IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/KZN/8/98

In the complaint between:

Jane Roslind Crone	Complainant

and

Southern Life Association Limited	First Respondent
Kate Mackenzie	Second Respondent
Little Switzerland Hotel (Pty) Ltd	Third Respondent

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT OF 1956

Introduction

This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act of 1956.

The complainant is Jane Roslind Crone, an adult female, the widow of the late Mr Lee Crone, the previous Assistant General Manager of the third respondent until his death on 2 January 1997.

The first respondent is the Southern Life Association Limited, a registered insurer who carries on business amongst other things as an administrator of pension funds.

The second respondent is Ms Kate Mackenzie, a financial services broker who has acted on behalf of both the first and third respondents.

The third respondent is the Little Switzerland Hotel (Pty) Ltd, a company duly

incorporated under the laws of South Africa and carrying on business as a hotel and resort in the vicinity of Harrismith.

After some initial correspondence between the complainant and the respondents, the complainant lodged a written complaint with the Office of the Pension Funds Adjudicator on 16 March 1998. It is common cause between the parties that the complainant has complied with the provisions of section 30A(1) requiring her to lodge a written complaint with the pension fund or the employer participating in the fund before lodging it with the Pension Funds Adjudicator. It is also common cause that the respondents have properly considered the complaint and have replied to it in writing as required by section 30A(2).

After an exchange of correspondence, consisting of a number of letters and other documentation, I met with the complainant, Mr Mumby of the third respondent and Mr Bradley Chapman of the Employee Benefits Division of the first respondent's Durban office at the Magistrate's Court in Pietermaritzburg on 21 April 1998. However, as Mr Chapman had no knowledge of the matter, it was necessary to adjourn the proceedings. A few days later, on 24 April 1998, I visited the first respondent's offices in Johannesburg and took delivery of several documents relevant to the determination of this complaint. A second hearing was held on 20 May 1998 at the offices of the first respondent in Johannesburg. By agreement of all the parties, the complainant was not in attendance at the second hearing.

The first respondent was represented by Mr W P Lane-Mitchell, the third respondent was represented by Mr Mumby and the second respondent attended in person. The hearings were of an informal nature and no party adduced oral evidence under oath. However, subsequent to the hearing the first respondent has furnished me with two affidavits and additional documentation. In determining this matter, therefore, I have relied exclusively on the documentary evidence and argument put to me in writing and orally.

Having completed my investigation I have determined the complaint as follows. These are my reasons.

The complaint

The complainant's complaint relates to the administration of the Little Switzerland Hotel Provident Fund and alleges that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by an act or omission on the part of one of the respondents. Alternatively, she alleges that the employer who participates in the fund has not fulfilled its duties in terms of the rules of the fund.

The complainant claims payment of R128 100,00, being the amount she would have been entitled to as a death benefit in terms of the rules of the fund, had the fund been properly administered. The first respondent has repudiated liability for this amount and the issue for determination in this matter is whether it or the other respondents is responsible in law for the payment.

It is to be noted that the pension fund is not a party to these proceedings. The Pension Funds Act of 1956 does not require the respondent to a complaint to be a pension fund. Provided the complaint relates to the administration of the fund, the investment of the fund's monies or the interpretation and application of the rules of the fund in terms of the Act, the choice of respondent is open-ended. The jurisdictional limitation imposed by the definition of a complaint in section 1 relates to the cause of action rather than the parties. Section 30G makes it plain that the respondent to a complaint can be a pension fund or any "person against whom the complaint is directed". Hence, the respondent in a complaint can be a pension fund, a board of trustees, a single trustee, the participating employer, an administrative regulatory agency, a valuator, a broker or an administrator. However, the Adjudicator's jurisdiction is limited to granting relief against such parties to the extent that their conduct in some way impacts upon the administration of the fund, the investment of its funds or the interpretation and application of its rules.

As shall become apparent below, the first and third respondents have certain legal responsibilities for the administration of the fund. The second respondent has been cited as a party by virtue of the obligations she may incur as a consequence of the relationship of agency existing between herself and the other two respondents.

Background to the complaint

The complainant's husband, Mr Lee Crone, commenced employment with the third respondent on 1 July 1996 as Assistant General Manager of the Little Switzerland Hotel. One of the conditions of his employment was membership of the provident fund administered by the first respondent under fund scheme number 94540. The late Mr Crone contributed to the scheme at an amount of R350.00 per month, which amounts were deducted from his salary and shown as a deduction on his monthly pay advice.

On 2 January 1997, Mr Crone was shot and killed on the hotel property by a former employee of the hotel, whom he had dismissed at the end of December 1996.

Shortly after Mr Crone's death, Mr C Mumby, the manager of the hotel and principal shareholder in the third respondent, instigated a claim with the first respondent for the payment of death benefits to the complainant in terms of the rules of the provident fund.

Eventually on 5 September 1997, after much prior correspondence and telephonic discussion, Mr W P Lane-Mitchell, the Regional Manager for Employee Benefits - Marketing, of the first respondent, addressed a letter to the second respondent indicating the basis upon which it had decided to refuse the claim. The relevant portion of the letter reads:

> Following our last conversation, as you requested, I telephoned Mr Mumby and discussed the scheme as a whole. What became immediately apparent is that the member movements on and off have not been relayed to The Southern Life. I suggested that in order to make sure that the scheme ran correctly Mr Mumby should inform us of what the membership status should be and that we would amend our records accordingly. He agreed to do this and I am still waiting for the relevant documentation to be sent through.
>
> What is of concern is that we have sent the March 1995, March 1996 and March 1997 pre-revision data to you as the appointed broker for onward transmission to the client.

