THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: PFA55/2022

In the matter between:

J.A., N.O.	APPLICANT
and	
THE PENSION FUNDS ADJUDICATOR	FIRST RESPONDENT
SANLAM UMBRELLA PROVIDENT FUND	SECOND RESPONDENT
SANLAM EMPLOYEE BENEFITS (PTY) LTD	THIRD RESPONDENT
Z.K.	FOURTH RESPONDENT
Z.K. N.O.	FIFTH RESPONDENT

APPLICATION FOR CONDONATION AND RECONSIDERATION OF DECISION
FILED ITO SEC 230 OF THE FSR ACT 9 OF 2017

DECISION

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1 This matter is closely related to the matter decided by the Tribunal on 21 November 2022 in case PFA 46/2022, and many facts overlap. The difference is that another Fund and Administrator were involved. Although the papers in that case referred to the Determination in this case, nothing more was said or provided. In particular, it was not disclosed that this matter was or may have been the subject of reconsideration. For the sake of convenience, I repeat some of the text from that decision which is relevant to this decision and overlaps.

2 The Applicant, Ms JA, applies in her capacity as guardian of two of her children for the reconsideration of a determination of the Pension Funds Adjudicator made in terms of sec 30M of the Pension Funds Act 28 of 1956. The determination relates to the allocation of the death benefits of the late Mr RBK, who was a member of the second respondent, the Fund.

3 The Applicant alleged that her children were dependants of the Member and that they are entitled to be considered for an allocation of the death benefit due by the Fund to the beneficiaries in terms of sec 37C of the Act. Such dependency could be because the Member was, as alleged by the Applicant, the father of the children or because the children were factually dependent on the Member.

4 The fourth respondent is a son (hereinafter called 'the Complainant') of the Member and is also the executor of his estate. He disputes the allegations of the Applicant relating to the paternity of the children although he admits that his father had a long-standing extramarital liaison with the Applicant, has given the one child his surname, and nominated the children as beneficiaries in retirement annuity policies at Sanlam and Old Mutual. Admittedly, the Member had fathered another child extramaritally and paid maintenance surreptitiously (R5 000.00 per month) for that child.

5 To obtain DNA evidence to prove that the Member did not father the Applicant's children, the Complainant, in the words of the Applicant, harassed him. This led to an application for a protection order by her against the Complainant in the Magistrates' Court, which evolved into a quasi-paternity suit. The learned Magistrate thought that if DNA tests were ordered, the 'harassment' would stop, and she ordered such tests. Since the Member was deceased, the DNA tests were conducted to determine whether there was a blood relationship between the Complainant, as son, and the two

daughters. The results were handed to the Court by the Applicant's attorney and established that no such relationship existed.

6 The Magistrate dismissed the Applicant's application because, as she held, the Complainant's only aim in 'harassing' the Applicant was to ascertain paternity to finalise the estate and since the DNA tests were concluded, his search for the truth has come to an end. The Magistrate was overly optimistic.

7 The applicant disputes the validity of the DNA tests on the ground that there is no proof that the Complainant was in fact the biological son of the Member but whether the common-law presumption *pater est quem nuptiae demonstant* (the father is him who was married to the mother) applies was apparently not considered.

8 The Complainant, his siblings and his mother instituted an action in the High Court against the Applicant. The case is apparently pending and the Applicant's defence to the claim is not known. The essential allegations by the plaintiffs are that the Applicant had knowingly misrepresented to the Member that the children were his biological children (while they were not) and that she had coerced him into accepting parenthood and extorted from him financial support without any legal basis which included maintenance and life policies for the benefit of the children.

9 The second claim alleges that the Member paid an amount of R10 000.00 per month from the joint estate for the maintenance of both children (as confirmed by the Applicant), and that the total amounting to R960 000 because of fraudulent or grossly negligent misrepresentation, coercion is repayable to the plaintiffs.

10 The Complainant, unsuccessfully, also launched two applications against the applicant in the High Court which were dismissed on 17 December 2020 and 11 March 2022 respectively. (The relevance of this is unclear because it had no effect on what follows.)

11 I now deal with the Fund's decisions relative to the allocation of the death benefit. As mentioned, the Member passed away on 26 September 2019 and the Fund, on the information then available to it, made an allocation of 11% per child of the applicant based on the assumption that they were the biological children of the Member and that he had maintained them.

12 After objections, the Fund changed all that to 12% and after that, the Fund was informed that paternity tests were required to determine the paternity of the Member. Having received the record of the Magistrate Court's proceedings and other documents, the Fund concluded that paternity had not been established but that factual dependence had, and it reduced the allocation to the children to 4% and 3% respectively (total of 7%).

13 Further objections followed and the matter was escalated by the Complainant to the PFA. The PFA accepted that paternity had not been established and as far as any maintenance/dependence relationship is concerned, said the following:

> It should be noted that isolated sporadic payments are not sufficient to indicate a maintenance relationship. There must be some regularity in the payments made by the deceased to confirm that he was supporting [the children] during his lifetime (see *Govender v Alpha Group Employees Provident Fund and Another*[2001] 8 BPLR 2358 (PFA) at 2360F-H). In this instance, the complainant could not provide some of regularity to proof that the children were financially dependent on the deceased. The evidence indicates that both biological parents of [the children] are still alive. Further, the evidence indicates that whatever amount the deceased disbursed for the children […] was not out of goodness of his heart, but he thought that they were his, however, it turned out not to be. Therefore, the decision of the fund to allocate a portion of the death benefit to [the children] was irrational, as the latter failed to prove their dependency.

