



IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/31428/09/RM

In the complaint between:

L NAYAGAR

Complainant

and

LIFESTYLE RETIREMENT ANNUITY FUND

First Respondent

LIBERTY GROUP LIMITED

Second Respondent

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

[1] INTRODUCTION

- 1.1. The complaint concerns alleged delays in processing the complainant's ill-health early retirement benefit and the quantum of the ill-health early

retirement benefit paid to her by the respondents.

- 1.2. The Ombudsman for Long-term Insurance (“LTI Ombud”) forwarded the complaint to this tribunal on 29 January 2009 after he had initially received the complaint on 3 November 2008. The LTI Ombud also forwarded a copy of the response it had received from the second respondent, which was dated 26 November 2008. On 23 February 2009 this tribunal sent a letter to the complainant acknowledging receipt of the complaint. On the same date letters were dispatched to the respondents, seeking a response to the complaint by 26 March 2009. This tribunal received responses from the second respondent on 2 March 2009 and 5 May 2009. The first respondent also responded on 5 May 2009. No further submissions were received from the parties.
- 1.3. After reviewing the written submissions before this tribunal, it is considered unnecessary to hold a hearing in this matter. This tribunal’s determination and its reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1. The complainant applied for and was admitted to membership of the first respondent, which is a registered retirement annuity fund, on 1 March 1998. She chose a maturity date of 1 March 2012. The second respondent is the underwriting insurer and administrator of the first respondent.
- 2.2. The complainant’s contributions commenced at R150 per month, escalating at 10 percent *per annum* on each contract anniversary date. She paid her last monthly contribution of R353.69 on 22 January 2008. The second respondent sent reminder letters advising her of the unpaid contributions, but no further monthly contributions were received. The

second respondent made the contract paid-up on 1 April 2008. The complainant's fund value immediately before the paid-up event was R64 704.82. A paid-up causal event charge of R1 512.77 was levied by the second respondent, reducing the complainant's fund value on 1 April 2008 to R63 192.05.

- 2.3 However, before the causal event on 1 April 2008, the complainant had submitted a disability claim form to the second respondent dated 30 January 2008. It appears that this claim form was never acted on because a second disability claim form dated 8 September 2008 was also submitted to the second respondent. A document titled "medical certificate for disability" was completed by the complainant's doctor and dated 7 October 2008. The complainant's ill-health early retirement application was assessed and approved on 21 October 2008. An actuarial computation of the complainant's early retirement benefit was confirmed on 23 October 2008; a tax directive from the South African Revenue Services ("SARS") for "nil tax" was obtained on 27 October 2008 and the second respondent paid the complainant her ill-health early retirement benefit of R42 183.62 on 31 October 2008.

[3] COMPLAINT

- 3.1 The complainant complains about the delays that occasioned her application for an ill-health early retirement benefit and about the quantum of the benefit that was paid to her, alleging that she is owed more than what was paid to her by the respondents.
- 3.2 The complainant submitted that she took seriously ill in October 2007. In December 2007 she visited the second respondent's head office in Braamfontein. She was given an ill-health early retirement claim form to complete and was sent to the second respondent's branch in Benoni.

The complainant duly did so and was assisted by consultants at the branch as well as by the second respondent's call centre.

- 3.3 The claim form was submitted on 30 January 2008, whereafter the complainant enquired on a regular basis about her application. The second respondent's representatives also informed her of the quantum of the benefit she could expect to receive. On one occasion the complainant was told that the consultant who had assisted her had not forwarded the claim form to the appropriate department. It appears that after further enquiries with the branch manager and the regional manager a claim was finally submitted to the second respondent's head office.
- 3.4 According to the complainant on 3 November 2008 she became aware of the payment that was made by the respondents, at which time she again contacted the second respondent's consultants to inform them about her unhappiness about the quantum thereof. The complainant was eventually referred to the LTI Ombud by a representative of the second respondent.

[4] RESPONSES

- 4.1 The first respondent's principal officer responded to the complaint by attaching a response from the second respondent in reply to the complaint. He averred that for the reasons provided in the attached response, the complaint against the respondents should be dismissed.
- 4.2 The second respondent's response contained copies of the complainant's policy document, rules and letters previously exchanged with the LTI Ombud. As regards the complaint, the second respondent firstly confirmed that it was a retirement annuity fund contract and that it

was made paid-up due to non-receipt of contributions. The complainant was advised of this in writing.