However we have never received back the completed schedules. Had these schedules been completed then membership movements would have picked up and the full scheme membership would be correct. This issue was actually raised in Mrs Powell's letter to you dated 18 October 1996.

You have now informed The Southern Life of the death of an employee of Little Switzerland Hotel. The details of this employee as a new member were never advise (sic) to The Southern Life and you have now asked that we consider the a claim. (sic)

I must advise that The Southern Life will not consider a claim in this instance. We sent out documentation for completion to ensure that the scheme membership was correct and have further followed up on this issue, but to date have never received a reply. In any event I would have expected that the relevant New Entry and Withdrawal forms would have been completed any time a person left or joined Little Switzerland Hotel which you as broker would have facilitated.

Mr Lane-Mitchell expands on this position in his letter of 24 February 1998 addressed to the complainant in response to her complaint lodged with the fund in terms of the Pension Funds Act. The relevant part of this letter reads:

The Southern Life is obligated to pay death benefits to members of the Little Switzerland Hotel Provident Fund in terms of the rules of the fund. The specific rules here are the **SCHEDULE OF BENEFITS** and rule A4.1.0 **Death in service** - copies of these rules are attached.

The Policy issued to the fund contains at clause A2.7.0 **Provision of information.**
Under this section clause A2.7.1 states:
"The employers and the scheme shall provide the Southern with all information concerning the members that is necessary, in the opinion of the Southern, for the carrying out the objects of, and the proper administration of, the scheme."

Furthermore clause A2.7.3 states:

"The Southern shall note be liable to any person in respect of any misrepresentations, errors or omissions contained in the information furnished to it in terms of A2.7.1 and

A2.7.2."

Copies of these clauses are attached.

In my letter dated 5 September 1997 to Kate Mackenzie Financial Services, the appointed broker to the fund, I stated that as The Southern Life had never been advised of any membership details of your husband we would not consider any claim. This is in accordance with the above provisions.

Subsequently, during the hearings, the first respondent argued further that as the information required in terms of the rules had not been provided by the third respondent or its broker, liability for the maladministration and the complainant's complaint must lie either with the second or the third respondent.

Survey of the evidence

In order to determine liability in this matter it is necessary to survey the history of the fund and the interaction between the respondents concerning its administration.

During February 1994, the second respondent introduced Mr Mumby of the third respondent to Mr Len Hoar of Southern Life for the purpose of establishing the provident fund. According to the second respondent, she was acting in terms of the broking agreement between herself and the first respondent in terms of which she is appointed as a broker to canvass for applications for life insurance, endowments, retirement annuities, pensions or any other business of a similar nature offered by the third respondent.

Since, the first respondent has alleged that the second respondent carries liability for maladministration in this matter, the terms of the broking agreement between them are of considerable importance. The relevant clauses read:

3. Scope of authority

3.1 The Broker shall have no authority to bind the Southern in any way whatsoever,

to incur liability or debt, to make or alter or discharge any contracts, to waive any lapse or forfeiture or to institute legal proceedings in connection with any matter relating to the business of the Southern.

3.2 No advertisement shall be published and no pamphlet or other printed matter relating to the Southern shall be circularised by the Broker without the prior written consent of a duly-authorised official of the Southern.

4. Duties of the Broker

4.1 Any monies collected by the Broker on behalf of the Southern shall immediately be remitted to the Southern.

4.2 The Southern may from time to time instruct the Broker of the procedure to be adopted respecting medical examinations in respect of any proposals for contracts. Should the Broker arrange medical examinations contrary to any procedure adopted from time to time or without the authority of the Southern, the Broker shall himself bear the costs of such medical examinations. If the Southern, after the costs of a medical examination have been incurred, is prepared to issue a contract persuant (sic) to an application submitted by the Broker and the application is subsequently withdrawn or the first premium is not paid, the Southern is entitled to charge such medical costs to the Broker.

5. Remuneration

The Broker's sole remuneration shall be commissioned upon premiums received by the Southern on contracts issued pursuant to applications received by the Broker and bearing his name as Broker. The Broker shall not be entitled to any other remuneration. Commission payable shall be in accordance with the Commission Schedule annexed hereto which the Southern may vary or amend from time to time by notice in writing to the Broker. Any such amendments or variations shall not affect the contracts already in force.

Acting in terms of this agreement, as already stated, the second respondent introduced Mr Mumby to Southern Life.

On 4 March 1994, Mr Mumby signed a document described as a Scheme Authorisation

whereby he formally requested the first respondent to underwrite and administer a provident fund for his employees. The scheme authorisation document reads as follows:

SCHEME AUTHORISATION

Little Switzerland Hotel Provident Fund

> We the undersigned hereby formally request The Southern Life Association Limited to underwrite and administer a provident fund for our employees.
>
> We understand and agree that the risk benefit cover under the policy issued to the scheme is subject to
>
> > Our compliance with the rules and the policy
> >
> > Our notifying The Southern Life Association Limited in writing if less than seventy-five per cent of the eligible employees enter the scheme on the commencement date
> >
> > Our admitting all employees who enter service after the commencement date to the scheme immediately they qualify for membership
> >
> > Our indication, in the appropriate place on the entry form, of all employees who, on the date they qualify for membership, are not at work attending to and capable of attending to all their normal duties.
>
> We certify that the attached rules are the rules in force at the date referred to therein.
>
> We acknowledge receipt of the policy issued to the scheme.

Acting on this authority, the first respondent established the fund which was constituted in terms of a set of rules as supplemented by an insurance policy both to be effective from 1 February 1994. These are two distinct but interrelated documents constituting the founding documents of the fund as a whole. They appear to be standard form documents applicable to several funds administered by the first respondent.

