



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

CASE NO: PFA/GA/7422/2006/SM

In the complaint between:

KM NELSON

Complainant

and

TIGER BRANDS PROVIDENT FUND

First Respondent

NBC HOLDINGS (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 quantum of the death benefit that became payable following the death of the complainant's wife, Mrs VA Nelson ("the deceased") and the alleged failure of the respondents to consult the complainant before placing the amount that is payable to their minor children in a trust.
- [2] The complaint was received by this office on 1 February 2006. A letter acknowledging receipt thereof was sent to the complainant on 13 March 2006. On the same date letters were dispatched to the respondents giving them until 3 April 2006 to submit their responses to the complaint. A response was received from Mr T Thipa, the former divisional director (Legal Services) of the second respondent, on behalf of the respondents.
- [3] This response was forwarded to the complainant on 11 September 2006, in the event that he wished to make any further submissions. It appears that the respondents also forwarded a copy of their response to the complainant during August 2006. This office received the complainant's further submissions of 28 August 2006.
- [4] After considering the written submissions 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 husband of the deceased who passed away on 23 January 2001. The deceased was a member of the first respondent until she passed away. Upon her death, a lump sum death benefit of R316 243.66 became available for distribution to her beneficiaries after an amount of R20 000.00 was allocated to the complainant.

[6] The amount of R316 243.66 was placed in a trust for the benefit of the deceased's minor children, Andre WG Nelson and Samantha AM Nelson. An amount of R120 000.00 was allocated to Andre WG Nelson and an amount of R196 243.66 was allocated to Samantha AM Nelson. A monthly amount of R474.00 in respect of Andre Nelson and R775.00 in respect of Samantha is being paid to the complainant as a guardian from the trust. Further, the board of trustees decided to use an amount of R20 000.00 from the trust to purchase a wheelchair for Samantha, who is handicapped.

COMPLAINT

[7] The complainant alleges that the second respondent failed to register a trust with the Master of the High Court in respect of his minor children. He, therefore, alleges that it has become a beneficiary of the death benefit. Further, the complainant

submitted that he did not receive payment of the amount of R20 000.00 that was supposed to be paid to him. He indicated that the account number that was used to deposit the amount is not his correct business account. He further stated that the second respondent failed to pay interest on the amount of the death benefit from the deceased's death until it was invested. Further, the complainant submitted that he did not receive the wheelchair that was bought for his daughter.

[8] In his further submissions, the complainant submitted that the respondents did not have a mandate from him regarding the placement of the minor children's share in a trust. Further, he stated that as a natural guardian of his minor children, the board of trustees should have consulted him regarding the mode of payment to the minor children. Further, he submitted that the amount that is being paid to him from the trust in respect of the minor children is not adequate.

[9] Moreover, the complainant stated that the second respondent initially indicated that the total amount of the death benefit is R316 243.66. He submitted that if he were to add the amount of R20 000.00 that was supposed to be paid to him the amount would be R336 243.66. He stated that he received a letter from the board of the first respondent which indicates that the settlement amount is R361 377.00. However, he submitted that this amount represent a shortfall of approximately R25 000.00.

RESPONSE

[10] Mr T Thipa, the former divisional director (Legal Services) of the second respondent, filed a response on behalf of the respondents. He submitted that a trust (NBC Umbrella Trust) was established in respect of the two minor children. He further indicated that a letter confirming the establishment of the trust was sent to the complainant on 23 April 2002.

[11] He submitted that the respondents deny the complainant's allegation that they have become the beneficiary of the death benefit. Further, he pointed out that the amount of R20 000.00 was paid into the complainant's business account on 21 September 2001 and provided a deposit slip in this regard.

[12] He further submitted that the amount of the death benefit earned some interest as reflected on the capital statement dated 31 March 2006. Further, he submitted that the board of trustees decided to use an amount of R20 000.00 to purchase an electric wheelchair for the complainant's daughter as reflected in the trustees' minutes dated 24 August 2001.

[13] Moreover, he pointed out that the complainant's complaint is time-barred in terms of section 30I of the Act and the complainant failed to submit any reasons for the grant of condonation in this regard.

DETERMINATION AND REASONS THEREFOR

Technical point

- [14] The respondents raised the issue of time-barring in terms of section 30I(1) of the Act. It was submitted that the complainant's complaint is time-barred and he failed to submit any reason for the grant of condonation.
- [15] The present complaint was lodged on 1 February 2006, approximately 5 years following the death of the deceased. Thus, it is time-barred for the purposes of section 30I(1) of the Act. However, I still need to satisfy myself whether good cause exists for me to extend the 3 year limit or to condone the non-compliance therewith. This is determined by examining a host of factors including the length of the delay, the explanation therefore, the importance of the case, the existence or otherwise of *bona fide* measures to resolve the dispute and the prospects of success on the merits.
- [16] The complainant initially lodged his complaint with this tribunal on 8 September 2003 under the reference number PFA/GA/1300/03/NJ/JC. The file was subsequently closed on 30 September 2004 after the complainant failed to reply to the respondent's response. However, this office requested the complainant to reformulate his complaint properly before the file is reopened. Thus, much of the delay in this matter was occasioned by the fact the complainant was requested to reformulate his complaint. In any event the prospects of success on the merits are

very strong. Therefore, I find that good cause exists for condoning the complainant's failure to comply with the provisions of section 30I(1) of the Act.

The merits

- [17] The issues that fall for determination are firstly, whether the complainant has received payment of the amount of R20 000.00 and secondly, whether the amount of the death benefit represents the correct amount that is due following the death of the deceased. The last issue that falls for determination is whether the board of trustees exercised its discretion properly and reasonably in deciding to place the minor children's share in a trust.
- [18] The complainant submitted that the account number that was used to deposit the amount of R20 000.00 is not his correct account number. Thus, there is a dispute of fact regarding the payment of the amount of R20 000.00 and the account number that was used to effect payment. The second respondent submitted that the amount of R20 000.00 was deposited in an account provided by the employer of the complainant's deceased wife (Meadow Feeds). A deposit slip was provided as proof of payment in this regard.
- [19] However, the account number that was used is a business account (Samandre Press CC) of which the complainant was a member. It is clear that payment of a benefit into a business account cannot be regarded as payment to the complainant for the simple reason that the account number is not in the name of the complainant

but in the name of a close corporation. Thus, the second respondent failed to exercise its duty of care and diligence in failing to pay the benefit in the complainant's personal account. It has been held that the duties of the board set out in section 7C of the Act, which include the duty to act with due care, diligence and good faith are delegated to the administrator of a fund. The failure to perform these duties precisely and completely constitutes maladministration of the fund. Further, it has been held that the duty to act with care and diligence requires the fund and administrators not to act carelessly and without diligence (see *Connery v Old Mutual Life Assurance Co. (SA) Ltd and Another* [2002] 6 BPLR 3544 (PFA) at 3550A-B).

[20] Therefore, for the second respondent to deposit the amount of R20 000.00 in a business account which is not in the name of the complainant without obtaining the complainant's personal account amount to a breach of the duty to act with care and diligence. Further, the complainant stated that there is no record of the amount of R20 000.00 being deposited into his business account. Thus, the second respondent should be ordered to obtain the complainant's correct account number and pay the amount that is due to him with interest.

[21] As regards the amount of the death benefit and interest on the amount, it is evident that the second respondent submitted a breakdown which shows how it arrived at the amount of R316 243.66. It is clear that this amount includes interest as reflected on the breakdown of the benefit. The complainant did not submit anything to dispute the calculation of the benefit in this regard. Further, it is evident that the amount of R361 377.00 that the complainant referred to was the benefit before tax as

indicated in the trustees' minutes. The complainant further failed to submit any evidence to support his allegations that the respondents are the beneficiaries of the death benefit. Therefore, this aspect of the complainant's complaint cannot succeed.

[22] The complainant is also not satisfied with the decision of the board of trustees to place the minor children's share in a trust. He submitted that he was not consulted before the decision was taken and that the amount that is being paid to him from the trust is not adequate.

[23] Section 37C of the Act governs the disposition of death benefits. It, *inter alia*, vests the board with discretionary powers on the proportions and manner of distributing the proceeds of a death benefit. As with the exercise of any discretionary power, in effecting an equitable distribution the board is required to give proper consideration to relevant factors and to exclude irrelevant ones from consideration. It may not unduly fetter its discretion by following a rigid policy that takes no account of the personal circumstances of each beneficiary and of the prevailing situation. The board is also vested with a discretion to determine an appropriate mode of payment of the benefit.

[24] Section 37C(2) and (3) of the Act regulates the different modes 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, 1988 (Act No,57 of 1988), for the benefit of a dependant or nominee contemplated in this section shall be deemed to 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: Provided that interest at a reasonable rate, having regard to the investment return earned by the fund, shall be added to the outstanding balance at such times as the board may determine: Provided further that any balance owing to such a dependant or nominee at the date on which he or she attains majority or dies, whichever occurs first, shall be paid in full.”

[25] A benefit payable to a minor dependant is normally paid to the guardian of the minor. As a legal guardian of a minor child, at common law, a parent has a duty, *inter alia*, to administer the property and assets of his minor child. Thus, the payment of the minor children’s benefit to his or her legal guardian should be done in the ordinary course of events unless there are cogent reasons for depriving the parent of the duty to take charge of his or her minor children’s financial affairs and the right to decide how the funds due to the minor children should be utilised in the best interests of the minor children (see *Dhlamini v Smith and Another* [2003] 7 BPLR 4894 (PFA) at 4901C-F).

[26] This presupposes that there must be an investigation into the competence or otherwise of the legal guardian to administer the minor children’s financial affairs. Where the board has decided to depart from the ordinary route of effecting payment

of the benefit directly to the minor's legal guardian, it will have to show the existence of good grounds giving rise to the apprehension that the guardian will fail to fulfil his duty. It has been held in *Ramanyelo v Mine Workers Provident Fund* [2005] 1 BPLR 67 (PFA) at paragraph 16 that the factors that the board needs to consider in determining whether a guardian should administer moneys on behalf of his minor children are as follows:

- the amount of the benefit;
- the ability of the guardian to administer the moneys;
- the qualifications (or lack thereof) of the guardian to administer the moneys; and
- the benefit should be utilised in such a manner that it can provide for the minor until he or she attains the age of majority.

[27] *In casu*, the complainant expressed his dissatisfaction with the decision of the board to place the minor children's benefit in a trust. The board of the first respondent failed to advance any reason for depriving the complainant, as a legal guardian of the minor children, from administering the benefit that is payable to them. The decision to place the minor children's benefit in a trust and the purchase of the wheelchair was taken without the complainant's consent. Thus, the board has fettered its discretion by placing the minor children benefit in a trust without investigating the ability of the complainant to administer such moneys on behalf of his minor children.

[28] Therefore, in light of the fact that the board fettered its discretion by failing to

consider the above factors, I set aside the decision of the board. In this regard, the interests of justice are best served by remitting the matter to the board for a fresh exercise of its discretion in respect of an appropriate mode of payment having regard to the factors mentioned in this determination.

RELIEF

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

[29.1] The complainant is directed to furnish the respondents in writing with the bank account where his share of the deceased's death benefit is to be made within 7 days of the date of this determination.

[29.2] The respondents are jointly directed to pay the complainant the amount of R20 000.00 with interest at the rate of 15.5% per annum from the date of this determination until the date of payment.

[29.3] The decision of the board of the first respondent to place the minor children's benefit in a trust is hereby set aside.

[29.4] The board of the first respondent is directed to re-exercise its discretion and determine (with due regard to the factors referred to in this determination) whether the complainant should be deprived of the right to administer the moneys on behalf of the minor children, within six weeks of the date of this

determination.

Dated at Johannesburg on this the day of 2008

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR