

**THE FINANCIAL SERVICES TRIBUNAL**

Case No. PFA62/2023

In the matter between:

**ADCORP BLU, A DIVISION OF ADCORP  
WORKFORCE SOLUTIONS (PTY)LTD**

Applicant

And

**PENSIONS FUNDS ADJUDICATOR**

1<sup>st</sup> Respondent

**NBC UMBRELLA RETIREMENT FUND**

2<sup>nd</sup> Respondent

**RETIREMENT INVESTMENTS AND SAVINGS  
FOR EVERYONE (PTY)LTD T/A RISE**

3<sup>rd</sup> Respondent

**BRYTE LIFE**

4<sup>th</sup> Respondent

**RONNIE ZISILE MGUBASI**

5<sup>th</sup> Respondent

**Tribunal Panel:** Retired Judge Pretorius (Chairperson), Adv M Le Roux SC, Adv K

D Magano

**Appearance for the applicant:** In Person

**Appearance for the first to fourth respondents:** No appearance

**Appearance for the Fifth respondent:** In Person

**Date of hearing:** 8 April 2024

**Date of decision:** 25 April 2024

**Summary:** Application for Reconsideration in terms of section 230 of the Financial Sector Regulation Act - Late submission of a life assurance claim - Applicant is ordered to pay to the Fund the insured portion together with interest thereof

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## DECISION

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### INTRODUCTION

1. This is an application for the Tribunal to reconsider a determination made by the first respondent, the Pension Funds Adjudicator (*“the Adjudicator”*), on 27 July 2023 (*“The Determination”*).
2. This application is made in terms of section 230 of the Financial Sector Regulations Act 9 of 2017 (*“the Determination”*).
3. The Determination was made pursuant to a complaint lodged by the fifth respondent, Mr Ronnie Mgubasi (*“Mr Mgubasi”*), to the Adjudicator in terms of section 30M of the Pension Funds Act 24 of 1956 (*“the Pension Funds Act”*).
4. It is not in dispute that Mr Mgubasi, who from the record and the determination is the biological father of the deceased, was duly authorised to act on behalf of the deceased’s family. It appears that the Adjudicator, without ruling in terms of section 30G of the Pensions Funds Act, was satisfied that Mr Mgubasi has sufficient interest in the complaint as defined in Section 1 of the Act.

## **FACTUAL BACKGROUND AND CHRONOLOGY OF EVENTS**

5. The deceased, Mr Lorato Smiles, was employed by Adcorp Blu, a division of Adcorp Workforce Solutions (Pty) Ltd (*“the applicant”*) from 4 August 2015 until his demise on 7 February 2020. At the time of his death, the applicant had assigned the deceased to its client, Lear Corporation (Pty) Ltd (*“Lear”*).
6. The applicant is a participating member of the second respondent, NBC Umbrella Retirement Fund (*“the Fund”*). The deceased was a member of the Fund by virtue of his employment with the applicant.
7. Upon the deceased’s death, a group life assurance benefit became due and payable to his dependents. However, no group life assurance benefit was paid. Mr Mgubasi is aggrieved that the Fund did not pay the group life assurance benefit following his son’s death.
8. Following the Fund’s decision to repudiate the group life assurance benefit claim, Mr Mgubasi lodged a complaint with the Adjudicator on 3 August 2023.
9. Mr Mgubasi’s complaint is that on 10 February 2020, he notified the applicant of the deceased’s death (three days after the date of the deceased’s death), but despite this early notification, the applicant did not notify the Fund timeously. The late notification resulted in the Fund repudiating the deceased’s group life assurance benefit claim.
10. Mr Mgubasi states that the applicant had an obligation to pay contributions towards risk and administration expenses during the period the deceased was not earning a salary and that it was not exempt from paying risk benefits on behalf of the deceased during his absence while he was sick.

11. The relief sought by Mr Mgubasi is that the Adjudicator must investigate the matter and order the applicant and the Fund to be held jointly liable for payment of the group life assurance benefit due to the deceased's beneficiaries.
12. On receipt of the complaint, the Adjudicator notified the applicant and the Fund of the complaint and requested their response on or before 12 September 2022.
13. In its response, the Fund confirmed that the deceased was its member until his date of death. According to the Fund, it was notified of the deceased's passing on 16 February 2021, a year after his death. The underwriters repudiated the claim based on late notification of death and late submission of the necessary documents to process the claim.<sup>1</sup> The risk premium recorded that he was on pro-rata risk premiums for October 2019, and no premiums were received from November 2019 to January 2019. Accordingly, the deceased was not covered for risk benefits at the date of his passing.<sup>2</sup>
14. The Fund also submitted that it requested the underwriters to consider an *ex-gratia* payment. The request was rejected.
15. The applicant's response to the complaint was that the deceased last reported for duty on 6 October 2019. He was booked off on sick leave and his medical

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<sup>1</sup> Clause 5.14.1 state that *"The insurer must be advised in writing of claims in respect of Death Benefits not later than six (6) months from the date of the Life Assured's death, failing which the claim shall not be admitted, unless there are extenuating circumstances for the late advice thereof to the insurer. The formal written and documentation required by the insurer shall be lodged with the insurer not later than twelve (12) months from the date of the Life Assured's death, failing which the claim shall not be admitted, unless there are extenuating circumstances for the late submission thereof to the Insurer"*

<sup>2</sup> Clause 3.1.2 state that *"Premiums shall be payable monthly in arrears by the fifteenth (15<sup>th</sup>) day of the month following the month to which the premiums relate and 3.2.2 state that the Assurance in respect of the Life Assured shall terminate, either fully or partially, as the case may be, on the happening of the discontinuance of payment of premiums or part thereof in respect of a Life Assured"*.

certificate indicated that he would return to work on 8 November 2019. It was submitted that the deceased never returned to work on 8 November 2019, and neither he nor his family informed it that he could not report for duty because of his ill health. According to the applicant, had the deceased's family notified it of his extended sick leave, it would have seen to it that he continues to contribute to the Fund.

16. The applicant submits that when the deceased did not return to work on 8 November 2019, it assumed that he had absconded, and as such, the employment relationship terminated in November 2019.
17. Mr. Mgubasi disputes that the applicant was not notified of the deceased's ill health and that he was not fit to return to work. He submits that he submitted further sick notes as proof that the deceased was still ill. The applicant denies that Mr Mgubasi submitted the medical certificates or that he had notified it of the deceased's prolonged illness. There is also a dispute about the authenticity of the medical certificates Mr Mgubasi allegedly submitted.
18. It is common cause that, on the date of the deceased's death, the applicant had not terminated the deceased's employment, and the deceased was still on its payroll. It is also common cause that Mr Mgubasi notified Lear about the deceased's death.
19. In analysing the facts of this case, the Adjudicator, *inter alia*, noted the following:

- 19.1. Mr Mgubasi submitted that he never submitted claim documents to the Fund or insured himself but did so with the applicant's assistance.<sup>3</sup>
- 19.2. The applicant acknowledged that the deceased was employed by it until his passing on 7 February 2020.<sup>4</sup>
- 19.3. There is no evidence proffered by the applicant that it dismissed the deceased before his passing or whether he absconded. Mr Mgubasi provided the deceased's payslips indicating that he received a salary during his illness.<sup>5</sup>
- 19.4. The Fund confirmed that the deceased was its member until he passed away on 07 February 2020.
- 19.5. The Fund was notified of the deceased's passing on 16 February 2021.
- 19.6. The Fund received the full claim pack on 09 April 2021 and on 14 May 2021 from the insurer.
- 19.7. The Fund's underwriters repudiated the death claim because it was lodged outside the relevant periods set out in the Fund Rules.
- 19.8. According to rule 6.8 of the Fund Rules, the applicant was obligated to pay risk premiums on behalf of the deceased during his temporary absence due to sickness.
20. The Adjudicator accordingly found that the applicant must be held liable for payment of the insured portion of the group life assurance benefit plus interest

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<sup>3</sup> Determination dated 27 July 2023; p 27 at para 3.7

