IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/KZN/207/99/AS

In the complaint between:

G D Dobie N.O. Complainant

and

National Technikon Retirement Pension Fund 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 complainant is Mr G D Dobie N.O. representing his mother Mrs M Dobie, in terms of a General Power of Attorney granted to him by his mother, who is presently aged 80 and who is a beneficiary of the proceeds of the estate of the late Dr B A Dobie, son to Mrs M Dobie and brother to Mr G D Dobie. Dr B A Dobie was a member of the respondent and died on the 5th July 1997.

The respondent is the National Technikon Retirement Fund, a pension fund duly registered in terms of the Pension Funds Act of 1956. The fund is not a government fund, but is a private fund although members of the respondent had all been members of a

government fund until they were given the option to transfer to the respondent in or about

December 1994.

The complaint relates to the administration of the fund and/or to the interpretation and application of the rules of the fund and alleges a dispute of law concerning the payment of interest on a portion of the death benefit paid by the respondent.

No hearing was held in this matter, but a report was placed before me by investigator Antonia Simmons. Accordingly, in determining this matter I have relied on the documentation and report placed before me. Having completed my investigations I have determined this complaint as follows and for the reasons set out herein.

The evidence and argument

Dr B A Dobie who had been a member of the respondent died on 5 July 1997. In terms of the rules of the respondent a death benefit became payable. Dr B A Dobie died in service and had not yet retired at the date of his death. The relevant rule of the fund applicable to him was, therefore, rule 5.1 which reads as follows:

> 5. **Death**
>
> 5.1 **Death in Service**
>
> On the death of a member while in service prior to his or her normal retirement date or while entitled to disability income benefits as described in Rule 6., there shall be payable, subject to the provisions of section 37C of the Act, quoted in Annexure A and subject to Rules 9.1 and 9.2, the following benefits:
>
> (a) a lump sum equal to three times the member's pensionable emoluments and , if a qualifying spouse's pension or a qualifying child's pension is not payable after the death of a member in terms of this rule, his or her member's share at the date of death shall also be payable;

(b) a pension to his or her spouse equal to 40% of the member's pensionable emoluments immediately before his or her death, provided that the trustees manage to locate the Spouse within twelve months of the member's death;

Provided that if there is no spouse but there are children each such child will be entitled to a pension equal to 10% of the member's pensionable emoluments immediately before his or her death per child, up to a maximum of three children.

It is to be noted that in terms of this rule payments of the benefits due are explicitly made subject to the provisions of 37C of the Pension Funds Act of 1956.

Prior to his death the member, Dr B A Dobie, had signed a nomination form appointing his estate as the nominee in respect of the death benefits due to him. A lump sum payment in the amount of R345,774.96 was made to the account of Estate Late BA Dobie on 12 March 1998. This amount represented the guaranteed benefit of three times his annual salary after the deduction of tax in the sum of R176,216.04, such tax having been stipulated in terms of a tax directive from the SARS obtained by the administrators of the respondent. A second sum was due to the estate of the deceased being the member's share. The member's share was R803,904.51 with tax payable thereon in the sum of R172,088.18. A second payment was duly paid by the administrators of the respondent on 14 May 1998 in the sum of R631,816.33.

The board of trustees, after having received representations by the complainant, requesting interest payments on the benefits due to the estate, agreed to grant interest at the rate of 10% on the member's share from 8 December 1997, being the date on which all documentary evidence and requirements were before the respondent, (which included the claim form from the employer and the nomination form which had been in the possession of Syfrets) to 14 May 1998 being the date of payment of this benefit. The total interest thus calculated was R35,019.40. It was necessary for the respondent's administrators to obtain a third tax directive. After receipt of the final tax directive, a final payment of R16,159.57 was made on 10 June 1998 being the interest less the tax payable.

The complainant submits that interest should have been paid on both of the benefit payments calculated from the date of death of the member until the date of payment of the benefit. She effects a computation based on a 10% interest rate, but argues that even this amount is inadequate as a net rate of 13% or higher would have been more realistic.