The fund is constituted as a defined contribution provident fund. Despite the fact that the employer deducted amounts from member salaries (presumably as a salary sacrifice) the fund is described as a non-contributory fund entitling the members to the following benefits:

retirement benefits - a lump sum equal to a member's equitable share

death benefits - death in service before age 70: 36 X scheme salary.

disability benefits - 36 X scheme salary as a lump sum.

In terms of the schedule of benefits forming part of the rules, the qualifications for membership of the scheme are described cryptically as follows:

At the fixed date: (i.e. 1 February 1994)
All employees

After the fixed date:
All employees under the normal retirement age

This cryptic description of eligibility is enlarged upon in rule A1.0.0 which reads:

A1.0.0 MEMBERSHIP
A1.1.0 Conditions of membership

A1.1.1 An employee shall become a member from the first day of the month coinciding with or next following his fulfilment of the membership qualifications in the schedule.

A1.1.2 An employee who was in service immediately prior to the participation date may join the scheme within twelve months from the date he became eligible or waive his right to become a member.

A1.1.3 A new employer or class of employee may only participate in the scheme with

the agreement of the principal employer and the Southern, subject to the approval of the Commissioner for Inland Revenue.

A1.1.4 A membership qualification for a particular employee may be waived if the employer and the Southern so agree, subject to the approval of the Commissioner for Inland Revenue. However, where the employer wishes to waive the completed service requirement (if any) in respect of a particular employee, the approval of the Commissioner for Inland Revenue need not be sought.

A1.2.0 Cessation of membership

A1.2.1 A member may not withdraw from the scheme while he remains in the service of the employer.

A1.2.2 Membership shall cease on cessation of service unless the member remains entitled to a benefit in terms of the rules.

Section B of the rules provide for the scheme's constitution and operation. Rule B1.3.0 governs the operation of the scheme. It provides:

B1.3.0 Operation of the scheme

B1.3.1 The principal employer via its duly authorised officials shall perform the executive functions of the scheme as provided in these rules. In the event of legal proceedings against the scheme the principal employer shall appoint a principal executive officer to represent the scheme.

B1.3.2 The principal employer shall appoint the Southern to act as insurer to the scheme. In terms of the group policy issued to the scheme the Southern shall

(a) administer the scheme in accordance with the rules

(b) keep a complete record of all member particulars and other matters essential to the operation of the scheme

(c) provide such information to the statutory authorities as may be prescribed from time to time in relevant legislation

(d) open accounts for the scheme to which all revenue, contributions and insurance payments shall be credited and from which all benefit costs, insurance premiums and administration costs shall be deducted.

B1.3.3 The Southern's liability to the scheme aside from any insurance payment shall be limited to the balances held by the Southern in the investment accounts of the scheme.

The insurance policy forming part of the Scheme is introduced by the following undertaking:

The Southern undertakes on payment of the premiums to

provide insurance cover for members of the scheme,

invest the monies of the scheme, and

administer the scheme and pay benefits out of the accounts of the scheme

in accordance with the rules and the conditions of this policy.

Clause B 1.1.1 of the policy provides that the Southern shall perform the administrative, actuarial, technical and other services as the scheme may require on payment of the relevant administration fees. It is common cause that the third respondent has paid the administration fees to the first respondent for the administration of the scheme.

Among the general policy conditions of the policy, clause A2.7.0 regulates the provision of information. It provides:

A2.7.0 Provision of information

A2.7.1 The employers and the scheme shall provide the Southern with all information concerning members that is necessary, in the opinion of the Southern, for the carrying out of the objects of, and the proper administration of, the scheme.

A2.7.2 In addition, the Southern shall be entitled to any further information which is in its opinion relevant to any matter relating to the scheme or to the provisions of this policy. The scheme, the employers and the members shall be obliged to furnish any such information on the request of the Southern.

A2.7.3 The Southern shall not be liable to any person in respect of any misrepresentations, errors or omissions contained in the information furnished to it in terms of A2.7.1 and A2.7.2.

A2.7.4 In the event that any information requested in terms of this policy is not provided to the Southern in writing within one month of the despatch of the Southern's written request for same, where the said requested information is in the Southern's opinion material to the Southern's ability to perform its obligations in terms of the policy, the Southern's performance of services, and provision of any risk cover provided in terms of the policy shall lapse.

A2.7.5 The Southern shall be entitled, at all reasonable times, to inspect and make copies of the payrolls and other records of an employer for any purpose relating to this policy.

Finally, clause G1.6.0 of the risk benefit cover conditions grants the insurer certain rights in relation to member information. It reads:-

G1.6.0 Member's information

G1.6.1 If information given to the Southern concerning any member is, in the opinion or the Southern, incorrect or inadequate, the Southern reserves the right to adjust the member's risk benefit and/or the premiums in an appropriate

and reasonable manner.

At the time the scheme was established, the third respondent furnished the first respondent with an initial review providing an overview of the contributions and members' details at the date of the installation of the scheme.

As is apparent from Mr Lane-Mitchell's correspondence, the first respondent repudiated liability in this matter because after the initial review no further revision data was received for 1995, 1996 or 1997. As a consequence, the deceased, Mr Crone, by virtue of his only commencing employment in July 1996, was never recorded as a member of the scheme. Indeed, according to the first respondent, it has no record of any additions or withdrawals to or from the scheme subsequent to 1994.

On 28 December 1995, an employee of the first respondent addressed a letter to the second respondent attaching a revision schedule of current member data held in the first respondent's records. The writer requested the second respondent to arrange for the schedule to be amended where appropriate and updated with the new salaries to be returned as soon as possible. The writer makes the following further request:

> It is possible that some recent movements are not reflected on this list. Kindly annotate the list appropriately in such instances, for example, mark people who have left as "withdrawn", "died" or "retired" and add details of recent entrants at the end of the list. If the relevant notification forms have not yet been sent to us, please attach them to the updated list.

Further in the letter she concludes:

> As the members' benefit statements reflect the records we have captured on computer we would ask you to treat the exercise as a data audit and report any discrepancies to the Southern so that our records can be amended.

The second respondent has no recollection of receiving this letter, nor was the first respondent able to furnish me with any proof that the letter had been sent. Ms

Mackenzie explained that when in mid 1994 Mr Mumby closed his Johannesburg office and decided to operate from the Little Switzerland Hotel, she contacted one of the consultants at the first respondent and made arrangements for her to meet with Mr Mumby. She maintains at that point she terminated any role she had in the arrangement and ceased to act as the third respondent's agent in the performance of any of the employer's obligations under the scheme. She concedes to having received correspondence from the first respondent, but claims that her practice was simply to refer the matter on to Mr Mumby at the Little Switzerland Hotel.

The fact that the first respondent received no reply to its letter of 28 December 1995 does not appear to have prompted it to any further action.

Almost one year later, in October 1996, a problem arose which was discovered as a result of an error regarding a payment that the first respondent had incorrectly attributed as a contribution. The consequence of this error was that the account appeared to be in credit when it was in fact in arrears. This revealed also that the revision data had not been collated. Mrs A E Powell, Manager, Customer Services, (now deceased) addressed a letter to the second respondent setting out the problem. This letter reads as follows:

> Recent conversations between Southern Life, yourselves and Mr Mumby of Little Switzerland have reference.
>
> The scheme was placed with us from 1 February 1994 and duly installed.
>
> The revision date of the scheme is March in each year but neither the March 1995 nor March 1996 revisions were completed as no revision details were received.
>
> A few months ago Mr Mumby contacted out offices regarding differences between the SACCAWU Provident fund and that of Little Switzerland.
>
> This enquiry highlighted the fact that the scheme had not been revised during 1995 and 1996.

> Although we were not in receipt of withdrawal notices or new entrant details we started to reconstruct details by way of the payment lists received and have completed the 1995 revision.
>
> As part of our revision process we reconcile the payments expected to payments received an found that a amount (sic) of R86 189.35, received in April 1994, was banked as scheme contributions. This amount was in fact in respect of transfer values received from the previous fund.
>
> The impact of this was that the scheme appeared to be in credit and an arrear situation was therefore not picked up although the last payment for the scheme was for the month of September 1995.
>
> We are concerned about all our schemes and would like to suggest that the scheme to placed on a twelve month contribution holiday. This will alleviate the arrear situation.
>
> I hope the above will clarify the situation and look forward to receiving your advises in due course.

Ms Mackenzie's response to this letter was to request Southern Life to deal directly with Mr Mumby. The next day, presumably acting in accordance with the second respondent's request to deal directly with the third respondent, Ms Amy Behnken of the first respondent addressed a fax to Mr Mumby dated 5 November 1996. In it the first respondent recommended that the third respondent take a retrospective contribution holiday from 1 October 1995 to 31 October 1996 and only pay the risk costs and administration charges for that period. The fax reads:

> Mrs McKenzie (sic) phoned me on the 4th of November 1996:
>
> I mentioned to Kate that you have two options on this fund:
>
> 1). To take a contribution holiday from 1/10/95 to 31/10/96 and only pay Risk costs and Administration charges
>
> Administration and Commission R 1498.65 p.m.

Group Life		R 1462.75 p.m.
Disability		R 904.46 p.m.
Funeral Benefits		R 358.05 p.m.
		R 4223.91 p.m. X12
	=	R50686.92

Retirement contribution R5892.20 p.m.

2). Pay all arrears:

Retirement contribution 10% salary
= R10,053.11 X 13 = R130,690.43

The last membership details we have received on your fund was 1/9/95.

Death claims paid: Funeral benefit:-	Mvolisi Ngcobo	R 250.00
	NR Miya	R8820.00

Please advise whether there are any claims.

Please accept my sincere apologies for the inconvenience we may have caused you.

I have recently taken Kate over as one of my brokers and I can guarantee you that something like this will not happen again.

Please phone me or fax me if you have any queries.

What is notable about this fax is that despite the request for further revision data addressed to Kate Mackenzie on 18 October 1996, there is no follow up of this request to Mr Mumby other than to note that last membership details were received on the fund on the 1 September 1995. There also seems to be an implicit acknowledgement, that

the fault in this regard lay with the first respondent as is evident in the penultimate paragraph of the letter.

It is unfortunate, that Ms Behnken did not testify before me when I was at the first respondent's offices in Johannesburg. However, she subsequently has furnished me with an affidavit. In her affidavit she avers that in mid 1996 she was appointed as the Southern Life Consultant to service the brokerage of the second respondent. As the fund membership and premiums were not up to date, she telephoned the second respondent in October 1996 in an attempt to rectify the situation. Ms Behnken confirms that the second respondent did not wish to become involved in the issue and instructed her to contact Mr Mumby directly to obtain the information.

Thereafter, Ms Behnken telephoned Mr Mumby and discussed the arrear premium situation with him and claims to have mentioned that there was a need to update the membership information. This telephone conversation she followed up with the fax transmission dated 4 November 1996, referred to above. This version does not square entirely with the version given to me by Mr Mumby orally. His version of the telephone conversation is that Ms Behnken requested the payments to be updated and that there was no discussion of updating the membership information.

Following her conversation with Mr Mumby, Ms Behnken claims to have delivered a complete set of administration forms and an administration guide to the second respondent so that membership movements could be brought up to date. The administration guide, which I received some three weeks after the hearing, and to which there had been no prior reference before then, provides amongst many other things that as soon as an employee qualifies for membership, a new entrant form must be filled in and sent to the first respondent. Such an entry form is included in the administration guide. The guide sets out detailed instructions as to what and as to how to fill in the form. However, it makes no comment on the consequences of a failure to do so. Similarly, the guide gives instructions on how to deal with annual reviews, but again fails to deal with the consequences of the failure of the participating employer furnishing such information.

Ms Behnken seems to suggest in her affidavit that the reason this guide was furnished to Ms Mackenzie was because the latter had stated in the telephone conversation with Ms Behnken that she did not want to lose the appointment to the Little Switzerland Provident Fund as this could affect the life business that she had with the client. The first respondent can furnish me with no proof, besides Mrs Behnken's affidavit , that the guide was posted to or received by the second respondent.

Unfortunately, this information was furnished to me for the first time subsequent to the hearing and it was not possible to put such an allegation to the second respondent. However, the second respondent in her meeting with me did repeatedly reiterate that she had requested Ms Behnken to deal directly with Mr Mumby, and that any subsequent correspondence that she received relating to the fund she simply redirected to the employer.

There is no evidence either that Mr Mumby received the complete set of administration forms or the administration guide.

It is unfortunate that the first respondent failed to produce the guide in the months leading up to the hearing or at the hearing. However, even had it done so, it is doubtful whether that in itself would have altered the outcome in this matter.

Finally, Ms Behnken in her affidavit maintains that she phoned Ms MacKenzie at least three times leaving messages on her telephone answering machine. She then comments:

> When my calls were eventually answered I advised that she as broker was being paid commission for her services and that there was duty on her to make sure that membership details were accurately maintained and relayed to the Southern Life to make sure that premiums were up to date.

Ms Behnken fails to point to any provision in the broking contract or to any other contract which imposes such a duty on the second respondent.

On 19 November 1996, Ms Behnken addressed a fax to Mr Mumby as a follow up to her letter to him of 5 November 1996. In her affidavit she makes no mention of this memorandum (which I obtained when I visited the offices of the first respondent a few days after adjourning the Pietermaritzburg hearing). This memo reads as follows:

> I refer to my memo to you of 5 November 1996. You told me on the phone that you were going to speak to Kate MacKenzie about this fund. I have not heard from Kate (I have left messages for her). Please advise in writing of your decision.

The decision referred to in the memorandum, is obviously a reference to the two options posed in the letter of 5 November 1996, namely either to take a contribution holiday and pay the risk costs and administration charges, or to pay all arrears. There is no reference in the memorandum to any request for further information.

The memorandum of 19 November 1996 faxed to Mr Mumby, has a number of handwritten notes on it. The most important reads:

> Lettie I spoke to Chris Mumby yesterday. He will pay the R50 000.00 plus three months' premiums via Beltel. This should be in by tomorrow. I gave him the banking details. He will pay the money via Beltel every month. Thank you. Amy.

This latter note seems to be dated 8 January 1997 (6 days after the death of the deceased).

A further note signed (by an unknown party) and dated 10 January 1997 reads:

> Contribution holiday as per letter from Amy. Client to confirm in writing.

Shortly thereafter on 17 January 1997 Ms Behnken sent a fax to the second respondent which reads as follows:

> Please let us have a letter confirming the contribution holiday period and let us know what was the amount paid by Chris Mumby and the date. He said he was paying by Beltel. We cannot trace the amount. Please treat this as urgent.

Again, the follow up facsimile fails to make any request for the provision of revision data.

Despite the confusion about the agreed payments, it would appear that Mr Mumby indeed kept his part of the bargain. Mr Mumby has furnished me with the bank statements of the third respondent for the month of January 1997. The statement reflects two payments made to the first respondent, one in the amount of R50 000.00 on 8 January 1997 and the other in the amount of R9000.00 on 15 January 1997.

On 26 May 1997, Mrs L Naick of the first respondent's employee benefits department addressed the following letter to Mr Mumby in relation to outstanding contributions:

> We refer to several phone calls regarding outstanding contributions on the above fund but had no reply from yourself. The agreement was that the contribution would be paid by Beltel and you would fax us a copy of the transfer. Please confirm urgently the situation regarding the contribution outstanding, failing which we would have no alternative but to terminate the above fund with effect from 31 May 1997.
>
> Please phone us immediately on (011) 491 6519 or fax (011) 491 6174 us with any relevant correspondence.

In immediate response to this letter, Mr Mumby, the next day, deposited an amount of R15097,00 into the first respondent's bank account, thus bringing his contributions up to date.

Again it should be noted that the letter of 26 May 1997 makes no reference whatsoever to updating the revision data.

After this date, various telephone conversations took place between all the parties involved concerning the administration of the fund as well as the late Mr Crone's death benefits. Matters appear to have come to a head sometime during August when the third respondent decided to transfer the provident fund business from the first respondent to Sanlam. Mr Mumby testified that his reason for doing so was the shoddy

manner in which the fund was being administered.

On 26 August 1997, the Group Benefits Adviser of Sanlam Free State and Northern Cape addressed a letter to the first respondent advising them of the third respondent's decision to transfer from Southern Life to Sanlam and requesting specific information. Less than 10 days later on 5 September 1997 Mr Lane-Mitchell, addressed a letter to the second respondent advising that the first respondent was not prepared to consider Mrs Crone's claim on the grounds that the scheme documentation had not been completed.

