



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

CASE NO: PFA/GA/20235/2007/SM

In the complaint between:

TS MABUZA

Complainant

and

MINEWORKERS PROVIDENT FUND

Respondent

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

INTRODUCTION

- [1] The complaint concerns the mode of payment of a death benefit adopted by the board of trustees of the respondent following the death of the complainant's brother, Mr D Mabuza ("the deceased").
- [2] The complaint was received by this office on 29 October 2007. A letter acknowledging receipt thereof was sent to the complainant on 23 January 2008. On 22 January 2008 a letter was dispatched to the respondent giving it until 12 February 2008 to file a response to the complaint. A further letter requesting a response was dispatched to the respondent on 17 March 2008 as no response was received by 12 February 2008.
- [3] The respondent omitted to file any response despite been invited to do so on several occasions.
- [4] After considering the complainant's complaint 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 therefore appear below.

FACTUAL BACKGROUND

- [5] The complainant is the brother of the deceased who passed away on 30 April 2006. The deceased was employed by Elandsrand Mine ("the employer") and was a member of the respondent until he passed away. The deceased was survived by five children who are being cared for by his mother, Mrs Z Mabuza.
- [6] Upon his death, a lump sum death benefit in the amount of R108 000.00 became available for distribution to his beneficiaries. After completing its investigation regarding the circle of beneficiaries the board of trustees decided to pay the deceased's mother, Mrs Z Mabuza an amount of R19 346.00 and the balance was placed in a trust for the benefit of the deceased's minor children.

COMPLAINT

- [7] The complaint is that the board of trustees erred in deciding to place the remaining portion of the deceased's death benefit in a trust for the benefit of his minor children. The complainant contends that the remaining amount of the death benefit is been paid to the deceased's mother on a monthly basis from the trust. However, he submitted that the remaining amount was placed in a trust without his or the deceased mother's consent or knowledge. Further, he stated that the respondent failed to investigate whether they are able to administer the financial affairs of the minor children before placing it in a trust.

- [8] Therefore, the complainant requests that the remaining amount of the death benefit should be paid directly to the deceased's mother (Mrs Z Mabuza) in a lump sum as she is able to administer the financial affairs of the minor children.

DETERMINATION AND REASONS THEREFOR

- [9] 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 sent to the respondent on 22 January 2008 requiring a response to the complaint by 12 February 2008. A further letter was sent to the respondent on 17 March 2008, as nothing had been received by that date setting a further deadline for the respondent to file a response. However, the respondent still omitted to file any response in this regard.
- [10] 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.
- [11] 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 . . . ”

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

“31(2)(a) Whenever in an action the claim 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. . . .”

- [13] 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 involve 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 were 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 his rights to his benefit in the fund and also delays access to justice.

- [14] 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.”

- [15] Therefore, the main purpose of requesting a response from the respondent is to ensure that the respondent is afforded an opportunity to answer the complaint'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.
- [16] In this regard it is 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 judgments we are presently concerned with, does not grant the judgment on the basis that the defendant does not have a defence: it grants 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."

- [17] *In casu*, the complainant requests that the respondent should be ordered to pay the remaining amount of the death benefit in a lump sum directly to the deceased's mother as she is able to administer the financial affairs of the minor children. Further, the complainant stated that the board of the respondent decided to place the remaining amount of the death benefit in a trust without investigating the ability of the deceased's mother to administer the financial affairs of the minor children.
- [18] Section 37C(2)(3) of the Act regulate the mode of payment of a death benefit to a minor dependant or minor nominee. It reads as follows:
- “(2) For the purpose of this section, a payment by a registered fund to a trustee contemplated in the Trust Property Control Act, 1998, (Act No 57 of 1988), for the benefit of a dependant or nominee contemplated in this section shall be deemed to be a payment to such dependant or nominee.
- (3) Any benefit dealt with in terms of this section, payable to a minor dependant or minor nominee, may be paid in more than one payment in such amounts as the board may from time to time consider appropriate and in the best interests of such dependant or nominee. ...”
- [19] When paying a benefit to a minor, the benefit is normally paid to the guardian of the minor. As a legal guardian of a minor child, in common law, a parent has a duty, *inter alia*, to administer the property and assets of her/his minor child. Thus, the payment of the minor child's benefit to her/his legal guardian should be done in the