The administrators of the respondent in replying on behalf of the respondent argue that no interest was in fact due and payable on either amount since they were not bound to make any of the payments until the expiration of a 12 month period in accordance with section 37C of the Pension Funds Act of 1956 and the rules of the fund.

The relevant section of the Pension Funds Act reads as follows:

Section 37C 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 the provisions of sections 37A(3) and 37D, not form part of the assets in the estate of such a member, but shall be dealt with in the following manner:

(a) 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 dependant or, as may be deemed equitable by the board, to one of such dependants or in proportions to some of or all such dependants;

(b) 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 of the member exceeds the aggregate amount of the assets in his 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 proportions 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 proportions 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.

Although several peripheral issues are raised by the respondent explaining certain actions taken by it, the crux of its defence is that it was acting in terms of section 37C and the applicable rule. Benefits were payable by the fund upon the death of the member. The member was found not to have any dependants. According to the respondent section 37C compels it to hold the benefits for a 12 month period before paying a nominee in order to grant it time to trace dependants.
Nevertheless, it paid the benefit earlier than this. After various trustees meetings, receipt of the nomination form and delays relating to tax directives, the board was satisfied that no dependants existed and that nomination of the estate was in order. It decided to pay the benefits prior to the expiration of the waiting period in March and May 1998.

According to the respondent, the decision of the board to pay some interest on the member's share was merely to satisfy the complainant who persisted in making requests for interest and in the interest of good business relations, such additional payment being within the discretion of the board. The interest was paid only on the member's share as this was a specific uninsured amount held in account for the member. The rate of 10 % was deemed to be adequate as the interim rate normally applicable to a member's share accounts was approximately 9.4%.

No interest was paid on the insured benefit as this represented a defined benefit which by its nature could only be determined on the happening of the specified event and was thus merely an actuarial notion and not cash in bank as such. The respondent's submission remains, however, that in fact no interest at all was payable on any part of the benefit advanced to the deceased estate, and that the amount paid was in terms of an agreement as a gesture of good faith.

Analysis

The complaint raises interesting and challenging questions about the payment of interest in respect of benefits payable by pension funds upon the death of a member in terms of section 37C of the Pension Funds Act.

Interest is the price payable by one person to another for the use of the latter's money. Generally, in our law, the obligation to pay interest depends on the agreement between the parties. In the absence of agreement, interest is payable only where there is fault or *mora* on the part of the defendant. The matter was pronounced upon by the Supreme Court of Appeal in *Commissioner of Inland Revenue v First National Industrial Bank Limited* 1990 (3) SA 641(A), where a disagreement had arisen between the appellant and respondent on whether a certain auto card scheme administered by the respondent was subject to stamp duties. After the appellant insisted that the stamp duties be paid, the respondent paid them under protest to avoid paying penalties. In the court *a quo*, two issues had to be decided: "(a) whether the stamp duty was properly chargeable and accordingly whether the Commissioner was obliged to repay the capital sum or not; (b) whether the Commissioner was obliged to pay interest on the capital sums from the respective dates of payment. Both issues were decided in favour of the respondent on the basis that the claim for a refund was based on unjustified enrichment. The appellant appealed only against the second finding. The court held that the basis of the respondent's claim was not in fact enrichment, but a tacit agreement between the parties. The court then decided the issue of interest on that basis. The following *dicta* of Nienaber AJA are instructive:

> To be in *mora* there must be a debt and the debt must be enforceable. The Commissioner could not be in *mora* as regards repayment until such time as it was decided that a duty to repay existed. That was the very point of their understanding: money would only be refundable once it had been

established (by a tribunal or by compromise) that the Commissioner misconstrued the statute and was obliged to repay the money. Any claim by the bank for repayment to be made prior to the determination of the dispute could be met by the Commissioner with the defence that such a claim would be premature and might yet prove to be idle.