Analysis of the evidence and the argument

The question for determination, therefore, is whether the prejudice suffered by the complainant is as a consequence of maladministration on the part of the administrator of the fund, the participating employer or the employer's agent. This can be decided only with reference to the duties of the respective parties as determined by the rules and various other contractual arrangements.

The first respondent is attempting to shift responsibility to the broker, the second respondent, whom it claims acted as the agent of the employer. Hence, it is necessary to decide whether the employer is guilty of any dereliction of duty or maladministration for which the broker is liable by virtue of her being the employer's agent.

Mr Lane-Mitchell, on behalf of the first respondent, has relied on a number of rules in support of his contention that it is entitled to renounce liability on account of the employer failing to furnish it with the revision data. However, he was obliged to concede that nowhere in the rules is there an express or categorical rule which unequivocally obligates the employer to furnish information about employees who commence and leave service, as and when they do so.

Mr Mumby, on behalf of the third respondent, argued that the true intention of the scheme was to provide cover to all employees of the third respondent at any given time.

The difficulty here results from the rules and the policy not adequately addressing the issue.

The scheme authorisation, being the initial constituting document, provides that the parties understand and agree that the risk benefit cover under the policy issued to the scheme is subject to compliance with the rules and the policy, notification in writing of less than seventy five per cent of the eligible employees enter the scheme on the commencement date, the admittance of all employees who enter service after the commencement date immediately when they qualify for membership, and an indication of all employees who are not at work attending to and capable of attending to all their normal duties on the date they qualify for membership.

There is no requirement specifically requiring the employer to report or furnish information concerning each employee, at the time of admittance. The eligibility requirements in the schedule of benefits and the membership conditions also lend some support to the interpretation that membership of the scheme immediately followed employment without the furnishing of details being a precondition. Rule A1.1.1 seems to make membership automatic following the commencement of employment. Likewise, the first respondent's letter of 28 December 1995, requesting revision data, (cited fully above) also offers some support to an interpretation that the insurance cover was automatically extended to employees on entering service. The letter is written on the common understanding that the revision data was required to update details of membership. It does not intimate that the absence of such cover would result in a loss of cover. Indeed, it implies the opposite: the cover continues despite the lack of updated information.

The general impression that cover was automatic is contradicted by certain of the general risk benefit conditions which provide for an automatic acceptance level. Thus, clause G1.3.0 provides that the first respondent shall determine an automatic acceptance level in respect of cover for the scheme from time to time. No evidence of insurability is required in respect of a member where cover is required in an amount less

than or equal to the automatic acceptance level. A member's cover in excess of the automatic acceptance level shall be granted on acceptance by the first respondent of medical evidence of his good health and insurability. If the evidence is not acceptable to the first respondent, the member's excess cover may nevertheless be granted, but subject to any special conditions and/or extra premiums agreed to by the employer and the first respondent. This arrangement clearly indicates that the information concerning the personal particulars of each new employee is material for the purpose of the medical underwriting of the risk cover. And, thus, the assumption that all employees were automatically covered cannot be sustained.

However, this unsatisfactory and ambiguous state of affairs begs the question as to who bore responsibility for gathering the information. Rule B1.3.2 read together with the preamble to the policy make it abundantly clear that the first respondent will administer the scheme in accordance with the rules. More importantly, Rule B1.3.2(b) imposes a definitive duty on the first respondent to keep a complete record of all member particulars and other matters essential to the operation of the scheme. In exchange, it receives a substantial administration fee.

To ensure that the first respondent is able to meet its obligations under this rule, clause A2.7.0 of the policy places certain obligations on the employer. In particular, the employer is obliged to provide the first respondent with all information concerning members that is necessary in the opinion of the first respondent, for the carrying out of the objects and the proper administration of the scheme. To this end, clauses A2.7.2 and A2.7.5 permit the first respondent to obtain additional information to inspect and make copies of the employer's records.

Clause A2.7.4 then permits the first respondent to allow the provision of risk cover provided in terms of the policy to lapse if the information is not provided. Before the right to cancel in clause A2.7.4 can come into operation, in my view, a number of conditions must be fulfilled. These are:

1. the information must be requested with sufficient particularity as to allow

the employer to furnish it;

2. the information should be relevant and material to Southern Life's ability to perform its obligations in terms of the policy;

3. the request for information must be in writing;

4. the employer must fail to provide the information within one month of the despatch of the written request; and

5. the policy will only lapse once Southern Life has exhausted all other reasonable options to obtain the information; for example by relying on its right to request further particulars, exercising its right to inspect and make copies of the employer's records and by putting the employer on notice.

Some of these conditions flow *ex facie* the written terms of clause A2.7.0. However, the requirements of particularity, notice and the exhaustion of alternatives are implied from a contextual and proper reading of the rules and the policy as a whole, especially in the light of the failure of the rules and the policy to expressly impose an obligation on the employer to furnish the details of new and departing members.

Moreover, the consequences of electing to allow the policy to lapse extend beyond the employer and conceivably can deprive an entire workforce of their property. In such circumstances, the precepts of our new constitutional order require proper notice to be given before the policy can lapse. Not to put the employer to terms is bad management making the administrators of the fund guilty of maladministration as contemplated in the definition of a complaint in section 1 of the Pension Funds Act. Of particular importance in this regard is the duty imposed on the first respondent to keep proper records and the fact that it received payment of an administration fee for that purpose.

Has the first respondent sufficiently complied with these conditions?

There can be no doubt that the information sought by the first respondent was relevant and material. Such importance notwithstanding, besides the letter of 28 December 1995 addressed to the second respondent, there is no evidence of a written particularised request for information directed to the third respondent. Nowhere in the correspondence for the period 18 October 1996 until August 1997 do we find a particularised request in writing for the revision data. Indeed, the primary (if not sole) purpose of the correspondence was to extract payment from the third respondent for the risk cover and contributions. At no point, between these dates is the revision data specifically *requested* in *writing*.

