's employer, wherein it was stated that the complainant was unemployed, uneducated and not capable of handling large sums of money.
- [13] According to the respondent, the amount of the benefit was limited and it was felt that the payment of a portion thereof to the complainant would have eroded the

available amount. It is further stated that the complainant's prior consent was not sought and that the decision taken was appropriate and in the best interests of the minor children.

DETERMINATION AND REASONS THEREFOR

Time-barring

- [14] Although the respondent has not raised the preliminary point of time-barring, this Tribunal is compelled to consider the provisions of section 30(1) in dealing with this matter, because its peremptory provisions preclude me from investigating and adjudicating upon any complaint if the act or omission to which it relates occurred more than 3 years prior to the receipt of the written complaint. Subsection (2) thereof further provides that the provisions of the Prescription Act of 1969 relating to a debt apply in the calculation of the three-year period.
- [15] The act giving rise to this complaint, namely, the board's decision to pay the benefit into a trust, occurred on 7 March 2000. This complaint was received on 14 March 2007, just over seven years from that date. At the latest, the complaint should have been received by 7 March 2003. Thus this complaint was lodged in excess of the prescribed time limit.
- [16] There are sound reasons for a limit to be imposed 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.”

Condonation

[17] 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 Amendment Act”). The subsection empowered the Adjudicator to condone non-compliance with the three year time-bar, provided good cause was shown, or was found to exist.

[18] 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).

- [19] The Amendment Act referred to above contains a specific clause (40B) indicating which definitions and sections will have retrospective effect. The deletion of section 30I (3) is not specified as being retrospective in its effect in terms of the Act. 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.
- [20] 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."

- [21] The period of four years over which the lodging of this complaint has been delayed is quite long under the circumstances. Although no explanation has been proffered for the delay, it appears that the complainant expressed her dissatisfaction with the board's decision as long ago as August 2000. She again, in a letter addressed to the administrators of the trust, dated 12 March 2002, tried to prevail upon them to dissolve the trust and pay out the proceeds to her.
- [22] Of great significance is the fact that the complainant enjoys highly favourable prospects of succeeding on the merits in that, by reason of the factors that will be set out in the course of this determination, the board's decision regarding the distribution of the death benefit proceeds cannot be said to be an equitable decision as envisaged in section 37C(1).
- [23] The issue of the payment of death benefits into trust companies as a matter of course without the board having properly applied its mind to the relevant factors is an issue that has drawn a lot of public interest. A decision which addresses that issue will serve as guidance to the boards of trustees of various funds.

[24] Thus, in light of the favourable prospects of success and the importance of the matter, this Tribunal finds that good cause exists for condoning the late lodging of this complaint.

The merits

[25] Section 37C(1) places a duty on the board of trustees of a fund to firstly identify the deceased's dependants and beneficiaries, secondly to decide on the appropriate proportions of the benefit that should be paid to them, and thirdly, on the appropriate mode of payment of the benefit. As such, the section vests the board with a discretion, which has to be exercised reasonably. A reasonable exercise of a discretionary power entails the taking into consideration of all the relevant factors, the disregarding of irrelevant ones, and not unduly fettering one's discretion.

[26] Among the factors that have been regarded as relevant are the respective ages of the dependants, the extent of their dependency, their relationship with the deceased, the financial circumstances of the dependants, their future earning capacity or potential, the wishes of the deceased and the amount that is available for distribution.

[27] A consideration of the relevant factors thus requires that the board conduct an

individualized investigation into each and every dependant's financial circumstances, the extent of dependency of each dependant, each dependant's future earning capacity, and each dependant's relationship with the deceased. Having done so, the board will then be in a position to decide, having regard also to the amount available for distribution, to decide to which dependants an allocation should be made and in what proportions. Thus, it does not suffice for the purposes of properly exercising its discretion for the board to lump all the dependants together and allocate the entire benefit jointly to all of them. Clearly therefore, the board has failed to exercise its discretion properly regarding the proportions of the benefit which should be allocated to each dependant separately.

- [28] Having decided on the identity of the dependants to whom an allocation will be made and the proportions of such allocation, the board has a further duty to decide on the appropriate mode of payment of the death benefit proceeds. With regard to major dependants, three modes of payment are envisaged; namely, directly to the dependant, or to a trust in terms of section 37C(2), or in instalments from the fund in terms of section 37C(4).

- [29] The first mode of payment gives recognition to a major person's right and duty to manage his or her own legal and financial affairs, and should be the default position that may only be departed from if one of the other two options is more appropriate: (See *Baloyi v Ellerine Holdings Staff Pension Fund* [2005] 7 BPLR 606 (PFA)). Any

deviation from this mode of payment has to be justifiable on legal and factual grounds. The payment of a major's benefit into a trust can only be resorted to if direct payment of the benefit to the major and payment of the benefit from the fund in instalments are not appropriate in the circumstances. For example, the rules of certain funds contain provisions which authorize the board, in instances where the member or beneficiary is labouring under a legal disability, to pay the benefit into a trust.

- [30] Section 37C(4) allows the payment of a major beneficiary's benefit from the fund in instalments, provided that the beneficiary has consented in writing thereto. The beneficiary furthermore has the right to terminate the arrangement at any time by giving notice, in which event the remaining amount has to be paid out to him/her in full.
- [31] The only grounds advanced by the respondent for paying what should have been the complainant's separate share of the benefit to the trust appears to be that it was informed by the deceased's employer that she is uneducated, unemployed and incapable of handling large sums of money. There is no indication that the complainant, for example, is a person labouring under a legal disability like insanity, prodigality or insolvency. The respondent does not appear to have even conducted its own investigation before acting in this patronizing fashion of depriving a major with full legal capacity to manage her own affairs of her legal right to do so: (See the

unreported decision in *Moralo v Holcim SA Provident Fund & Others*; Case No. PFA/GA/5400/05/ZC, handed down on 19 July 2007).

- [32] Furthermore, by not considering the complainant's ability to manage her own separate portion of the death benefit, as against managing the entire amount, the board also committed a serious misdirection. That misdirection comes out clearly from the respondent's statement that it relied on the deceased's employer's say-so that she was "not capable of handling large sums of money".
- [33] Clearly, therefore, the board of the respondent failed to apply its mind with regard to the appropriate mode of payment of the complainant's share of the benefit.
- [34] With regard to the minor children's portions, there are four alternative modes of payment. The benefit may be paid either directly to the minor, or to his guardian, or to a trust, or from the fund in instalments. The first two modes are not spelt out in the Act, but can, in certain circumstances, be appropriate. The reasoning behind not paying a minor's benefit directly to him is that, as a general rule, minors are incapable of managing their own affairs. Where a minor has achieved a measure of financial independence and is between the ages of 18 and 21 years, it can be appropriate to pay the benefit directly to him.

- [35] The board does not seem to have investigated whether or not the deceased's eldest son, who was already 20 years old at the date of distribution, had achieved a measure of financial independence, which would have made the direct payment to him of his portion appropriate in the circumstances. .
- [36] The payment of a minor's benefit to the minor's guardian is the default position, which arises from the guardian's legal duty to manage her minor child's financial affairs and her right to decide how the funds due to the minor should be utilized in the best interests of the minor. As was stated in *Dhlamini v Smith & Another* [2003] 7 BPLR 4894 (PFA) at 4901E-F, this mode should be resorted to in the ordinary course of events and should be displaced by the others only if there are cogent reasons for depriving the guardian of the natural consequences of guardianship.
- [37] The factors that have to be considered in deciding not to pay the minor's benefit to his guardian are the amount of the benefit, the ability and qualifications of the guardian to administer the monies, as well as the need to ensure that the benefit will be utilized in such a manner that it can provide for the minor until s/he attains the age of majority: (See *Ramanyelo v Mineworkers Provident Fund* [2005] 1 BPLR 67 (PFA) at 71I-72A, and the cases cited therein).

- [38] The payment of a minor's benefit to a trust is indeed provided for by the Act. However, that does not mean that the board may automatically pay the benefit to a trust without considering the default mode and the other alternative modes of payment. Furthermore, the board also has to consider the cost implications involved in this mode as against the other modes of payment. That does not appear to have been considered at all in this case, with the board having blindly relied on the deceased's employer's word instead of conducting its own investigation and properly applying its mind to the matter.
- [39] From the foregoing it is clear that the board of the respondent failed to properly exercise the discretion vested in it by section 37C(1).
- [40] Where a functionary has failed to exercise the discretion vested in it, the reviewing tribunal or court will generally set aside the functionary's decision and refer the matter back to the functionary for a proper exercise of its discretion, except under exceptional circumstances. Examples of such exceptional circumstances are where a further delay would cause unjustifiable prejudice to the applicant; or the functionary has shown itself to be biased or incompetent to such an extent that it would be unfair to require the applicant to submit to the same jurisdiction; or the reviewing Court or Tribunal is in as good a position to make the decision itself; or the end result is in any event a foregone conclusion and it would be a waste of time

refer the matter back to it for a fresh exercise of discretion. None of those exceptional circumstances exist in this matter.

[41] The order of this Tribunal is thus the following:

[41.1] The decision of the board of trustees of the Barloworld (SA) Retirement Fund (“the respondent”) taken on 1 March 2000, to pay the proceeds of the death benefit arising out of the death of the late Mr. CM Mafe to the Syfrets Trust Limited, is hereby set aside.

[41.2] The matter is referred back to the board of management of the respondent to exercise its discretion properly regarding the appropriate mode of payment of the death benefit due to the complainant and each individual dependant by no later than twenty days of the date of this determination.

SIGNED IN CAPE TOWN ON THIS

DAY OF

2007

**MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR**