

THE FINANCIAL SERVICES TRIBUNAL

Case №: PFA64/2023

In the matter between:

SEBENZILE JANE MTAMBO

Applicant

and

D[...] H[...] OBO

K[...] H[...]

First Respondent

PENSION FUNDS ADJUDICATOR

Second Respondent

MEDIA24 PROVIDENT FUND

Third Respondent

Summary: Application for reconsideration in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 – application for condonation – lack of good cause – no prospect of success on the merits of the matter – Pension Fund Act 24 of 1956 - section 37C – pension benefit up on death

DECISION

1. The applicant applies for the reconsideration of a determination of the Pension Fund Adjudicator (“the PFA”) under section 30M of the Pension

Funds Act, 24 of 1956 (“the Act”).

2. The present application is made under section 230 of the Financial Sector Regulation Act, 9 of 2017 (“the FSR Act”).
3. The parties waived their rights to a formal hearing and the matter will be decided on the record filed.
4. This matter concerns a death benefit which became available for allocation and distribution in terms of section 37C of the Act. It follows the death of the Fund’s member, Mr PE Mtambo (“the deceased”) on 25 September 2021.
5. After having conducted a trace of deceased’s dependants, the Fund considered for allocation and distribution of the death benefit to six dependants, including Ms H, who was 17 years old at that time.
6. The applicant, who was the spouse of the deceased, disputes the allocation and distribution of part of the death benefits to Ms H. In essence, the applicant disputes the paternity of Ms H, who will hereinafter be referred to as the child.
7. The determination of the PFA is challenged on the basis that the PFA was bias and that the applicant is entitled to request DNA tests. According to the applicant, the allocated share to the child is depriving her of getting 50% of the provident fund. She persists that DNA test must be done to prove paternity.
8. This application was lodged out of the prescribed time in terms of the FSR Act. It is for that reason that the applicant, duly represented, lodged an application for condonation for the late filing of the application for reconsideration.
9. The application for condonation states that reason for the late filing of the

application is mainly the inability of the applicant and her family to timeously raised the fees to brief counsel to draft the application. Further, the legal representative for the applicant states that the necessary funds were raised in September 2023. Furthermore, the legal representative states that there was no delay after fees were paid and that the respondents have not been unduly prejudiced by the delay.

10. The Financial Services Tribunal Rules¹ provides in paragraph 31 that an application for condonation must be succinct and show good cause.

11. The Constitutional Court stated in the *Grootboom v National Prosecuting Authority*² that:

“It is by axiomatic that the granting or refusal of condonation is a matter of judicial discretion. It involves a value judgment by the court seized with the matter based on the facts of that particular case.” (own emphasis).

12. *The Grootboom case* stated that it is now trite that condonation cannot be had for the mere asking and a party seeking condonation must make out a case entitling it to the court’s discretion.³ The party seeking condonation must show sufficient cause.⁴

13. Further, the court stated in *the Grootboom case*⁵ that the standard for considering an application for condonation is the interests of justice. According to the court, the ultimate determination of what is in the interest of justice must reflect due regard of all relevant factors which may include may but not limited to the following: the nature of the relief sought; the extent and cause of the delay; the effect of the delay on the administration of justice and other litigants; the reasonableness of the explanation for the delay; the importance of the issue to be raised in the intended appeal; and the prospects of success.

¹ Issued in terms of section 227 of the Financial Sector Regulation Act 9 OF 2017

² [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC) at para 35.

³ *Grootboom* at para 23

⁴ *Ibid* par 23

⁵ *Grootboom* at par 22

14. Section 230(2)(b) of the FSR Act, states that the application for reconsideration must be made within 60 days after the applicant was notified of the decision or such longer period as may on good cause be allowed.
15. The determination of the PFA was sent to the parties on 7 July 2023. Although the applicant states in her application that the determination was received on 10 July 2023, there is no explanation provided by the applicant on why it was not received on the date it was sent.
16. The period of 60 days appears to have expired on 7 September 2023 and the applicant's application for reconsideration was filed on or about 5 October 2023. The applicant was out of time with not less than 20 days from the date of receipt of the determination.
17. No information is provided by the applicant on when the payment of fees (which is the cause of delay) was paid to enable the Tribunal to assess on the extent and reasonableness of the delay. This is not assisting the application for condonation.
18. The Fund stated that it alerted the applicant of the determination of the PFA on 7 July 2023 and the fact that the Fund is required to pay within 2 weeks the death benefit allocated to the child. The Fund indicated that it will pay on 4 August 2023. Further, the Fund requested the applicant to indicate not later than 21 July 2023 on whether she will be challenging the decision. It appears from the record that there was no response.
19. Further, the Fund submits that the legal representative of the applicant informed the offices of the Tribunal Secretariat that his client objects to the PFA's order that payment be made. The Tribunal Secretariat, in turn, informed of the applicant that she may apply for the suspension of the PFA's order in terms of section 231 of the FSR Act. These activities happened on 14 August 2023. The record reflects that no steps were

taken by the applicant to apply for suspension of the PFA's order.

20. The implementation of the PFA's order in respect of the death benefits of the child was put on hold by the Fund in anticipation of the applicant's move to lodge an application for suspension. The Fund decided to effect payment of the death benefit on 28 September 2023. This happened after the applicant failed to take any step.
21. The delay of the applicant in taking appropriate steps (suspension of the order) before the payment on 28 September 2023 has resulted in the implementation of the PFA's order. The delay in the implementation of the PFA's order had impact on the administration of justice and to say that the Fund should have waited would be unjust to the Fund and the child.
22. Regarding the merit of the matter, the Fund conducted its investigation regarding the paternity of the child. The Fund's investigation led to, amongst other things, the following information: (i) the Fund was provided with a damages letter dated 28 November 2004 which was witnessed by several people including the deceased's brother and Sammis Mofokeng, who was a friend of the deceased; (ii) an affidavit from Sammis Mofokeng, confirming that he was part of the delegates to acknowledge that the deceased was the father of the child (unborn then); and (iii) the application form regarding birth registration of the of the child was received from the Department of Home Affairs and the Fund was satisfied that the deceased did indeed sign the application form.
23. The PFA considered the submissions of the parties, including the submissions of the applicant. We do not find any basis to support the allegation that she was bias.
24. Further, the PFA stated that she is not convinced that there is a need to subject the child to unnecessary DNA test for the reason, amongst others, that the Fund conducted a proper investigation to whether the child was the deceased child or not. We have no basis to interfere with the order of

the PFA.

25. It is our view that the applicant's case has no prospect of success on the merits.
26. For the reasons stated herein above, the application for condonation for the late filing of the application for reconsideration shows no good cause and is not in the interest of justice to temper with the PFA's order. It is therefore dismissed.

ORDER:

- (a) The application for reconsideration is dismissed.

Signed on 14 February 2024

Adv W Ndinisa (Member) and

LTC Harms (Deputy Chair)