In the letter of 18 October 1996 the absence of data is noted. Likewise, in the letter of 5 November 1996, the only comment made is that the last membership details were received on 1 September 1995. As for the letters subsequent to that date, no mention at all is made of the missing information.

Furthermore, in none of these letters does the first respondent put the third respondent on notice that should it fail to provide the data, the policy would lapse. Yet, it did precisely this on 26 May 1997 in its letter giving notice of its intention to terminate on the grounds that the third respondent had failed to pay the contributions. Thus, plainly it recognises an obligation to put the third respondent on notice, certainly in regard to the payment of its contributions and premiums, yet believes that it is entitled to forego such notice when it comes to the failure to provide information.

Turning now to deal with the letter of 28 December 1995 addressed by the first respondent to the second respondent. This is the only particularised request in writing requesting the revision data. When questioned by me the second respondent indicated that she had no recollection of ever having received the letter. The first respondent also was unable to furnish me with a facsimile transmission report or a registered postal slip to confirm that the letter indeed had been delivered to the second respondent. Before the first respondent is entitled to rely on its right to cancel in terms of clause A2.7.4, it is obliged to establish that a written request for information was made to the employer or the employer's agent. The onus, therefore, rests on the first respondent to establish

that the request for information was put into writing and that the written request was delivered to the employer or its agent. This the first respondent has failed to do.

Nevertheless, accepting for the purpose of argument that the letter of 28 December 1995 addressed to the second respondent is sufficient proof of a written request for information, that of itself would not assist the first respondent. Firstly, the second respondent denies that she is the authorised agent of the third respondent in relation to its dealings with the first respondent in connection with the administration of the provident fund in terms of the rules of the fund and the policy. Her denial shifts the onus to the first respondent to prove the agency relationship.

Mr Lane-Mitchell, on behalf of the first respondent, has argued that the role of the broker in the broker/client relationship is determined more by practice than by formalised agreement. He contends that the employer appoints the broker to act as his agent with regard to the scheme. The broker is expected to possess a certain expertise with regard to retirement funds and in practice all contact via the first respondent with the client is through the broker. He further contends that in practice the expected role of the broker inter alia includes:

> informing the underwriter of all membership movements as advised by the client - the broker would be expected to know that for the correct administration of a scheme this information is vital and would be expected to follow this up with the client if it were not forthcoming;
>
> making sure that the contributions of the scheme are up to date and that they have actually been paid over to the underwriter;
>
> testing the market on how current underwriters' risk and administration costs compare in the market;
>
> monitoring the investment performance of the scheme;

advising the client of legislative changes which could impact on the scheme;

advising the client on benefit and other changes to the scheme rules.

For this, he maintains, that the broker is paid commission.

In the insurance context it is possible for two separate relationships to exist between the parties, namely, that of a mandate between the insured and the broker and that between the insurer and the broker. However, the existence of a contract of mandate between the insured and the broker, as well as its terms and operation, are questions of fact to be proved by means of appropriate evidence.
The second respondent maintains that her role as agent in this matter was that of the agent of the first respondent as set out in the broking agreement outlined above. Plainly the duties undertaken by the second respondent in terms of the broking agreement do not extend as far as those listed by Mr Lane-Mitchell.

The second respondent did receive commission from the first respondent in 1995, 1996 and 1997. The 1996 amount was reversed on account of the contribution holiday, and she has repaid the 1997 amount. She maintains that the commission she received was in respect of the introduction of new business and in accordance with the broking agreement between herself and the first respondent.

There is no evidence before me which indicates unequivocally that the second respondent undertook the responsibility for furnishing the first respondent with the revision data. Indeed, clause 4.2 of the broking agreement between the insurer and the broker limit the information gathering responsibilities to the arranging of medical examinations.

Neither do the rules of the pension fund or the policy impose any express obligation on the broker. The obligations which exist regarding the provision of information all rest on the employer (and by implication his agent). In both the rules and the policy the

employer is defined as:-

> The principal employer or any associated or subsidiary concern which participates in the scheme.

Clearly, the broker is not deemed to be in the position of the employer in terms of either the rules or the policy.

Accordingly, in view of the second respondent's denial that she contractually assumed responsibility for the provision of information in terms of the rules, it is incumbent on the first respondent to prove that some other contractual term existed between the second and the third respondents obliging the second respondent to take responsibility for the provision of information. Plainly, there is no express term to such effect. Nor, in my respectful view, do Mr Lane-Mitchell's submissions about the "expected role of the broker" in practice, amount to sufficient evidence of a tacit term. An obligation requiring the broker to provide the insurer with information cannot be construed as necessary in the business sense to give efficacy to either contract of mandate.

Nor is there evidence suggesting that such a term was actually intended by the first and third respondent in their dealings with the broker. On the contrary, the second respondent's subsequent conduct indicates that she did not see the provision of information as her responsibility and the first respondent by its conduct accepted that. It was for this reason that the first respondent began directing its queries to the third respondent as is evident from the correspondence after the 18 October 1996. Had the "expected role of the broker" given rise to contractual duties, as submitted by Mr Lane-Mitchell, one would have expected the insurer to have persisted with its claims for information by continuing to direct its demands to the broker.

For the aforegoing reasons, I am satisfied that the second respondent was under no obligation to act as the employer's agent for the purposes of providing the first respondent with the information required for the revision of data. Consequently, the letter of 28 December 1995 does not constitute a written request to the employer as contemplated by clause A2.7.0 of the policy.

