

THE FINANCIAL SERVICES TRIBUNAL

CASE NO: PFA73/2022

In the matter of:

SIBUSISO KEKANA

Applicant

and

**NAMPAK CONTRIBUTORY PROVIDENT FUND
AND NBC FUND ADMINISTRATION SERVICES
(PTY) LTD**

1st Respondent

THE PENSION FUNDS ADJUDICATOR

2nd Respondent

NAMPAK LIMITED

3rd Respondent

DECISION

Tribunal: Adv A.T. Ncongwane, SC (Chairperson),
E. Phiyega, and
L. Ngcobo (members)

Hearing: 05 June 2023

Date of decision: 07 June 2023

Appearances:

On behalf of the applicant: In person

On behalf of the first, second and third

respondent: No appearance.

Summary: The application failed – to show that the Pension Fund Adjudicator has no authority to shorten the 12 months period stipulated in Section 37C(1)(a) of the Pension Fund Act as well as the period for investigation in terms of the Fund’s rules. Payment of death benefits made within the prescribed period – interest not applicable.

Introduction

[1] This is an application instituted by the applicant in terms of Section 230 (1) of the Financial Sector Regulatory Act 09 of 2017 (“the FSR Act”). This application is for reconsideration by the Tribunal of the determination dated 23rd of November 2022 by the Pension Funds Adjudicator (“the Adjudicator”). The Adjudicator’s determination was made in terms of Section 30M of the Pension Funds Act, 25 of 1956, as amended (“the ‘Act’”) and its determination obliged Nampak Contributory Provident Fund and NBC Fund Administrators Services (Pty) Ltd (“The Fund” or “First Respondent”,) as the case may be, in the following:

- “6.1.1 The Fund is ordered to pay the insured benefit from its risk reserve account to the deceased’s beneficiaries, within three weeks of the date of this determination, and*
- “6.1.2 The Fund is ordered to provide the complainant with the breakdown of the death benefit paid within 6 weeks of the date of this determination.”¹*

[2] It is not in dispute that the applicant, who from the record and the determination, is a relative of the deceased (either as the brother or brother in law), was duly authorised to act on behalf of the deceased’s family. It

¹ See: Determination dated 23rd November 2022 page 18 of the record, para 6.1., 6.1.1 and 6.1.2.

appears that the adjudicator, without making any ruling in terms of Section 30G of the Act, was satisfied that the applicant or the complainant has sufficient interest in the complaint as defined in Section 1 of the Act.

The basis for reconsideration

[3] The grounds for reconsideration are stipulated in the applicant's email dated the 9th of December 2022 and attached to Form A application form² provided for under the FSR Act, to launch reconsideration applications.

[4] In the email referred to above, it appears that the basis of the applicant's complaint is derived from what is stated in the findings by the adjudicator. We extrapolate the grounds from the email which states:

"6.1.1 ...That the Fund should be instructed to pay with immediate effect (with interest), considering that Rule 9 relating to the risk reserve account has already being provided in 28 September 2022 (sic)... The basis to provide the Funds with weeks (sic), consideration it December – January and offices will be closing. The Fund has never indicated that they are not capable administratively. These 3 weeks fall in the middle of December, which means practically, (if they do pay) it will be only in 2023. In the meantime the family eats what? They must continue to suffer with no breadwinner at home?"

"6.2.1 ... there is no basis for the PFA to further provide six weeks for breakdown of the statement. Considering that the fund claims to have paid the 'credit' within 12 months, surely they don't need six weeks to provide a breakdown."

[5] As pointed out above, the adjudicator handed down his determination on the 23rd November 2022. This application was launched on the 7 December

² Application provided for under the FSR Act, to launch reconsideration applications.

2022. Subsequent to the launching of the application and on the 20th December 2022,³ the Fund wrote a letter to the Office of the Adjudicator, in which letter, the adjudicator was notified about the compliance with her determination. The letter is quoted verbatim:

“Your office is notified of the following:

Re: Order 6.1.1

The death benefit allocation in terms of the Trustees resolution, in respect of T. Seqhibolla (the wife of the deceased) and FL Mosebedi (major child), have been paid to them, respectively, as a lump sum on the 15th December 2022.

With regards to the portion allocated to the minor child (R Sibanda), a beneficiary fund account has been opened with the NBC Beneficiary Fund. Such Portion will be transferred thereto, on behalf of the minor child.

Re: Order 6.1.2

Benefit allocation and payment breakdown letters dated 19 December 2022, have been forwarded to the beneficiaries by the Fund Administrator.

We hope you find this in order, and regard this matter closed.”

- [6] It could be anticipated that the notice issued by the Fund dated the 20th December 2022 and confirming payment of the benefit, will bring an end to the conflict. It did not, and at the commencement of the hearing, the applicant was required to indicate whether he persists with the application in the light of the content of the notice.

³ Page 21 of the record, part A Nampak Contributing Provident Fund’s letter addressed to the office of the PFA.

[7] The applicant I undeterred in his pursuit with the application and made submissions that neither he nor the beneficiaries have received any document from the Fund serving as proof of the breakdown statement for the calculation of the benefit. His case is further that, he did not know whether the beneficiaries have received payment from the Fund, notwithstanding the content of the Fund's letter dated the 20th December 2022.

[8] The applicant was requested by the Tribunal to provide more about his detail regarding his lack of knowledge that the beneficiaries have been paid or not. At this point, applicant altered his account and he submitted that he knows that the beneficiaries have been paid but he does not have proof of payment with him, similarly he maintains that he himself has not received proof of the breakdown statement on the benefits.

[9] The hearing proceeded on the strength that the pension benefits as confirmed by the Fund in a letter to the adjudicator have been paid to the beneficiaries.

[10] The applicant's submission is that the adjudicator should not have handed down the ruling as per her determination. She should have provided that pension benefits should be paid out immediately and not give the Fund the three (3) weeks period to pay. Also that the Fund should not have been allowed the Six (6) weeks period to furnish the breakdown statement to the

beneficiaries. This ruling, according to the applicant should have ordered that the breakdown statement should be furnished with immediate effect.

Analysis and the law

[11] The applicant could not indicate any legal provisions for being aggrieved by the periods of three (3) months to make payments of benefits on one hand and the six (6) weeks to furnish the breakdown statement by the Fund. He just feels that there has been unnecessary delays in the processing of the claim and the adjudicator should have considered that in her determination. Applicant contends that payment of benefits should have included interest from the date of the passing of the applicant's brother in law. He argues that the adjudicator did not consider these periods.

Interest

[12] In general, interest is expressed usually as a percentage of money lend or money owing, calculated either for a fixed period often the time of receipt of the loan until it is repaid or from the time the money owing is due and payable, until when fully paid.

[13] As it can be gleaned from what appears above, the applicant insists on payment of interests on the benefit paid out to the beneficiaries from the date of death of the deceased brother in law i.e. 22nd July 2021.

When does the interest commence to run?

[14] From the adjudicator's determination, the payment of the benefit had to occur three (3) weeks after the date of the determination, being the 23rd of November 2022.

[15] Payment indeed was made on the 20th December 2022, i.e. three (3) weeks and 1 day after the date of the adjudicator's ruling.

[16] It seems to us, it is appropriate to establish whether under the Pension Fund Act or any rule made under the Act, interest will become payable when the adjudicator makes a ruling on payment of the pension benefit by the Fund, and if so, and at what rate and from when will the interest become calculable.

[17] The question whether interest is pertinent appears to be relevant from the provisions of Section 30N of the Pension Funds Act, which stipulates:

"30N Interest on amount awarded

Where a determination consists of an obligation to pay an amount of money, the debt shall bear interest as from the date and at the rate determined by the adjudicator."

[18] The central issue that is relevant to this Tribunal is whether the adjudicator considered whether the period of delay the complaint referred to, justified that the fund be ordered to pay the amount of benefit with interest from the date of the deceased's death.

[19] In the determination, the adjudicator has dealt with the issue of delay. This appears in sub-paragraphs 5.5 to 5.8 of the adjudicator's determination, essentially, dealing with the evidence that the employer only notified the Fund of the deceased's death on the 22nd of February 2022, and not in July 2021. The Fund finalised its investigations in terms of section 37C of the Act on 20th May 2022 and distributed the death benefit that became due and payable at the time. This payment did not attract any payment of interest. The adjudicator found that there was no delay and the death benefit comprising of the deceased's Fund credit was paid within the twelve(12) months period provided for in the Act. What remained at that stage was the insured portion of the death benefit which had to be payable from the Fund following the liquidation of Nestlife (the insurer). This required the Trustees of the Fund to resolve to have the insured benefit paid from the Fund's risk reserve account,⁴ which process required the registration of rule Amendment 6. The FSCA approved the registered Rule on the 28th of September 2022.