That, in my view, is the short and simple answer to the Bank's contention: the Commissioner was not in *mora* so cannot be liable for interest *a tempore morae* ....

According to the Court *a quo* the Bank was entitled to interest at the legal rate in respect of each payment from the moment such payment was received by the Commissioner:

> "By accepting such a payment it deprived the applicant of the benefit and the fruits of the money from the date of payment....the applicant is entitled to interest and it should run from the date of payment."

With respect, I am unable to agree with this line of reasoning if it is suggested thereby that, because the payee was enriched at the expense of the taxpayer, interest is due on and should run from the date of receipt of the money. 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 the fruits of the money which he had paid to the latter.

The following points arising from the judgement have particular relevance to payments made in terms of section 37C.

1. To be in *mora* there must be a debt and the debt must be enforceable.

2. Where a debtor's liability has to be determined, either because it is in dispute or it is conditional upon the performance of certain preconditions, such as the board taking a decision, the debtor will not be in *mora* as regards payment until such time as it is determined that a duty to pay exists.

3. The claim for payment made prior to the determination of liability could be met by the debtor with the defence that such a claim would be premature and might prove idle.

4. That the beneficiary may have been deprived of the benefits and the fruits of the money pending the determination of liability does not *ipso facto* give rise to any entitlement to interest.

5. Once liability and the extent of indebtedness is determined, the ordinary principles of *mora debitoris* apply for determining liability for interest on late payment.

According to van der Merwe *et al: Contract-General Principles* there are four requirements for *mora debitoris*.

< performance must remain possible notwithstanding the delay;
< the debt must be due and enforceable;
< the delay must be wrongful; and
< the delay must be due to the fault of the debtor.

It is debatable whether an entitlement to death benefits under section 37C arises *ex contractu*, or whether it is quasi-contractual arising *ex lege*. Whatever the case, the principles of *mora* should be applied consistently.

In relation to section 37C the cardinal question is when does the benefit payment become due and enforceable against the pension fund. A debt becomes due when the duty to pay arises. A due debt is not enforceable before the time set for performance or, if no time is set by agreement, before a reasonable time has elapsed. What amounts to a reasonable time depends on the nature and circumstances in which the obligation to pay arises.

A delay will not be regarded as wrongful if the debtor was not able to place his duty to perform within a time-frame. Section 37C stipulates time-frames in relation to five different contingencies. These provisions have led to considerable debate and confusion in the pension funds industry and require clarification. I shall return to them presently. In contractual terms a failure to perform will be wrongful if it does not take place at the time for performance stipulated in the contract. *Mora* which occurs in this manner is *mora ex re*. Where a time for performance is not stipulated, the debtor must be placed in *mora* by means of a demand (*interpellatio*) that performance must occur at a certain time. The demand must set a specific time for performance which is reasonable in the circumstances - *Nel v Cloete* 1972 (2) SA 150 (A). Non-compliance with a reasonable demand will result in the debtor being in *mora ex persona*.

Section 37C, and the entitlements arising thereunder, should be interpreted in the light of these general principles of the common law. In two other determinations I have interpreted certain aspects of section 37C, namely, *van der Merwe v Southern Life* (PFA/WE/21/98) and *TWC v Rentokil* (PFA/KZN/129/98). The purpose of section 37C is to restrict a deceased member's freedom of testation in relation to the benefits payable by the fund in the event of death. The guiding principle is that such assets do not form part of the deceased's estate and are required to be distributed in accordance with the statutory scheme which gives preference to need and dependancy above the member's choice. The section imposes an onerous duty on the board of management of a fund to determine need and to effect an equitable distribution among the deceased's dependants and nominees.