<sup>4</sup> Determination dated 27 July 2023; p 37 at para 5.12

<sup>5</sup> Determination dated 27 July 2023; p 37 at para 5.8

(an amount of R276,255.60) in accordance with Rule 6.3.2(a) of the Fund Rules and Fund must pay same to the deceased's dependants in terms of section 37C of the Pensions Fund Act as soon as reasonably possible but not later than six weeks after the date of the determination.<sup>6</sup>

21. The applicant is aggrieved by the Determination.

### **RECONSIDERATION APPLICATION**

22. The issues that we are required to determine are:

22.1. Whether the Adjudicator infringed the applicant's rights to procedural fairness during the investigation of the complaint and

22.2. Whether there is any basis for this Tribunal to interfere with the Determination.

i. **Procedural Fairness and lack of Audi Alteram Partem**

23. The applicant's first ground of its application for Reconsideration is that the Determination must be set aside because the Adjudicator's investigation of the complaint was procedurally unfair.

24. According to the applicant, it did not receive Mr Mgubasi's response to its submissions. It also submits that it did not receive the Fund's representation and was not afforded an opportunity to respond thereto. The applicant further alleges that it only became aware of those representations upon receipt of the Determination.

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<sup>6</sup> Determination dated 27 July 2023; p 41 at para 6.1 and 6.2

25. The Adjudicator's response to the above is that she duly provided the applicant with the representations of the Fund. She concedes that she did not provide the applicant with the response from Mr Mgubasi. According to the Adjudicator, Mr Mgubasi's response did not raise anything new except to deny the applicant's submissions. She further submits that affording the applicant an opportunity to reply to Mr Mgubasi's submissions would not have had a material effect on the outcome of her determination.
26. We accept that the Adjudicator may have committed a procedural irregularity. However, it is trite that procedural irregularities at first instance may, depending on the circumstances, be cured by a procedurally fair appeal.<sup>7</sup>
27. We have considered all the submissions the applicant has made relevant to the Decision afresh, as envisaged in the Niemec decision.<sup>8</sup> The evidence shows that Mr Mgubasi's reply to the applicant's representation was indeed a denial of the applicant's version. We also note that Mr Mgubasi did not present any new evidence that warranted a further response from the applicant. Therefore, any prejudice that the applicant may have suffered because of the Adjudicator's failure to provide it with Mr Mgubasi's response, has been cured.

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<sup>7</sup> **Amanda Dolores Laetitia Niemec and Others v Constantia Insurance Co Ltd and Others** (Case No PA1/2021) paragraph 40 where this Tribunal held as follows:

*"It is unnecessary to deal with the audi in any detail because we accept the submission by Constantia that procedural irregularities at first instance may, depending on the circumstances, be cured by a procedurally fair appeal. (**Minister of Environmental Affairs and Tourism and Another v Scenematic Fourteen (Pty) Ltd** 2005 (6) SA 182 (SCA) at paras 33-35; **Slagment (Pty) Ltd v Building, Construction and Allied Workers' Union and Others** 1995 (1) SA 742 (A) at 756F-757A.) There is no reason why this should not be the case in this matter. The Tribunal can consider the merits of the PA's decision afresh – including all the submissions the applicants say they would or could have made, given the opportunity, and those they say were given short shrift by the PA. Therefore, any procedural fairness concerns the applicants may have regarding the PA's process can be cured by a full and fair hearing on appeal to the Tribunal."*

<sup>8</sup> See paragraphs 30-35 of the Niemec decision



28. There is no evidence that the Adjudicator's failure to provide the applicant with Mgubasi's response to its submissions led to the Adjudicator making a wrong decision. Accordingly, we find that the procedural irregularity mentioned above does not warrant the Determination to be set aside on this point.

ii. **The deceased was employed by the applicant at the time of his death**

29. The applicant disputes that the deceased was, at the time of his death, employed by the applicant.

30. The evidence before the Tribunal is that the deceased was at the time of his death, employed by the applicant. On 9 April 2021, the applicant addressed a letter to Bryte Insurance Company. In the said letter, the applicant, *inter alia*, wrote:

*"The above employee was our staff until he passed away on 7 February 2020. He was a member of the NBC Umbrella Retirement Fund wherein Adcorp Blue (Capacity outsourcing participating employer). In December 2019, he got sick and subsequently died on February 7, 2020. According to our records, his last contribution was for December 2019, as he did not earn a salary in January 2020. No claim for temporary disability claim was lodged as he was still within the 3 months waiting period. No death claim notification was sent to the Provident Fund following the member's death in February 2020 as it took time to collate the claim documents and supporting documents."*

31. The applicant conceded during the hearing that the letter was authentic. If indeed the employment relationship between the applicant and the deceased had terminated, the deceased would not have written a letter confirming employment. The above letter also acknowledges that the deceased was sick

from December until his date of death. The applicant's acknowledgment in the letter that the deceased was sick from December until his date of death flies in the face of its earlier submission that it was reasonably entitled to assume that the employment relationship with the deceased had terminated because the deceased absconded his duties as an employee.

32. The other difficulty with the applicant's version that the deceased was no longer its employee is that, notwithstanding the alleged abscondment, the applicant did not terminate its employment relationship with the deceased. It also kept the deceased on its payroll until his death. Its conduct shows that it still considers the deceased to be its employee.
33. The applicant also conceded during the hearing that it did not have all the relevant facts to conclude that the applicant had absconded. The other concession by the applicant was that it did not take steps to enquire from the deceased why he was not reporting for duty. According to the applicant, such inquiries would have only been made if the deceased returned to work.
34. The letter referred to above and the applicant's conduct demonstrates that the alleged reasonable belief that the deceased had absconded was an afterthought when the applicant faced the potential liability of a group life assurance claim.
35. We, therefore, conclude that based on the evidence before us, the employment relationship between the applicant and the deceased was terminated when the deceased died on 7 February 2020.
36. In the circumstances, the Tribunal can find no grounds to interfere with the

Adjudicator's finding that the deceased was employed by the applicant until 7 February 2020.

iii. **Late Notification**

37. We now deal with the applicant's last ground for reconsideration of the determination, which is that the deceased's family did not timely inform the applicant about the deceased's death.

38. As part of the record relevant to this application, the applicant attached an affidavit deposed to by Saheed Abader ("Mr Abader"), a Human Resource Manager of Lear. In his affidavit, Mr Abader states:

*"4. I confirm that the family of the deceased's family telephonically advised Lear Corporation, through Mr Mgubasi, of the deceased's death on or about February 2020 and delivered some documents related to the deceased's death to me.*

*5. I confirm further that I promptly informed AdcorpBLU of the documents and communication I had received from the deceased's family regarding the deceased's death claim during or about October 2021, and a meeting was promptly held between Lear Corporation, the deceased's family and AdcorpBLU with the view of AdcorpBLU assisting the family with the death benefit claim."*

39. Based on the above, the applicant was aware of the deceased's passing soon after his death. The applicant does not dispute the contents of Mr Abader's affidavit; however, its defence is that the deceased was not employed by Lear and that his family should have notified the applicant directly, not its client, Lear. The defence is not sustainable because it is clear from this affidavit and the applicant's concessions that it was aware of the deceased's death in February 2020.

40. If one also considers the applicant's letter dated 9 April 2021, the reason given by the applicant for submitting the claim late is as follows: "*No death claim notification was sent to the Provident Fund following the member's death during February 2020 as it took time to collate the claim documents and supporting documents.*" The applicant does not inform the Fund that the reason for the late claim was the late notification of the deceased's death by his family.
41. The adjudicator is correct in finding that the applicant failed to provide any evidence to prove that the deceased's family delayed notifying the applicant of the deceased's death.
42. There is no basis for interfering with the Adjudicator's finding that the applicant caused the delay in processing the life assurance benefit claim.

## **CONCLUSION**


43. We conclude that the Adjudicator's finding is reasonable, and there is no basis for interfering with that finding or the order made.
44. We do not find any grounds in the application for consideration that could justify setting aside and remitting the adjudicator's decision.

## **ORDER:**

45. The following order is made:
- 45.1. The procedural complaint raised by the applicant is without merit and is dismissed.

45.2. The application for reconsideration is dismissed.

Signed on behalf of the Tribunal

A handwritten signature in black ink, appearing to be 'KD Magano', is positioned above a horizontal line.

**KD MAGANO**