[20] It is perhaps apposite to quote the adjudicator's analysis and reasoning in her consideration of the issue of the delay in the sub-paragraphs mentioned supra, it is stated in the following:

"5.5 The death benefit must be distributed and paid without any unreasonable delay (see Dobie NO v National Technikon Retirement Pension Fund [1999] 9 BPLR 29 (PFA)). Where there is delay in payment of a death benefit, such a delay must be reasonable and justifiable.

⁴ Reserve account is defined in the Act, in relation to a Fund, to mean a contingency or investment reserve account, as the case may be.

- 5.6 *The deceased passed away on 22 July 2021 and a death benefit in terms of rule 7.1 became due and payable to deceased's beneficiaries. However, the fund's registered insurer, Nestlife, notified it on 28 July 2021 (a few days after the deceased's death) of its inability to honour the insured benefit referred to in rule 7.1.1. (a). As a result, the insurer benefit was no longer payable by the fund as provided for in rule 7.1.2.1(a) and (b). It is noted that whilst the employer only notified the fund of the deceased's death on 22 February 2022, the late notification did not result in the non-payment of the insured benefit. Had the employer timeously notified the fund of the deceased's death, it is unlikely that a claim for the insured benefit would have been submitted to Nestlife before 28 July 2021 (when Nestlife notified the fund of its inability to honour claims). That is, it is unlikely that the claim would have been submitted to Nestlife within six days of the deceased's death. Whilst the employer's failure to act timeously is unacceptable and must be condemned in the strongest possible terms, it is unlikely that the claim would have been honoured by Nestlife as it was placed in liquidation a few days thereafter.*
- 5.7 *Further, the evidence reflects that the fund finalised its investigations in terms of section 37C of the Act on 20 May 2022 and distributed the full death benefit that became due and payable at the time (fund credit only as the insured portion was no longer payable). The evidence reflects that all aspects pertaining to the distribution of the death benefit that was due at the time (fund credit only) were finalised by 20 May 2022, within the twelve months of the deceased's death.*
- 5.8 *Notwithstanding the above, the fund undertook to register rule amendment 6 which provides that in the event that the registered insurer is unable to pay the insured portion of the death benefit, the trustees can agree to pay same from the fund's risk reserve account. The evidence indicates that the FSCA approved and registered rule amendment 6 on 28 September 2022. Thus, in terms of the rule amendment 6, the board of the fund must be ordered to determine whether or not the insurer benefit may be funded from the fund's risk reserve account."*

The adjudicator concludes by finding that:

"5.12 Further, the complainant stated that the fund intentionally delays the payment of the death benefit to earn interest thereon for its own benefit. As stated in paragraph 5.7 and 5.8 above. The fund paid the deceased's fund credit within the legislated timeframe. The payment of the insured benefit was always subject to Nestlife honouring same, which it did not. Therefore, the complainant's assertion that the fund delays the payment of the death benefit to earn interest on same for its own benefit, cannot be upheld.

5.13 In light of the above, this Tribunal is of the view that there was no delay on the part of the fund. Up until 28 September 2022, rule 7.1.2.1 (a) and (b) prevailed and consequently only the fund credit became payable from the fund and same was distributed by 20 May 2022. Upon the registration of rule amendment 6, the board is now in a position to pay the insured benefit, not honoured by Nestlife from the fund's risk reserve account."

[21] The function of this appeal tribunal is to scrutinise the legality of the determination by the adjudicator, but not to substitute the adjudicator's decision with our own. To do otherwise, would constitute the usurping of the powers entrusted to the adjudicator legislatively. Section 30N has entrusted the discretionary duty to the adjudicator to determine as to the rate and from when interest is to run on an amount awarded in the determination.

[22] The undisputed facts are that the Fund finalised the claim within the statutory 12 months period and in so doing, complied with the Act.⁵ In the light of the applicant's concession referred to in paragraph 7 above, that the amount in issue were received by the beneficiaries, and the submission that the applicant has noticed that the breakdown statement has been sent to the beneficiaries, it is beyond the powers of this tribunal to reconsider the facts that came to light after the adjudicator's determination was handed down. The applicant has no credible explanation as to why he did not establish from the beneficiaries if any proof of payment and proof of the breakdown statement were received by the beneficiaries and most importantly, obtain an affidavit from the beneficiaries on this aspect.