Section 37C(1) envisages and regulates five possible scenarios for payment of the benefit (and hence the beneficiary's entitlement) with consequent differences as to when the debt becomes due and enforceable. These are:

1. the board is aware of or traces dependants and the deceased has not nominated a nominee (section 37C(1)(a));

2. there are no dependants but the deceased has nominated a nominee (section 37C(1)(b));

3. there are both dependants and nominees (section 37C (1)(bA));

4. there are no dependants and the deceased has not nominated a nominee and the benefit is distributed to the estate (Section 37C(1)(c)); and

4. there are no dependants and the deceased has nominated a nominee, but only in respect of a portion of the benefit (section 37C(1)(c)).

As already mentioned, the twelve month time-frame stipulated in the sub-clauses of section 37C(1) is the source of considerable confusion and argument. In the hope of offering some guidance I shall digress beyond the narrow issue regarding liability for interest raised in the complaint. Each scenario will be looked at in turn.

1. <u>Section 37C(1)(a) - distribution to dependants</u>

The first scenario envisages a situation where the deceased member has not nominated a beneficiary but is survived by dependants known to or traced by the fund. In such an instance, the board shall pay the benefit to the dependants, in proportions as it may deem equitable. Not every dependant (as defined in section 1) has an automatic right to receive payment of a portion of the benefit. Entitlement is contingent not only on dependancy, but also on identification as a beneficiary by the board pursuant to the exercise of its equitable discretion. Until the board's determination there is no duty to pay. The distribution may be made to one dependant or in proportions to some or all such dependants. As with all board decisions, the inclusion or exclusion of particular dependants within the distribution will be reviewable in terms of the complaints process established under chapter VA of the Pension Funds Act.

Leaving aside the 12 month period in section 37C(1)(a), and 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.

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 improprietary 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 improprietary 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.

2. <u>Section 37C(1)(b) - distribution exclusively to nominees</u>

Where a deceased member has nominated a nominee who was not a dependant and the board has not become aware of or traced a dependant within the 12 month period, the board is obliged to distribute the benefit to the nominee on the expiry of the 12 months. As stated, the overall purpose of the time-frame is to allow for distribution of a benefit in accordance with the member's wishes only after no dependants are discovered within the 12 month waiting period. It seems logical, therefore, and the language of the section supports this, to conclude that the debt payable to the nominee becomes due and enforceable at the expiry of the 12 month waiting period. Unlike the situation in section 37C(1)(a), in section 37C(1)(b) the time period clearly qualifies the duty to pay. The provision sets two pre-conditions to payment. First is the lapsing of the time period to identify and trace dependants. Second is the designation of a non-dependant nominee in writing. If the fund does not become aware of or cannot trace a dependant "*within*" the 12 month period "*the benefit shall be paid*" to the nominee. The term "within" in relation to time is defined in the Concise Oxford Dictionary to mean "in a time no longer than" or "before expiration of". Performance in this instance, therefore, becomes due by virtue of the operation of the statute on expiration of 12 months after the death of the member. The fund does not have to exercise any discretion in that regard. The board's function is purely administrative or ministerial. It merely has to satisfy itself that the 12 month period has lapsed and a nominee has been designated in writing. If the two pre-conditions are met, the nominee is entitled to payment, a duty to pay arises immediately upon the expiry of the 12 month period. Any delay in payment to the nominee once the period has expired will place the fund in *mora ex re* and the nominee shall be entitled to claim interest from that date.

By way of comparison, and as already discussed, section 37C(1)(a) does not appear to oblige the board to effect a distribution at the expiry of the 12 month period where the fund has traced or become aware of a dependant. It may exercise abundant caution and choose to wait longer and may not necessarily incur liability for interest. By virtue of being aware of a dependant or having traced a dependant there will be no obligation to distribute on the expiry of 12 months. Nevertheless, unjustifiable delay may constitute maladministration.

An awkward problem arises when the board fails to locate any dependants within the 12 months, but subsequently becomes aware of a dependant either before or after making payment to the nominee under section 37C(1)(b). Is the nominee’s right absolute on the expiry of the 12 months where dependants are discovered later?