Finally, even if I am mistaken in this and the second respondent ought properly to be considered the employer's agent, the first respondent has failed to exercise its election to cancel the contract in a reasonable time after becoming aware of the circumstances giving rise to the right to resile from the contract. In terms of clause A2.7.4, the first respondent had the right to resile from the contract within one month of the written request - (provided of course that the request was indeed in writing and the request was directed to the employer or its agent, neither of which is accepted here).

The fact that a contracting party fails to exercise the right to cancel within a reasonable time does not by itself mean that it has lost the right - *Mahabeer v Sharma* 1985 (3) SA 729(A) 736. However, the delay may justify the inference that the contracting party elected to abide by the contract and not to cancel it. Such an election can be regarded as an abandonment of the right to cancel. The first respondent's conduct after 28 December 1995, clearly indicates an intention on its part to keep the contract alive. It consistently sought payment of the contributions and premiums required under the scheme and only sought to resile from the contract almost two years later after receiving the complainant's claim and when it received notice that the third respondent intended to transfer its business elsewhere. The first respondent's conduct can thus be construed as a waiver of its right to cancel.

In response to this argument, Mr Lane-Mitchell has drawn my attention to clause A2.4.0 of the policy which attempts to exclude waiver by means of a so-called non-waiver clause. The clause reads:

> By granting extensions of deadlines or allowing non-compliance with any of the requirements of this policy, the Southern shall not be deemed to have waived any of its rights under this policy, nor shall any novation of this policy be deemed to have taken place.

The essential question on this issue is whether the wording of clause A2.4.0 applies to a waiver by the first respondent of an accrued right to cancel the agreement or to an election not to invoke such a right. In my view the words "by granting extensions of

deadlines or allowing non-compliance with any of the requirements of this policy" is simply not applicable to a waiver by the first respondent of its accrued right to cancel. Its decision not to allow the policy to lapse in terms of rule A2.7.4, or its waiver of the right to cancel does not constitute the granting of an extension of a deadline or the allowing of non-compliance of any of the requirements of the policy. The first respondent has not granted an extension nor has it allowed a non-compliance with the requirements of the policy.

Put differently, clause A2.4.0 effectively amounts to a notice in advance by the administrator of the fund and an acknowledgement by the employer that a grant of an extension or the allowance of non-compliance in respect of performance shall not be deemed to be a waiver of the administrator's rights to strict compliance and as such that term does not preclude the employer from relying on a waiver by the administrator of an accrued right to cancel the contract - see *Palmer v Poulter* 1983 (4) SA 11 (T).

In short, for the three reasons advanced above, the first respondent is not entitled to rely on the letter of 28 December 1995 to resile from the contract.

To sum up, before the first respondent could have become entitled to resile from its obligations, it should have made a proper, particularised, written request for information directed at the employer. The request should have been properly served and the employer should have been advised of the consequences of non-compliance. In other words, the employer should have been put to terms before liability under the scheme could be denied. This simply has not happened in this case. It is not enough for the first respondent to say that the employer (either the third or the second respondent) failed to give it the information it required. It (the first respondent) had a duty to take proper steps to obtain that information and it failed to do so.

As discussed, the employer's right to be put to terms derives from a contextual and purposive reading of the rules and the policy as a whole, and in particular from the first respondent's duty to keep proper records and the ancillary powers it had in that regard.

To the extent that an argument might be made that a right to be put to terms does not derive *ex contractu* from the rules and the policy read together, reference may be had to the definition of a complaint in section 1 of the Pension Funds Act of 1956, in terms of which a complainant enjoys statutory protection against prejudice in consequence of the maladministration of a fund. In other words, regardless of the contractual rights and obligations in this matter, the failure by the first respondent to put the third respondent to terms, and the consequent failure to keep proper records, has resulted in the complainant sustaining prejudice as a consequence of the maladministration of the fund.

The liability of the first respondent in this matter, therefore, is akin to delictual liability based on the fact that it wrongfully and negligently failed to keep proper records (in accordance with its duty in terms of the rules and policy) resulting in the complainant sustaining prejudice. Had the first respondent kept proper records, the complainant would have had a contractual entitlement to the death benefits in terms of the rules and the policy. Hence, any denial of liability on the basis that the contract of insurance failed to cover the late Mr Crone, does not exclude liability on the grounds of maladministration.

Relief

The appropriate relief is to put the complainant in as good a position as she would have been in had the wrong not been done. Had the fund not been maladministered the complainant would have been entitled to death benefits in terms of rule A4.1.0 of the rules of the fund. The rule provides:

> On the death of a member in service before his normal retirement date there shall be payable
>
> (a) the pre-retirement lump sum death benefits specified in the schedule plus
>
> (b) the cash amount the member would have received had he withdrawn on the date

of his death.

As mentioned above, the schedule provides for a death benefit of 36 times the scheme's salary. It is common cause that the deceased earned R3500.00 per month and that his withdrawal benefit would have been R2100.00. Accordingly, the complainant would have been entitled to R128 100.00. In terms of the rules and the Pension Funds Act of 1956, the first respondent is only entitled to pay out death benefits one year after the death of the member. As a consequence, the complainant only became entitled to receive payment of the death benefits on 3 January 1998. She is entitled to interest from that date.

Accordingly, the order of this tribunal is as follows:

The first respondent is ordered to pay the complainant an amount of R128100.00 together with interest calculated from 2 January 1998 at the rate prescribe in respect of a judgment debt in terms of Section 2 of the Prescribed Rate of Interest Act 1975 on or before the close of business on 30 June 1998.

DATED AT CAPE TOWN THIS 10TH DAY OF JUNE 1998.

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Prof John Murphy
PENSION FUNDS ADJUDICATOR