⁵ Section 37C (1)(a) of the Act provides that if the Fund, within 12 months of the death of the member becomes aware or traces a dependent or dependents of the member, the benefit shall be paid to such dependent...

[23] The adjudicator has no authority to ignore the Fund's rules and the 12 months statutory period and make a ruling that a shorter period should have applied to finalise the claim. The reasoning by the adjudicator, in this regard, is unassailable.

[24] The adjudicator considered the arguments and the documents put before her by the Fund and concluded that, despite the applicant's allegations, the Fund has complied with its duties and finalised the death benefit claims within the 12 months period. The applicant's strenuous allegations that the Fund kept the money for itself in order to earn interest thereon for its own benefit, was found to have been made without any factual basis. The applicant cannot expect the adjudicator and the Tribunal to infer that there was any form of deceit or misrepresentation or even fraud in an absence of at least *prima facie* evidence pointing in that direction.

[25] We have no justifiable reasons to doubt the reasoning of the adjudicator on the aspect of the delay and there is no possibility, in our view, that there exists an alternative decision that may be taken by the adjudicator when making a finding that the delay was not unreasonable after considering all the relevant material facts, including the fact that the Fund finalised the claim within the prescribed period.⁶ Therefore, we agree that no interest was payable by the Fund. No grounds to fault the rationality and consideration of relevant factors by the adjudicator in her reasoning.

⁶ Adjudicator's decision pages 16-17 of Part A of the Record.

[26] During the hearing, applicant argued that interest also applied for the period after determination. This was raised as a new matter before us. The assertion is that interest should have applied from the date of adjudicator's determination, which involves the period of three (3) weeks and 1 day. The finding by the adjudicator is that the Fund's Board was in a position to pay the insured portion of the death benefit, not honoured by Nestlife from the Fund's risk reserve account, only upon the registration of the Amendment 6 rule. The registration appears to have been commenced on or about 16 August 2022, when the resolution was adopted in accordance with the rules of the Fund⁷ and finalised on the 28th of September 2022, when the amendment number 6 rule was registered with the FSCA.⁸ When the matter served before the adjudicator, the Fund had no other obstacles to make payment. This fact received the adjudicator's appreciation.

[27] From the facts gleaned from the records, the employer, despite the death of the member having occurred on the 21st July 2021, the Fund only received the notification of death on the 11th February 2022 and made a submission to the adjudicator that the Fund was advised that the persons responsible for the delay were severely sanctioned by the employer. In terms of rule 7 of the Fund, the obligation to complete and submit all the relevant documents within the time limits lies with the employer. Where the employer has failed to comply, the employer will be liable to compensate the member or the beneficiaries with interest. In the instant case, there was no loss as the pension benefit was paid out.

⁷ Resolution of the board of Trustees, pages 111 – 125 of Part B of the record.

⁸ Page 114 – 115 of the Record.

[28] The adjudicator was informed in the letter of the 4 November 2022 that the Fund credit would be paid. The complaint received on the 15 April 2022 culminated to the determination on the 23 November 2022. The adjudicator had fully explained the steps she took in conducting her investigation process pursuant to the complaint.

[29] In the exercise of her discretion, the adjudicator set the time-period for the payment. The adjudicator submits in her further reasons that the time-period is reasonable and there is no deviation from other determination issued by her. We agree with this reasoning, and no case is made for not setting a rate of interest that would have applied for the three (3) weeks time-period after the determination.

[30] In any event, this new argument was not part of the issues before the adjudicator to determine. The adjudicator only set the three (3) weeks time-period for practical consideration for enforcement of the determination. In particular, the affected parties, in terms of S. 30A (3) of the Act, being the beneficiaries, have not procured any evidence before the adjudicator as to how they were prejudiced by the three (3) weeks period set by the adjudicator. But, most importantly this was not the issue the adjudicator had to determine.

Conclusion

[31] We do not find any grounds from the application for consideration that could justify the setting aside and remitting of the decision to the adjudicator.

[32] After having assessed the grounds and the reasons furnished in the determination dated 23 November 2022, the adjudicator was not wrong.

[33] Consequently, the application for reconsideration is dismissed.



AT NCONGWANE SC, CHAIRPERSON

With the panel consisting of:

E. Phiyega, and

L. Ngcobo

Date: 07 June 2023