

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

In the complaint between:

CASE NO: PFA/GA/136/98/NJ

RONALD ARTHUR FREDERICK BODDY

Complainant

and

MORGANITE SOUTH AFRICA (PTY)

LTD PENSION PLAN

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 complaint concerns the non-payment of interest on benefits owing to the complainant.

After an exchange of correspondence between the complainant and the respondent, consisting of a number of letters and other documentation, the complainant lodged a complaint at my office on 28 April 1998. No hearing has been held in this matter. Accordingly, in determining this matter, I have relied exclusively on the documentary evidence, arguments put to me in writing and a report placed before me by my investigator, Naleen Jeram.

The complainant is Mr Ronald Arthur Frederick Boddy, a spouse of the late Mrs P. Rossi, who was a former member of the respondent. The respondent is Morganite South Africa (Pty) Ltd Pension Plan, a pension fund duly registered under the Pension Funds Act of 1956, represented by Mr John Xides of Alexander Forbes Consultants and Actuaries, the administrators of the fund.

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The Morganite South Africa Pension Plan was established to provide retirement benefits for members. Withdrawal and death benefits are also provided. The Plan was a defined benefit scheme until 30 September 1997, whereafter it converted to a defined contribution fund.

The complaint

The complaint relates to the interpretation and application of the rules of the respondent and investment of its funds and alleges that a decision of the fund was an improper exercise of its powers.

Mrs P. Rossi was an employee of Morganite South Africa (Pty) Ltd, and joined the respondent on 1 November 1969 and remained a member until her death. The complainant and Mrs P. Rossi lived together in a common household as husband and wife even though they were not legally married as such from December 1974 until the death of Mrs Rossi on 24 August 1996.

On 15 March 1995, Mrs Rossi completed a nomination form, addressed to the trustees of the respondent in which she nominated the complainant as her dependant as well as nominee to receive all her benefits upon her death.

After the death of Mrs Rossi, the complainant received an amount of R417 887.04 from the respondent in terms of a group life insurance policy taken out by the respondent. This amount was paid in November 1996 in two separate instalments. The complainant does not dispute this amount.

Further, in terms of the rules of the respondent, the complainant considered to be a spouse by the respondent was entitled to a death benefit consisting of Mrs Rossi's accumulated contributions. The relevant rule reads as follows:

Death in Service

On the death of an Active Member while in Service, a lump sum benefit shall be payable equal to the Member's Accumulated Contributions at the date of his date. At the discretion of the Trustees

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the benefit may be increased to an amount not greater than the reserve value, as determined by the Trustees in consultation with the Actuary, of the Member's pension benefits in the Fund.

"Accumulated Contributions" shall mean for each Member at any particular date

- (1) the total of his contributions made in terms of Rule 4.1;
plus
- (2) the total of his contributions (if any) to the Old Fund;
plus
- (3) increases in the sum of (a) and (b) at the rate shown below against the number of years of Pensionable Service completed.

Completed years of Pensionable Service	Percentage
1	5
2	10
3	15
4	20
5	50
6	60
7	70
8	80
9	90
10 or more	100.

The respondent computed the benefit as follows:

The calculation of Accumulated Contributions, R57 761,22 (fifty-seven thousand seven-hundred and sixty-one Rand and twenty-two cents) was Ms Rossi's contributions paid to the Morganite S.A. Pension Fund of R28 880,61 (twenty-eight thousand eight-hundred and eighty Rand and sixty-one cents) doubled in accordance with the definition of Accumulated Contributions as described above.

The amount of R57 761,22 was then paid to the complainant on 21 August 1997, almost exactly one year after Mrs Rossi's death.

The complainant's argument is as follows:

The Accumulated Contributions, amounting to R57 761,22 was paid to me, after being held by the Fund for 12 months.

This factor I do not dispute.

What I am querying is why interest was not paid on the R57 761,22 (fifty-seven thousand seven-hundred and sixty-one rand and twenty-two cents) for 12 months it was held by the fund.

The respondent's attitude to the payment of interest is spelt out as follows in its letter of 14 April 1999:

In accordance with Section 37(C)(1)(a) , the Trustees agreed that it would be prudent to withhold the payment of the Accumulated Contributions from the Morganite S.A. Pension Fund for a period of 12 months. The Morganite South Africa Pension Plan did not provide for the payment of late payment interest.

Hence, the complainant seeks and order from the Pension Funds Adjudicator declaring that he is entitled to interest on the aforesaid amount.