- 4.3 The second respondent assessed an early retirement benefit based on the complainant's disablement. At the time of the claim the second respondent determined that the complainant met the disability requirements. The paid-up value of the contract was settled.
- 4.4 The second respondent advised that the policy had an illustrative maturity value of R85 194 on 1 March 2012. However, as the contract was terminated early due to ill-health early retirement, the second respondent submitted that the illustrative maturity value no longer applied. The second respondent averred that the complainant believes she is entitled to R85 194, whereas this amount was merely an illustrative value that may have been payable on maturity in 2012. The second respondent advised that the complainant's policy had an actual early retirement benefit value of R42 183.62 at the time of payment. There was no tax deductible on this lump sum benefit and the full amount was paid to the complainant.
- 4.5 As regards the delay in processing the complainant's claim, the second respondent admitted that there were "some delays in the processing of the claim." The second respondent proceeded to advise as follows:

"As a result of some issues in the branch during 2008, the claim was only submitted to the head office claims' department in July 2008. The assessment process was delayed further by the assessors requiring declarations from the former employer and medical reports from attending specialist. These are standard requirements for the assessment of any Disability Benefit.

The disability claim (Early Retirement Benefit) was assessed and approved on 21/10/2008. The settlement went through on 31/10/2008 after receipt of the Tax Directive."

4.6 The second respondent concluded by averring that the complainant believed she was entitled to a higher value than the actual value that was paid to her in October 2008. However, they verified that the amount paid to the complainant was in fact correct, so the complaint should be dismissed.

4.7 Upon further enquiry with the second respondent its actuarial services provided a fund build-up for the complainant's contract. The second respondent advised that the causal event charge on 1 April 2008 was actuarially sound and represented 2.34% of the complainant's fund value. The second respondent proceeded to advise as follows:

“The main reason for the relatively low value paid out on disability was the adverse effect that the volatile markets had on the underlying investment portfolio, LS Index 40...

The LS Index 40 Plus portfolio is designed to participate in the growth of the 40 largest equities on the Johannesburg Stock Exchange as measured by market capitalization. The portfolio was, therefore, adversely affected by the negative market conditions experienced in 2008. The worst month in terms of growth was October 2008, the month that the disability benefit was paid out.”

4.8 The second respondent provided a comprehensive fund build-up from inception of the complainant's contract in March 1998, but only the fund build-up from December 2007 will be illustrated here because it is pertinent to the present determination. The complainant's fund build-up from December 2007 looks thus:

Date	Contributions	Allocation amount	Investment value
01/12/2007	353.69	312.53	64,967.42
01/01/2008	-	312.61	62,036.45
01/02/2008		-40.99	59,298.67
01/03/2008		-40.91	66,964.28
01/04/2008		-44.33	64,704.82
01/04/2008		-1512.77	63,192.05
01/05/2008		0.00	67,755.29
01/06/2008		0.00	70,694.32
01/07/2008		0.00	67,867.99
01/08/2008		0.00	60,871.85
01/09/2008		0.00	60,342.59
23/10/2008	(42,183.62)	-42,183.62	

[5] STATEMENT OF DETERMINATION AND REASONS THEREFOR

Introduction

- 5.1 The complainant alleges that there were delays in processing her ill-health early retirement claim by the second respondent and that the eventual benefit paid to her was much smaller than what she expected. The second respondent should note that the complainant's expectation regarding the quantum of her benefit was created by its own representatives, so it is incorrect for the second respondent to assert that the complainant was solely responsible for her belief that she is entitled to a larger benefit.

Jurisdiction

5.2 The complaint can be crystallised as an enquiry into whether or not the delays occasioned by the second respondent in the processing of the complainant's ill-health early retirement benefit from the first respondent resulted in her receiving a smaller benefit than she is entitled to. This is so because the second respondent is the underwriting insurer and administrator of the first respondent. Therefore, this is clearly a complaint about the administration of the first respondent by the second respondent and whether or not the complainant suffered any financial loss as a result of the alleged maladministration of the first respondent by the second respondent. In the circumstances, the complaint meets the requirements of the definition of a "complaint" in section 1 of the Act (see *Mungal v Old Mutual* (56/09) [2009] ZASCA 141 (20 November 2009)).

5.3 This tribunal now moves to consider the merits of the complaint.

Merits

5.4 This tribunal needs to ascertain whether or not the complainant received her correct benefit from the respondents, having regard to the processing of her ill-health early retirement benefit claim by the second respondent. If it is the case that the complainant's benefit was smaller due to delays occasioned by the second respondent, then this tribunal will have to ascertain whether this was as a result of maladministration by the second respondent and then determine the quantum of the loss suffered by the complainant. The complainant's claim is founded in delict based on pure economic loss, so all the elements of delictual liability must be proved in order for the complaint to succeed (see *Hooley v Haggie Pension Fund and Another* [2002] 1 BPLR 2939 (PFA)).

(“*Hooley*”) at paras 20 and 21). The elements that need to be satisfied are as follows:

- 5.4.1 there must be an act or omission, which causes the damage or loss;
- 5.4.2 the act or omission must be wrongful;
- 5.4.3 there must be blameworthiness in the form of intention or negligence;
- 5.4.4 the complainant must have suffered loss or damage; and
- 5.4.5 a causal link must exist between the wrongful act or omission and the loss or damage allegedly suffered.

5.5 Looking at the first requirement that needs to be satisfied, the complainant initially made enquiries about her ill-health retirement with the second respondent in December 2007. It appears that the second respondent provided her with the requisite claim form and that the complainant duly submitted the completed form on 30 January 2008. However, by the second respondent’s own admission, there were “some issues” at its Benoni branch that resulted in the complainant’s claim being submitted to its head office claims department only in July 2008. Thus, there was an omission on the part of the second respondent’s employees to timeously submit the complainant’s claim form to its head office for assessment. As will be demonstrated in paragraph 5.16, this omission on the part of the second respondent’s employees resulted in the complainant suffering loss.

5.6 The second leg of the enquiry into a claim for delictual damages entails ascertaining whether the act or omission was wrongful or not. Brand JA in the recent Supreme Court of Appeal case of *Fourway Haulage (Pty) Ltd v SA National Roads Agency Limited* 2009 (2) SA 150 (SCA) at para 12, said the following about the enquiry into wrongfulness:

“Recognition that we are dealing with a claim for pure economic loss brings in its wake a different approach to the element of wrongfulness. This results from the principles which have been formulated by this court so many times in the recent past that I believe they can by now be regarded as trite. These principles proceed from the premise that negligent conduct which manifests itself in the form of a positive act causing physical damage to the property or person of another is *prima facie* wrongful. By contrast, negligent causation of pure economic loss is not regarded as *prima facie* wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms. In the result, conduct causing pure economic loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such conduct, if negligent, should attract legal liability for the resulting damages (see eg *Minister of Safety and Security v Van Duivenboden* [2002 \(6\) SA 431](#) (SCA) paras 12 and 22; *Gouda Boerdery BK v Transnet* [2005 \(5\) SA 490](#) (SCA) para 12; *Telematrix* (*supra*) paras 13-14; *Trustees, Two Oceans Aquarium Trust* (*supra*) paras 10-12).”

- 5.7 Since the complaint involves pure economic loss based on omission, it has to be established that a legal duty was owed to the complainant by the second respondent. In the present complaint the second respondent acts not only as the first respondent’s underwriting insurer, but also as its administrator. Therefore, the second respondent and its employees are bound by the provisions of section 2(a) of the Financial Institutions (Protection of Funds) Act, No. 28 of 2001, to observe the utmost good faith and exercise proper care and diligence over the funds it administers in respect of the first respondent. In addition, sections 13B(5)(b), (c), (d) and (e) of the Act require that administrators administer a fund in a responsible manner, keep proper records, employ adequately trained staff who are properly supervised and have well-defined compliance procedures.

- 5.8 In the present complaint it is clear that the second respondent, through its employees, was aware of the complainant's ill-health claim in December 2007 and that by 30 January 2008 she had submitted a claim form to the second respondent (this is the case because the second respondent acknowledged that its head office received a claim by July 2008, even though the second claim form was only submitted on 8 September 2008). Thus, there was a delay from 30 January 2008 to 8 September 2008 before the complainant's claim could be properly assessed by the second respondent.
- 5.9 The second respondent failed to explain the reason for the delay, but it admitted that there was a delay in its response dated 5 May 2009. It is not expected of an insurer or administrator of a retirement annuity fund to take over some six months to submit a claim form from its branch to its head office. This delay can only be attributed to the negligence of the second respondent's employees, who displayed a singular lack of care and diligence in this matter.
- 5.10 Their conduct does not comply with the legal requirements of the Financial Institutions (Protection of Funds) Act, 2001 in that they failed to observe the utmost good faith towards the complainant, neither did the second respondent's employees exercise proper care and diligence of the standard expected in the handling of the complainant's ill-health application.
- 5.11 Further, in respect of the duties placed on the second respondent in terms of section 13B(5) of the Act, the second respondent's employees failed to administer the first respondent in a responsible manner and failed to keep or maintain proper records. Therefore, the delay in submitting the complainant's claim form timeously constitutes a wrongful act on the part of the second respondent. Aside from the legal

requirements not being satisfied, public policy dictates that administrators should act in good faith and submit claim forms within a reasonable period of time. This was not the case in this complaint.