It is unnecessary for me to decide this difficult question for the purposes of this complaint. And I hesitate to pronounce on it without further argument. Suffice it to say that the provision in section 37C(1)(bA) obliging payment within 12 months where there are both dependants and nominees (discussed below), may be relied on to support an argument that in the absence of dependants the nominee’s right to payment is no longer contingent after 12 months. The consequence will be that a board may incur delictual liability for maladministration if the board is obliged to distribute exclusively to a nominee after 12 months and a dependant who the board ought reasonably to have traced or been aware of comes forward either before or after the distribution.

3. Section 37C(1)(bA) - distribution to dependants and nominees

Where there are both dependants and nominees, section 37C(1)(bA), introduced by an amendment in 1996, requires payment to be made within 12 months. The wording is clear: "*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 proportions as the board may deem equitable*". Like a distribution under section 37C(1)(a) the benefit must be paid in such proportions as the board deems equitable. Unlike the situation in section 37C(1)(a) and (b), the board is obliged to take its decision to distribute and to effect distribution within the 12 month period. The debt becomes due and enforceable, as with a distribution under section 37C(1)(a), once the decision is taken (within the period) and in accordance with its reasonable terms. Should no decision be taken within the 12 months, or if payment is not made, presumably the debt will become retrospectively due and enforceable as at the expiry of the 12 month period after the death of the member. Interest will be payable on the benefit either from the date of any stipulated performance, any *interpellatio,* or the expiry of the 12 month period, whichever is the applicable earlier date.

4. Section 37C(1)(c) - distribution to the estate

Where no dependant is discovered within 12 months and no nominee is designated, the benefit is payable to the estate. Like section 37C(1)(a), this paragraph does not stipulate a time for performance, nor does it require the board to make any decision in that regard. Presumably, therefore, the estate shall be entitled to payment at the expiry of the 12 months or shall have the right to place the fund in *mora ex persona* any time after the 12 month period allotted for tracing dependants has expired and the board has exhausted all reasonable steps to determine whether a nominee was designated.

Again, the awkward question arises whether the estate's claim becomes absolute once it is established that no nominee was designated and the 12 month period for tracing the dependants has lapsed. If it does, any dependant who appears *ex post facto,* and who the board ought reasonably to have discovered, will have a quasi-delictual claim for maladministration against the board.

5. <u>Section 37C(1)(c) - distribution to the estate and a nominee</u>

Where no dependants are found within 12 months and the deceased nominates a nominee to receive a portion of the benefit, the board must distribute the benefit accordingly between the nominee and the estate. Assuming that the nominee is known within the 12 month period, as in section 37C(1)(b), the debt will become due and enforceable on the expiry of the 12 months with the same consequences flowing from the application of section 37C(1)(b).

The above analysis of section 37C does not purport to be an exhaustive consideration of the range of possibilities potentially arising within its ambit. The aim rather is to expose some of the anomalies. Where there are dependants and no nominees payment can be due and enforceable either before or after the expiry of the 12 month period. Where there are no dependants but a nominee, the board cannot make payment within the 12 month period, but is obliged to do so immediately afterwards. Should the board not pay a nominee immediately upon the expiry of the 12 month period it shall incur liability for interest. Should a dependant come forward after 12 months, it may find itself in the position that it is obliged to distribute the full benefit to the nominee and face a claim for maladministration from the dependant. On the other hand where the board is aware of both dependants and nominees within the 12 month period it is obliged to make payment before the expiry of the 12 month period. The section is fraught with complex variables.

While it is hoped that the above analysis may shed some light, it provides precious little comfort or satisfaction. It is offered in response to repeated calls in public by board members, principal officers, actuaries and lawyers in the pension funds industry, requesting me to furnish some guidance. Fortunately, much of the aforegoing are *obiter dicta*, not required to determine the present complaint. I offer them with some reservation and without the benefit of rigorous legal argument.