Analysis of evidence and argument

The payment of any death benefit is regulated by section 37C of the Pension Funds Act, which reads:

Disposition of pension benefits upon death of member

- (1) Notwithstanding anything to the contrary contained in any law or in the rules of a registered fund, any benefit payable by such a fund upon the death of a member, shall, subject to a pledge in accordance with section 19(5)(b)(i) and subject to provisions of sections 37A(3) and 37D, not form part of the assets in the state of such a member, but shall be dealt with in the following manner:
 - (1) If the fund within twelve months of the death of the member becomes aware of or traces a dependant or dependants of the member, the benefit shall be paid to such a dependant or, as may be deemed equitable by the board, to one of such dependants or in proportion to some of or all such dependants;

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- (2) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member, and the member has designated in writing to the fund a nominee who is not a dependant of the member, to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the benefit or such portion of the benefit shall be paid to such nominee: Provided that where the aggregate amount of the debts in the estate, so much of the benefit as is equal to the difference between such aggregate amount of debts and such aggregate amount of assets shall be paid into the estate and the balance of such benefit or the balance of such portion of the benefit as specified by the member in writing to the fund shall be paid to the nominee.
- (bA) If a member has a dependant and the member has also designated in writing to the fund a nominee to receive the benefit or such portion of the benefit as is specified by the member in writing to the fund, the fund shall within twelve months of the death of such member pay the benefit or such portion thereof to such dependant or nominee in such proportion as the board may deem equitable: Provided that this paragraph shall only apply to the designation of a nominee made on or after 30 June 1989: Provided further that, in respect of a designation made on or after the said date, this paragraph shall not prohibit a fund from paying the benefit, either to a dependant or nominee contemplated in this paragraph or, if there is more than one such dependant or nominee, in proportion to any or all of those dependants and nominees; and
- (c) If the fund does not become aware of or cannot trace any dependant of the member within twelve months of the death of the member and if the member has not designated a nominee or if the member has designated a nominee to receive a portion of the benefit in writing to the fund, the benefit or the remaining portion of the benefit after payment to the designated nominee, shall be paid into the estate of the member or, if no inventory in respect of the member has been received by the Master of the Supreme Court in terms of section 9 of the Estates Act, 1965 (Act No. 66 of 1965), into the Guardian's Fund.

Dependant is defined as:

in relation to a member, means -

- (4) a person in respect of whom the member is legally liable for maintenance;
- (5) a person in respect of whom the member is not legally liable for maintenance, if such

person -

- (1) was, in the opinion of the board, upon the death of the member in fact dependent on the member for maintenance;
 - (2) is the spouse of the member, including a party to a customary union according to the Black law and custom or to a union recognised as a marriage under the tenets of any Asian religion;
 - (3) is a child of the member, including a posthumous child, an adopted child and an illegitimate child;
- (3) a person in respect of whom the member would have become legally liable for maintenance, had the member not died;

Mrs Rossi, on 15 March 1995, nominated the complainant as her dependant as well as her nominated beneficiary to receive her pension benefits. It is common cause between the parties that the complainant is a spouse in terms of paragraph b(ii) of the definition of dependant and the deceased's sole dependant. Accordingly the nomination is of no consequence because in terms of section 37C(1)(b) nominations apply only to nominees who are not dependants. Consequently, the distribution in this matter must be made in terms of section 37C(1)(a). The respondent held the benefit for just under 12 months in terms of Section 37C(1)(a), whereafter it paid the amount of R57 761.22 to the complainant, no interest was paid on this amount.

Thus, the issue in law is whether the complainant is entitled to interest. The rules of the respondent make no provision for interest on benefits kept on behalf of a dependant or nominee in terms of section 37C of the Act. Consequently, there is no basis in the rules of the respondent allowing any claim for interest.

The next enquiry is whether there was an express or implied contractual arrangement between the complainant and respondent in respect of interest. On 20 November 1996, the complainant telephonically made enquiries at the respondent, *inter alia*, about the question of interest on the amount of R57 761.22.

The respondent in a telefacsimile dated 4 December 1996 addressed to the complainant replied as follows:

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The Accumulated Contributions amounting to R57 761,22 (fifty-seven thousand seven-hundred and sixty-one rand and twenty-two cents) will be paid out in August 1997, and I suspect that the Trustees will grant you “call rate” interest on this amount at that time. We will require Trustee approval before interest will be paid out to you and the payment of interest will be confirmed with you close to the date of payment.

Eventually, the trustees decided that no interest would be paid, which forced the complainant to address further letters dated 2 October 1997 and 1 December 1997 enquiring about the question of interest.

The administrators of the respondent in their letter to the complainant suggest that they suspect the complainant is entitled to interest on a call account rate. Can this statement be regarded as a contractual arrangement between the complainant and respondent? I believe not as the use of the word “suspect” indicates that they are merely expressing an opinion which needs confirmation by the trustees. Further, it is categorically stated that any interest can only be paid with the approval of the trustees. Therefore, there was no express or implied contractual arrangement between the complainant and respondent in respect of interest.

The next issue in law is whether the principles of unjustified enrichment allow any claim for interest.

The leading case in South African law in respect of enrichment liability for interest is *Commissioner for Inland Revenue v First National Industrial Bank Limited* 1990 3 SA 641 (A). In this matter Nienaber AJA handing down the majority judgement held (654):

“..... I am not aware of any principle of law which entitles one party to demand interest at the legal rate from another simply because the former has been deprived of the benefits and fruits of the money which he had paid to the latter. *Baliol Investment Company (Pty) Limited v Jacobs* (1946) TPD 269 suggests the opposite: that interest is not *ipso facto* recoverable; it would be payable only if the parties had so agreed or if the payee was in *mora*.”

As there was no contractual agreement between the parties, the only basis on which the

respondent could be held liable would be on the principles of unjustified enrichment, provided the requirements of *mora debitoris* are met. The requirements of *mora debitoris* are as follows:

- i) Performance must be possible notwithstanding delay;
- ii) the debt must be due and enforceable;
- iii) the delay must be wrongful; and
- iv) the delay must be due to the fault of the debtor.

On the facts of this case the key requirement that needs to be analysed is when the debt was due and enforceable. A debt becomes due and enforceable when the time period set for performance has expired or where no time period has been agreed upon, then before the lapsing of a reasonable period of time. Further, where no time period has been agreed upon then the creditor needs to demand performance from the debtor (van der Merwe et al - *Contract General Principles* 243 - 4).

At this juncture, it is useful to repeat my observations in *Dobie N.O. v National Technikon Retirement Pension Fund* (case no. PFA/KZN/207/99/AS) in respect of a distribution to dependants in terms of section 37C(1)(a).

...applying the principles enunciated in *Commissioner of Inland Revenue v First National Industrial Bank Ltd*, until the board makes the decision recognising a dependant as a beneficiary and determining the proportions of the distribution, there is no duty to pay. Any claim for payment made prior to the determination of liability can be met by the fund with the defence that such a claim would be premature and might prove idle. That, however, is not to say that a board can be dilatory in making its decision. The failure by a board to take a decision timeously will be maladministration giving rise to a claim for a *mandamus* and/or delictual damages for any actual loss.

Nevertheless, no contractual or quasi-contractual claim arises until the board by its decision determines entitlement and correlative liability. Normally, therefore, the debt will be due and enforceable in terms of the board's decision and in accordance with any time term stipulated by the board. Yet, given the quasi-contractual and administrative context in which pension funds operate, and the statutory rights enjoyed by beneficiaries under the complaints process, any unreasonable time-frame imposed by the board is also likely to be considered maladministration.

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Where the board does not provide for a time frame for distribution, the principles of *mora ex persona* govern the situation, and the board will be in *mora* once the beneficiary by means of a reasonable demand (*interpellatio*) sets a specific time for performance.

A note of caution needs to be introduced here. *Mora* can also arise by operation of law where the debtor's need is urgent (time is of the essence) and the creditor's delay is unreasonable. Where dependants are in urgent need the requirements of reasonableness may override any time term imposed by the board or the need for an *interpellatio*.

This brings us to the 12 month period mentioned in section 37C(1)(a). A question routinely asked is whether it impacts on the due date or enforceability of a death benefit. In my opinion, it does not. The operative event determining entitlement under section 37C(1)(a) is the board's decision determining the identity of the beneficiaries and the extent of entitlement. Be that as it may, it needs to be asked whether the board is obliged to take a decision within the 12 month period or whether the board is required to wait 12 months before distribution. The idea being that the board should wait that long to see if any unidentified dependants come forward.