- 5.12 Thirdly, there must be blameworthiness in the form of intention or negligence. In this complaint the second respondent's employees became aware of the complainant's ill-health claim in December 2007. The complainant submitted the first claim form on 30 January 2008. According to the second respondent's own version, its head office only received the claim form in July 2008.
- 5.13 Now, a delay of some six months (i.e. from 30 January 2008 to July 2008) in forwarding a claim form from the second respondent's Benoni branch to its head office in Johannesburg with only an explanation that it was as a result of "some issues in the branch during 2008" is unacceptable. In the view of this tribunal this is an example of negligence on the part of the second respondent's employees.
- 5.14 The fourth requirement is that the complainant must have suffered loss. It is common cause that the complainant ceased contributions, so the second respondent was entitled to impose a causal event charge, which it did on 1 April 2008. However, due to the extraordinarily long delay in processing the complainant's ill-health early retirement application, she suffered a loss as a result of the fall in value of her investment. The second respondent confirmed having received the complainant's initial application in July 2008. It then appears to have requested further information and a second claim form was submitted on 8 September 2008. The second respondent thereafter assessed the complainant's claim and by 23 October 2008 the claim was admitted and the complainant was paid on 30 October 2008.

- 5.15 Thus, the properly submitted claim took from July 2008 to 23 October 2008 to be processed by the second respondent's head office. This is a period of three months and 23 days. Assuming that this is the second respondent's average time period taken to process such claims, if the complainant's claim dated 30 January 2008 had been properly submitted to the second respondent's head office by its Benoni branch, it would have been finalised, at the latest, by 1 May 2008.
- 5.16 Looking at the complainant's investment values provided by the second respondent and reproduced in the table in paragraph 4.8, the complainant would have received R67 755.29 on 1 May 2008. Instead the complainant received R42 183.62 at the calculation date of 23 October 2008. As the second respondent explained, this was due to adverse stock market conditions, especially in October 2008. The complainant would not have suffered such a sharp decline in her investment value had her ill-health early retirement claim been processed timeously by the second respondent. The quantum of her loss is the difference between her investment value on 1 May 2008, i.e. R67 755.29, and the amount that was paid to her on 30 October 2008, i.e. R42 183.62. This amounts to a loss of R25 571.67.
- 5.17 The last requirement is that of causation, i.e. there must have been a causal link between the loss suffered and the wrongful actions of the second respondent. Our courts have pronounced that this involves a two-stage enquiry. Firstly, there is the enquiry into factual causation, which is generally conducted by applying the "but-for" test. There is no dispute that the complainant qualified for the ill-health early retirement benefit, so if there had not been an inordinate delay in submitting the complainant's claim form, the complainant would not have incurred a loss of R25 571.67. Therefore, the "but-for" test is satisfied.

- 5.18 The second stage of the causation enquiry is whether or not the second respondent's negligent conduct is linked sufficiently closely or directly to the loss suffered by the complainant for legal liability to ensue, or whether the loss is too remote. This enquiry is referred to as legal causation or the remoteness of damage test (see *Fourway Haulage*, at para 30) and is determined by considerations of reasonableness, fairness and justice. As is evident from paragraph 5.16 *supra*, if the second respondent's employees had timeously submitted the complainant's ill-health claim on 30 January 2008, the complainant would not have suffered a loss of R25 571.67 in her investment value.
- 5.19 The second respondent confirmed that the complainant was invested in a market-linked portfolio. It is common knowledge that the value of this type of investment fluctuates with the passing of each day. Thus, any delays in disinvesting a market-linked investment can result in loss. This is fundamental to the operations of the second respondent, so it ought reasonably to be aware of the importance of timeous submission of claims so that benefits can be disinvested from the markets and paid at the correct time. Thus, the decrease in investment value occasioned by the delay in processing the complainant's claim was reasonably foreseeable by the second respondent.
- 5.20 Similarly, considerations of fairness and justice would require that the second respondent process claims in a diligent and professional manner that does not result in late submission of claims between branches and its head office. The negligence of the second respondent and its employees, which negligence is contrary to statutory duties placed on administrators and insurers, caused the loss suffered by the complainant due to the delay in processing her ill-health claim.

5.21 Therefore, the second respondent has acted contrary to its statutory duties, has caused the complainant to incur a loss in her investment value and as a result the second respondent, in its capacity as administrator of the first respondent, must compensate the complainant for her loss.

[6] ORDER

6.1 In the result, this tribunal makes the following order:

6.1.1 The second respondent is ordered to pay the complainant an amount of R25 571.67, less any deductions in terms of sections 37A and 37D of the Pension Funds Act, 1956, plus interest thereon at the rate of 15.5% *per annum* computed from 23 October 2008 to date of payment, within 14 days of the date of this determination.

DATED AT JOHANNESBURG ON THIS 8th DAY OF JUNE 2010

CHARLES PILLAI
PENSION FUNDS ADJUDICATOR

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Section 30M Filing: Magistrate's Court

Parties unrepresented