



HEAD OFFICE

Johannesburg

2nd Floor, Sandown House  
Sandton Close 2, Sandton, 2196  
PO Box 651826, Benmore, 2010  
Tel (011) 884-8454 □ Fax (011) 884-1144  
E-Mail: [enquiries-jhb@pfa.org.za](mailto:enquiries-jhb@pfa.org.za)

Cape Town

2nd Floor, Oakdale House, The Oval  
Oakdale Road, Newlands, 7700  
P O Box 23005, Claremont, 7735  
Tel (021) 674-0209 □ Fax (021) 674-0185  
E-mail: [enquiries@pfa.org.za](mailto:enquiries@pfa.org.za)  
Website: [www.pfa.org.za](http://www.pfa.org.za)

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Please quote our reference: PFA/GA/6062/2005/RM

**Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 1956 ("THE ACT") – N A NKADIMENG (ON BEHALF OF ESTATE LATE J.S. NKADIMENG) v CARGO CARRIERS WORKERS PROVIDENT FUND AND OLD MUTUAL LIFE ASSURANCE COMPANY (S.A.) LIMITED**

Complainant: Mrs. N.A. Nkadimeng (o.b.o. estate late Mr. J.S. Nkadimeng)

First respondent: Cargo Carriers Workers Provident Fund

Second respondent: Old Mutual Life Assurance Company (S.A.) Limited

[1.0] Introduction

[1.1] The complaint concerns the payment of a retirement benefit by the first respondent. The complaint was received on 21 October 2005.

[1.2] On 19 April a letter was sent to the second respondent, the administrator of the first respondent fund, giving them until 11 May 2006 to respond to the complaint. No response was received so a similar letter was re-sent to the second respondent on 3 July 2006, giving them until 24 July 2006 to file a response to the complaint. A response, which was also forwarded to the complainant, was received on 31 July 2006. No reply was received from the complainant.

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M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), Z Camroodien (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), E De La Ray (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator), S Mothupi (Assistant Adjudicator), P Mphephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), M Qhali (Assistant Adjudicator),

Office Manager: L Manuel, Senior Accountant: F Mantsho

[1.3] After considering the submissions before this tribunal, it is unnecessary to hold a hearing in this matter. The facts are known to the parties so they will not be repeated here, save for that which has a bearing on the outcome of this determination. The determination and reasons therefore appear below.

[2.0] Factual background

[2.1] The complainant is the wife of Mr. J.S. Nkadimeng, who was an employee of Cargo Carriers (Pty) Ltd. ("the employer") since September 1978. By virtue of Mr. Nkadimeng's employment he became a member of the first respondent. From the information provided it appears that Mr. Nkadimeng became entitled to a retirement benefit from the first respondent in June 1994.

[2.2] Mr. Nkadimeng became ill and passed away on 27 July 1998, leaving behind the complainant and his children.

[3.0] Complaint

[3.1] The complaint was submitted on the complainant's behalf by her daughter. I had difficulty discerning the complainant's specific complaint, but it appears that she wishes to establish who received payment of Mr. Nkadimeng's retirement benefit from the first respondent.

[4.0] Response

[4.1] A response was received from the second respondent on 31 July 2006. The second respondent advised that Mr. Nkadimeng had retired from the employer in 1994. Mr. Nkadimeng was paid a full and final once off lump sum benefit from the first respondent. There was no death cover after the date of payment of the retirement benefit. Therefore, no further benefits were due to anyone. A copy of a cheque was attached to the response. The cheque was dated 26 July 1994 and made out to Mr. Nkadimeng. The amount payable was R23 838.69. The cheque was marked "not transferable" and from the markings on the face and reverse side of the cheque it was presented for payment by Mr. Nkadimeng.

[5.0] Determination and reasons therefore

[5.1] The issue for determination in this complaint is whether the first respondent properly effected payment of Mr. Nkadimeng's retirement benefit.

[5.2] For the sake of completeness I note that the first respondent was only liable to pay Mr. Nkadimeng his retirement benefit, rather than a death benefit to his beneficiaries. Mr. Nkadimeng retired in June 1994. In terms of rule A.2.3, Mr. Nkadimeng thereafter became entitled to a retirement

benefit payable in cash, equivalent to his accumulated credit in the first respondent. If it is found that the first respondent properly discharged its liability by paying Mr. Nkadimeng's retirement benefit, then there can be no further complaint against the first respondent since Mr. Nkadimeng would no longer have been a member of the first respondent. In terms of rule A.4.1, a death benefit is only payable if a member dies before reaching his retirement age and while still in the service of the employer. The first respondent is not liable to pay a death benefit because Mr. Nkadimeng passed away after reaching his retirement age and he was not in the employer's service at the time of his death. I shall also assume that the complainant, being Mr. Nkadimeng's wife, has the necessary *locus standi* to lodge this complaint on behalf of his estate.

- [5.3] Before I can consider the merits of this case I need to first determine whether this complaint is time barred in terms of section 30I of the Act. This complaint relates to a complaint that, at the latest, arose in July 1994, following Mr. Nkadimeng's retirement from service as well as the first respondent. Thus, a period of approximately 11 years passed before the complaint was lodged with this office. Section 30I(1) of the Act requires that complaints be lodged within 3 years of the occurrence of the cause of action giving rise to the complaint. Thus, it is time barred for the purposes of section 30I(1) of the Act. There is good reason 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 may 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.”

- [5.4] However, the enquiry does not end there as I still need to satisfy myself as to whether or not good cause has been shown, or exists, for me to extend the three year limit or to condone the non-compliance therewith. The Supreme Court of Appeal 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) at 532C-F (“the Melane case”) the court said:

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, 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.”

- [5.5] Therefore, I need to objectively weigh all the facts before deciding whether to condone the late submission of this complaint. As alluded to in paragraph 5.3, more than 11 years passed before a complaint was lodged with this office. This, in my view is an extraordinarily long delay. In attempting to explain the reasons for the delay, it is stated that the complainant did not know who to complain to until one of her children decided to inform her, probably of the existence of this tribunal. Secondly, it is stated that the complainant is illiterate.
- [5.6] As regards the prospects of success of this complaint, I take cognisance of the second respondent’s submission that it issued a “not transferable” cheque in the name of Mr. Nkadimeng, which was presented for payment and was countersigned on the reverse side by Mr. Nkadimeng. A “not transferable” cheque cannot be negotiated to another party and has to be deposited into the bank account of the payee. Thus, in the present case, it is evident that the cheque was presented for payment and would have been deposited into Mr. Nkadimeng’s bank account. Further confirmation of the payment that was made is the fact that his signature is attached to the reverse side of the cheque. Therefore, the facts suggest that Mr. Nkadimeng received payment of his retirement benefit from the fund in July 1994 and the first respondent had discharged its liability towards him at that stage.
- [5.7] While I would have ordinarily attached significant importance to the reasons given for the late submission of the complaint to this tribunal, in this instance it would be remiss of me to find against the fund given the proof that substantiates payment of the retirement benefit to Mr. Nkadimeng. In my view, there is little prospect of success in the complaint against the respondents in this matter and as stated in the *Melane* case,

if there are no prospects of success with a case there is no point in granting condonation for the late filing of the complaint.

[5.8] Taking all these factors into consideration, I find that no good cause exists for me to extend the time limit prescribed for lodging a complaint in terms of section 30I(1), nor do I condone the non-compliance with the time limit prescribed in the section.

[5.9] In the result, the complaint cannot succeed.

DATED AT JOHANNESBURG ON THIS                      DAY OF                      2008

Yours faithfully

**MAMODUPI MOHLALA**  
**PENSION FUNDS ADJUDICATOR**