While there may be some wisdom in adopting such a cautious approach, section 37C(1)(a) does not make such a course of conduct obligatory. A contextual reading of section 37C as a whole indicates that the phrase "within twelve months of the death of a member" does not qualify the obligation to pay the benefit. It defines the period available for tracing dependants before making payment exclusively to a nominee. Hence, if the board is reasonably satisfied that it has traced all dependants, the stipulated period does not pose any limitation upon the distribution to the dependants. The provision does not prohibit distribution of the benefit within 12 months. Nor does it compel distribution at the expiry of the 12 month period. Section 37C(1)(a) must be read in conjunction with section 37C(1)(b) which provides that an exclusive distribution to a nominee may take place only after the expired 12 month waiting period has produced no dependants. The purpose then is to advance the need principle by only giving effect to the deceased member's nomination of a non-dependant when no dependants have been traced in the 12 month period. Accordingly, it should not follow that the board is obliged to wait the full 12 months when it has exhausted all reasonable steps within the waiting period to identify and trace dependants. Put differently, if the board is satisfied upon reasonable grounds, that it has taken all reasonable steps to identify and trace dependants, it shall be entitled (in urgent cases even obliged) to effect a distribution regardless of whether the 12 month period has expired or not.

Whether the board has acted properly under section 37C(1)(a) will not necessarily be determined with reference to the time-frame. The question always will be whether the board took all reasonable steps to comply with its duty to trace dependants. The board must properly apply its collective mind to the matter. A board which sits back and does nothing for 12 months and then

distributes the benefit to a single dependant of whom it is aware will not be insulated against a claim of maladministration or impropriety lodged by an undiscovered dependant who could have been traced had reasonable steps been taken. By the same token, there can be no complaint of maladministration or impropriety solely on the grounds that the distribution took place within the 12 month period, if the board could not reasonably have been expected to trace the dependant in question. The inquiry always shall be whether the board acted reasonably in distributing the benefit at the time it did. Relevant considerations in this regard will include: the needs of the beneficiaries identified, the personal circumstances of the deceased, the relationship between the deceased and the identified dependants, the practical ease with which the dependants could have been traced and so on.

Where a reasonable investigation reveals that there may be some doubt about the circle of dependants, the board will be well advised to postpone the distribution until it has taken reasonable steps to remove that doubt. As stated, once the board is aware of a dependant there is no compulsion to distribute within the 12 month period. However, strangely, because of section 37C(1)(bA) - (discussed below), if in addition to dependants there is a nominee, payment must be made within 12 months. In that instance, the statutory compulsion to pay within the 12 months will be an important consideration in assessing the reasonableness of the investigation.

In conclusion, dependants entitled to share in a death benefit under section 37C(1)(a) acquire a debt which is due and enforceable once the board has taken a decision to distribute to the selected beneficiaries. Interest will be payable on that debt if the fund agrees to pay interest or if it is in *mora*, either *ex re*, *ex persona* or by operation of law, as discussed above.

The respondent argues that in terms of section 37C(1)(a) the benefit was withheld for a period of at least 12 months. Let me stress again that section 37C does not make it obligatory for a board of trustees to wait 12 months before making an equitable distribution. However, until the board makes a decision in respect of the total number of beneficiaries and the equitable apportionment of the benefit, there is no duty to pay, consequently the debt is not due and enforceable. In this matter, the respondent was not absolutely certain of the circle of dependants. Accordingly, it elected to postpone the period of payment until this uncertainty was removed. No evidence was adduced as regards to whether the respondent took reasonable steps to locate any dependants or procrastinated in making a decision to distribute to the eventual sole dependant. In the absence of this evidence I am reluctant to interfere with the conservative but cautious decision of the respondent to hold the benefit in abeyance pending an investigation into

the class of beneficiaries. The complainant's financial position was much improved by the distribution of the proceeds of the group life policy and he accordingly had no urgent need to receive the benefit.

Hence, I find the decision of the board of trustees of the respondent to withhold the benefit for a period of 12 months to be reasonable and in accordance with section 37C. The debt became due and enforceable in terms of the trustee's decision on 24 August 1997 (12 months after the death of Mrs Rossi). Since the debt was paid to the complainant on 21 August 1997, the question of interest does not arise. Thus, the requirements of *mora debitoris* are not met. Accordingly, there is no claim for interest based on the principles of unjustified enrichment.

Therefore, for the foregoing reasons, the complaint is dismissed.

DATED at CAPE TOWN this 13th day of AUGUST 1999.

JOHN MURPHY
PENSION FUNDS ADJUDICATOR