One thing is certain about section 37C, it is a hazardous, technical minefield potentially extremely prejudicial to both those who are expected to apply it and to those intended to benefit from its provisions. It creates anomalies and uncertainties rendering it most difficult to apply. There can be no doubt about its noble and worthy policy intentions. The problem lies in the execution and the resultant legitimate anxiety felt by those who may fall victim to a claim of maladministration in trying to make sense of it. Any successful claim for maladministration will be borne ultimately by the other members, the participating employer, or perhaps even the members of the board of management.

One admirable aspect of the section is its worthy intention to protect dependants who do not reside in the same vicinity as the deceased member. One thinks here naturally of migrant labourers working in the urban areas with dependants in remote rural areas. By imposing a duty on the board to trace dependants the section advances such persons interests. However, there is legitimate concern about the practical difficulties of tracing such dependants. One solution may be for the section to identify more precisely the steps required to be taken, including an appropriate form of publication, and then allowing for a final distribution to known dependants and nominees at the expiry of a reasonable period culminating in indemnification of the board against further claims. Further discussion and consideration is obviously required.

Nevertheless, the call for revision is almost universal. It is to be hoped that the appropriate organs of state will respond speedily and in accordance with the values and principles governing public administration set out in chapter 10 of the Constitution. Section 195 of the Constitution, besides providing that public administration should be accountable, also states that "peoples needs must be responded to and the public must be encouraged to participate in policy-making". The pension funds industry, I surmise, lives in hope.

Determination

In this matter, the deceased member had no dependants. The respondent accordingly distributed the benefit in accordance with his nomination form to his estate. This is somewhat anomalous, because it is clear that an estate cannot be a nominee in terms of section 37C(1)(b). The provision provides that if there are no dependants and "the member has designated in writing to the fund a nominee *who is not a dependant of the member*", then the benefit should be paid to the nominee. The italicised portion of the provision makes it plain that a nominee should be a natural person. A deceased estate cannot, in law, be a person "who is not a dependant of the member". When such a nomination is made, one can reasonably expect the trustees to give practical efficacy to it by effecting a distribution to the heirs of the estate. Alternatively, the fund may regard the nomination as invalid and in the absence of dependants make payment to the estate in terms of section 37C(1)(c).

In this case, the sole heir of the estate is the deceased's mother, the complainant, and thus by distributing to the estate the trustees have given practical effect to the deceased's nomination. However, the trustees should be vigilant that the intention of section 37C is to exclude death benefits from the estate. However, the proviso to section 37C(1)(b) provides that where the aggregate amount of the debts in the deceased's estate exceeds the amount of assets, then the debts must be satisfied before distribution to the nominee. The creditors of the estate take precedence over nominees where there are no dependants. Accordingly, not much turns on the fact that the trustees paid the benefit into the estate.

Regarding the main contention of the complaint, namely, that the respondent is obliged to pay interest on both amounts paid as a death benefit from the date of death of the member until the date of payment, no such liability arises in terms of the interpretation of section 37C(1)(b) set out above. To recap briefly, a death benefit payable to a nominee in terms of section 37C(1)(b) becomes due and enforceable only once the 12 month period has expired. Interest becomes payable from that date. The respondent is thus correct that no interest is due and payable until the expiry of the 12 month period. In this case, the board (rather injudiciously) acted unlawfully and distributed the benefit prior to the expiration of the 12 month period and agreed to pay interest in respect of a portion of it. There was no liability to pay interest in respect of either portion of the death benefit at the time payment was made and the amount of interest paid was pursuant to an agreement. Accordingly, as the debt was paid fully prior to it becoming due and enforceable, there can be no additional liability for interest. Moreover, the board's illegal conduct has caused no prejudice or damages to the complainant. For these reasons, the complaint is dismissed.

DATED at CAPE TOWN this 9th day of JULY 1999.

JOHN MURPHY
PENSION FUNDS ADJUDICATOR