14 Whether these findings and deductions were justified or conclusive for the decision of the PFA is not now the issue, but some remarks would be apposite to determine whether the applicant has set out a prima facie case. Since we do not know who the father is, there could not have been evidence that 'he' was still alive (but that may have been an irrelevant consideration considering the issue). The acceptance of fatherhood by the Member and 'some' payment would usually have been sufficient to 'indicate a maintenance relationship'. As to the motive of paying, that was based on guesswork of the Complainant but may have been a reasonable guess. If we stand back for a moment to the position before DNA testing, a woman who had carnal knowledge with more than one man during the period when she fell pregnant was entitled to nominate the father – and under common law that would have been conclusive.

15 In the event the PFA issued the following order on 27 September 2021:

- The decision of the board of the fund to include [the children] in the allocation of death benefit is hereby set aside;
- The fund is ordered re-consider the allocation of the death benefit allocated to the deceased's beneficiaries and [the children] in terms of section 37C of the Act based on the reasons mentioned above,[1] within six weeks of this determination; and
- The fund is ordered to provide this Tribunal and the complainant with its report, within two weeks of finalising its decision.

16 The application for reconsideration was filed year and day later, i.e., on 28 September 2022. That is where the problem begins. Section 230(2) of the Act states that a reconsideration application 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.'

[1] There were more reasons than those quoted.

17 Although the applicant received the decision only on 15 October 2021 when the Administrator sent her and her attorney the determination and summarised its obligations, the application was still more than nine months late.

18 Another relevant section is sec 231:

> Neither an application for a reconsideration of a decision, nor the proceedings on the application, suspends the decision of the decisionmaker unless the Tribunal so orders.

This means that the Fund had to comply with the order of the PFA within the timelines set by the PFA.

19 Although the applicant informed the Administrator on 15 October that 'a full legal response follow' (in the context of the letter probably within two weeks) nothing followed. As the Fund said:

> The death claims committee met on 11 November 2021. As the six-week period by which the [Fund} was required to re-consider the allocation of the death benefit allocated to the deceased's beneficiaries and [Applicant's] children had elapsed, the death claims committee agreed to proceed with payment of the remainder of the benefit [after allocating the children's 7% to the Member's widow] as no further correspondence was received from the complainant or her attorney in regard to any legal action she intended to take in relation to the decision of the First Respondent.

20 The applicant's reconsideration application contains a condonation application, which is opposed by the Fund and the Complainant.

21 Apart from stating that she received the determination via the Administrator two/three weeks after its date, her first explanation for the late filing was that the determination of PFA 46/2022 was imminent, and that she would await that decision to decide whether to apply for reconsideration or not. (The Determination PFA 46/2022 was

received by her on 4 July 2022 and the reconsideration application date was 21 August 2022 – a month before the present application date. The matter was ripe for hearing and the file provided to the Tribunal on 11 November and the decision date was 21 November 2022.) The logic is not understood. The present determination was, according to her, in any event wrong and had to be upset. She also did not eventually file a consolidated reconsideration application.

22 The applicant, who had always been represented by an attorney, did not say that she or her attorney were unaware of the provisions of the Act mentioned above. The submission in the heads of argument that had the applicant been appraised of her rights to challenge the determination, she 'would certainly have also timeously challenged the determination' is not what she said in her affidavit and in effect contradicts it.

23 The applicant fairly referred to the classical exposition in Melane v Santam [1962] 4 All SA 442 (A) (1962 (4) SA 531) (AD), where Holmes JA said the following:

> In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success

which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked. I would add that discursiveness should be discouraged in canvassing the prospects of success in the affidavits.

24 In addition to the sections mentioned, it is appropriate to refer to sec 30O of the Pension Funds Act 24 of 1956:

> (1) Any determination of the Adjudicator shall be deemed to be a civil judgment of any court of law had the matter in question been heard by such court, and shall be so noted by the clerk or the registrar of the court, as the case may be.
>
> (2) A writ or warrant of execution may be issued by the clerk or the registrar of the court in question and executed by the sheriff of such court after expiration of a period of six weeks after the date of the determination, on condition that no application contemplated in section 30P has been lodged.

25 The point is that although the applicant might have a reasonable case, the Fund and the family have their rights too. The question is then whether granting condonation would not prejudice the Fund materially and not only procedurally.

26 The answer is that it would. The Fund was bound to comply with the order of the PFA (which has the force of a court order) within the prescribed period – all that in addition to the duty to finalise matters within strict time limits – see sec 37C(bA). It gave the applicant all the opportunity within the prescribed time limits to protect the interests of the children. The Fund then paid the surviving spouse the 7% allocated initially to the children.

27 Undoing the determination of the PFA means that the Tribunal will have to remit the matter to the PFA. The PFA will then have to decide whether to uphold, dismiss or refer

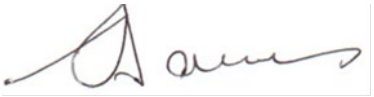
the matter back to the Fund for further investigation. Should the Fund then revert to its original 7% allocation, it will have to reclaim the overpayment from the Member's widow. If the Fund does not succeed, the funds of its other members will bear the loss. But there are also other scenarios horrible but easy to contemplate if regard is had to the litigation history and the unseemly antipathy between the applicant and the Complainant.

28 In summary, the Act contains a time bar; the applicant must make out a case for condonation; the applicant's explanation for the late filing of the reconsideration application is unconvincing; granting condonation will be unfair to the other beneficiaries, and will lead to unacceptable delays; it will expose the Fund to financial loss which is not of its own doing but that of the applicant's delay. As Holmes JA said, the respondents' interest in finality must not be overlooked.

29 In conclusion, the parties have waived their rights to a formal hearing, and this is, accordingly, the decision of the Tribunal.

ORDER: The application for condonation is dismissed and the application for reconsideration is accordingly struck from the roll.

Signed on behalf of the Tribunal on 7 May 2023.



LTC Harms (deputy chair)