ordinary cause of events unless there are cogent reasons for depriving the guardian of the duty to take charge of her/his minor child's financial affairs and the right to decide how the benefit due to the minor should be utilised in the best interests of the minor child (see *Malatjie v Idwala Provident Fund* [2005] 1 BPLR 45 (PFA) at paragraph 12 and *Dhlamini v Smith and Another* [2003] 7 BPLR 4894 (PFA) at 4901C-F).

- [20] It is trite law that the common law grants a legal guardian, as against a custodian or a care giver, a greater responsibility and authority to make decisions regarding the welfare of a minor child under his/her guardianship, subject to those decisions being in the best interests of the minor. (see *Robinson v Boehringer-Ingelheim Pension Scheme and Another* [2003] 10 BPLR 5234 (PFA) at 5237I-J). *In casu*, it is common cause that the deceased's minor children were survived by their grandmother, Mrs Z Mabuza, who is taking care of them. It is not clear from the papers before this tribunal whether the deceased was survived by the mothers of the minor children as the complainant indicated that they were born from different mothers. However, according to the papers it is clear that the minor children are been cared for by the deceased's mother and the monthly instalments from the trust is been paid to her.
- [21] It is clear that the deceased's mother is acting as the minor children's guardian as she is taking care of them. This tribunal held in a previous determination that any person who administers and safeguards a minor's property and property interests should be regarded as a guardian. However, this should depend on the nature of the relationship between the person concerned and the minor child. In this instance,

the deceased's mother is the grandmother of the minor children. It is clear that she is the one who attends to all the daily needs of the deceased's minor children. It is also clear the relationship between the deceased's mother and the minor children is not temporary as in the case of a temporary care-giver (see *AK Kowa v Corporate Selection Retirement Fund and Liberty Life* (PFA/GA/14151/2007/SM) at paragraphs 21-22 and the authorities referred thereto).

- [22] Thus, it was the duty of the board of trustees of the respondent to investigate the ability of the deceased's mother to administer the affairs of the minor children before depriving her of the right to administer the financial affairs of her grandchildren. This is due to the fact that there is uncontested evidence that the board of trustees placed the remaining amount of the death benefit in trust without investigating the ability of the deceased's mother to administer the financial affairs of the minor children. Further, the amount involved and the cost implications of placing the minor children's share in a trust, vis-à-vis those other suitable options, are highly relevant considerations that the board of trustees should take into account (see *Dhlamini v Smith and Another* [2003] 7 BPLR 4894 (PFA) at paragraph 23).
- [23] Thus, in the light of the fact that the board fettered its discretion by failing to investigate the ability of the deceased's mother to administer the financial affairs of the minor children, I set aside the decision of the board. The interests of justice are best served by remitting the matter to the board of trustees for a fresh exercise of its discretion in respect of its failure to conduct a diligent investigation regarding the ability of the deceased's mother to administer the financial affairs of the minor

children and the mode of payment of the death benefit.

RELIEF

[24] The order of this tribunal is as follows:

- [24.1] The decision of the board of the first respondent to place the minor children's share in a trust is hereby set aside.
 - [24.2] The first respondent is directed to re-exercise its discretion in respect of the mode of payment to the deceased's minor child having regard to the factors mentioned in this determination.
 - [24.3] The first respondent is further directed to determine whether the deceased's mother (Mrs Z Mabuza) should be deprived of the right to administer monies on behalf of the deceased's minor children having regard to the factors stated in this determination within six weeks of the date of this determination.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR