



HEAD OFFICE
Johannesburg
1st Floor, Norfolk House
Cnr 5th Street & Norwich Close
Sandton, 2196
PO Box 651826, Benmore, 2010
Tel (011) 884-8454 □ Fax (011) 884-1144
E-Mail: 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
Website: www.pfa.org.za

Please quote our ref: PFA/KZN/5934/05/NS

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, OF 1956 (“the Act”) – TM MAKHATHINI-JOE (“the complainant”) v SA EAGLE INSURANCE PENSION FUND (“the first respondent”) / NBC CONSULTANTS & ACTURIES (“the second respondent”)

1. Introduction

- 1.1 This complaint concerns the calculation of the complainant’s pension interest as at the date of divorce, in terms of a decree of divorce.
- 1.2 The complaint was received by this office on 15 November 2005. On 23 November 2005 a letter was dispatched to the first respondent requesting it to file a response to the complaint by no later than 14 December 2005. The response dated 20 December 2005 was received on 22 December 2005 and was forwarded to the complainant on 18 January 2006. A reply was received from the complainant on 1 February 2006.
- 1.3 After considering the written submissions, it is considered unnecessary to hold a hearing in this matter.

2. Complaint

- 2.1 The complainant was married to Sipho Cyril Joe (“the deceased”) in community of property on 29 March 1979. During the subsistence of the marriage the deceased was a member of the first respondent 5 February 1998 the marriage was dissolved in terms of a decree of divorce handed down by the North Eastern Divorce Court of Durban. The complainant states that according to the decree of divorce she was entitled to receive

M Mhlala (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrosbree (Snr Assistant Adjudicator), Z Camroodien (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Nekile (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator)

Office Manager: L Manuel

- 50% of the deceased's pension interest in the respondent, calculated as at the date of divorce, when such benefit accrued to the deceased. In addition, the complainant alleges that in terms of the court order she was also entitled to interest at the legal rate on the complainant's pension interest from the date of divorce to date of final payment.
- 2.2 The deceased died on 31 December 1998, at which time the complainant became entitled to payment of her pension interest. She received payment of R69 926.15 on 18 March 2005, more than six years later. The complainant is not happy with the amount that she received from the first respondent. The complainant states that she was not furnished with a breakdown of how this amount was calculated. The complainant would also like to know how much interest accrued on her benefit from the date of divorce to the date of payment of her benefit.

3. Response

- 3.1 The first respondent confirms that the complainant was entitled to 50% of the deceased's pension interest in terms of the decree of divorce. It states that the entire death benefit was paid to the deceased's widow on 6 April 1999 contrary to the terms of the divorce order due to an error of law on the part of the the first respondent. It subsequently changed its stance on this issue after obtaining legal opinion. It then decided to comply with the divorce order despite the fact that the distribution of the death benefit had already been finalized.
- 3.2 The first respondent states that the amount to which the deceased would have become entitled had he resigned at the time of divorce was R72 463.27. The complainant was therefore entitled to R36 231.35 which is 50% of the proceeds. It concedes that her right to payment of the benefit accrued on 31 December 1998. The first respondent states that the trustees resolved that interest would be paid for the period 1 January 1999 to 31 January 2005 and would be calculated as follows:

$$R36\ 231.35 @ 15.5 \% \times 6 = R33\ 695.16$$

- 3.3 In accordance with the above an amount of R69926.15 was paid to the complainant on 18 March 2005.

4. Determination and reasons therefore

Time barring

- 4.1 Section 30I of the Pension Funds Act imposes certain time limits with regard to lodging of complaints before the Adjudicator and states as

follows:

- “(1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.
- (2) If the complainant was unaware of the occurrence of the act or omission contemplated in subsection (1), the period of three years shall commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.
- (3) The Adjudicator may on good cause shown or of his or her own motion -
 - (a) either before or after expiry of any period prescribed by this Chapter, extend such period;
 - (b) condone non compliance with any time limit prescribed by this Chapter.”

4.2 The date of accrual of the complainant’s pension interest was 31 December 1998. Her complaint was lodged on 15 November 2005. It ought to have been lodged in December 2001. The complaint was therefore received almost four years out of time.

4.3 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 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.”

4.4 However, that the complaint has become time-barred in terms of section 30I of the Act is not the end of the matter as I still have a discretion to extend the “three-year” time period or to condone non-compliance therewith. But you need to show cause to enable me to do that.

4.5 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.”

Time lapse

- 4.6 Your complaint ought to have been lodged in January 2001, three years after the death of your former husband, but was only received in November 2005. No reasons have been provided for the delay. I am prepared to accept, however, that you may have been under the impression that any time limits imposed on bringing a claim would only have commenced running from the date you were paid out by the first respondent, which was on 18 March 2005.

Prospects of success

Merits

- 4.7 Regarding your prospect of success on the merits, the evidence suggests that the amount that was available on the deceased’s fund credit had he resigned at the time of divorce was R72 463.27. I concur with the first respondent’s submission that the complainant was therefore entitled to R36 231.35 being 50% of her pension interest.

5. Interest

- 5.1 With regard to the issue of interest it is noted that clause 3.3 of the settlement agreement provides for interest from the date of divorce to the date of final payment. This clause is inconsistent with the provisions of the Divorce Act 70 of 1979 which does not empower the court to grant such an order (*see Old Mutual Life Assurance Company (SA) Limited and Another v Swemmer* [2004] 4 BPLR 5581 SCA). It is clear that the first respondent has paid interest at 15.5%, the legal rate, on your pension

