



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

CASE NO: PFA/FS/22169/2008/LN

In the complaint between:

C KGOMOTSWANA

Complainant

and

KOLK PENSION FUND

Respondent

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

INTRODUCTION

[1] This complaint concerns the decision of the board of trustees of the respondent to reverse its decision to pay out the balance of the trust capital to the dependants of the deceased, Mr. K Kgomotswana (“the deceased”).

- [2] The complaint was received by this tribunal on 9 January 2008. A letter acknowledging receipt thereof was sent to the complainant on 27 January 2008. On 29 January 2008 a letter was dispatched to the respondent requesting it to file a response to the complaint by no later than 29 February 2008. The response was received on 25 February 2008 and a copy of same was forwarded to the complainant. No reply was received from him.
- [3] Having considered the written submissions filed before this tribunal, it is unnecessary to hold a hearing in this matter. The determination and reasons thereof appear below.
- [4] As the background facts are well-known to all parties, these shall be repeated only to the extent that they are pertinent to the issues raised herein.

FACTUAL BACKGROUND

- [5] The complainant is acting on behalf of his mother, Mrs. Sulina Kgomotswana, who is the surviving spouse of the deceased and who is totally disabled and depends on other people for her daily care. It also appears that she is mentally disabled.
- [6] The complainant claims to lodge this complaint on behalf of the other major children of the deceased who were also allocated portions of the death benefit by the trustees of the respondent. However, he has failed to provide this tribunal with a written mandate from those children authorizing him to act on their behalf. As a result, this tribunal can only investigate this complaint insofar as it relates to his mother's benefit as he has a sufficient interest in it.
- [7] The deceased passed away on 3 November 2002. Upon the death of the deceased, an after tax lump sum death benefit of R99 596.40 became available for distribution to his beneficiaries. The trustees of the respondent

decided to place the lump sum benefit into a trust until the youngest child attains the age of 21 years. A trust, administered by Absa Consultants and Actuaries ("Absa"), was established in January 2003 and has made several monthly payments to the complainant in his representative capacity in order to cover maintenance and educational needs of the dependants of the deceased.

THE COMPLAINT

[8] The complainant reports that Absa addressed a letter to him on 25 October 2007 advising him that the balance of the trust capital would be paid out on 30 January 2008. However, two weeks after receipt of the letter the complainant was informed by Absa that the trustees of the respondent had decided not to terminate the trust arrangement while his mother was still alive.

[9] The complainant is dissatisfied by the decision of the trustees to reverse its decision to pay out the balance of the trust capital to the dependants of the deceased. He alleges that he was informed at the commencement of the trust that interest would be paid to him on a monthly basis but he has not received it since April 2007. He states that the trustees of the respondent had knowledge of the condition of his mother since January 2003. He accordingly requests this tribunal to make an order directing the respondent to pay out the trust capital.

THE RESPONSE

[10] The respondent states that the disability of the complainant's mother was re-assessed by the board of trustees in November 2007 and they found that she was still disabled and totally dependent on other people for her daily care. The results of the assessment also revealed that she cannot walk and is too weak

to look after herself. In light of the above circumstances, the trustees decided not to divide the trust capital between the surviving spouse and the children of the deceased. This decision was taken on 21 November 2007. Instead, it was decided to continue with the payment of R600.00 per month to the surviving spouse until she dies. Upon her death, the trust balance would be divided amongst the children.

[11] The respondent states that the reason for the above decision is to ensure that there is money available for the daily needs and care of the complainant's mother. It submits that the deceased's children are older than 21 years and therefore they are no longer financially dependent.

[12] The respondent states that the amount that was available in trust as at 8 February 2008 was R83 000.00.

DETERMINATION AND REASONS THEREFOR

Time-barring

[13] Section 30I of the Pension Funds Act imposes certain time limits with regard to lodgment 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) The provisions of the Prescription Act, 1969 (Act No. 68 of 1969), relating to a debt apply in respect of the calculation of the three year period referred to in subsection (1).”

[14] The complainant's cause of action arose in November 2002 when the deceased's member died. However, the complaint was only lodged on 9 January 2008, and was therefore received almost five years out of time.

[15] There is a 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 issue. 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 interest of justice. They protract the disputes over the rights and obligations are 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.”

[16] In this matter, the complaint is time-barred and this tribunal is precluded to adjudicate upon it. Before the coming into operation of the Pension Funds Amendment Act, 11 of 2007 which came into effect on 13 September 2007, the Adjudicator used to have discretion to condone non-compliance with the Act. That discretion has now been removed.

[17] In the result, the complaint cannot succeed and is therefore dismissed.

SIGNED IN JOHANNESBURG ON THIS 30TH DAY OF NOVEMBER 2010

DR EM DE LA REY
ACTING PENSION FUNDS ADJUDICATOR

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