IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/EC/550/04/Z/CN

In the complaint between:

Albert Nyayeni **Complainant**

and

Illovo Sugar Pension Fund **First Respondent**

Illovo Sugar Limited **Second Respondent**

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956

Background

[1] Between the years 1962 and 1986, the complainant was employed by Illovo Sugar Limited ("the employer") as a labourer, earning an initial monthly wage of R12-00, which had increased to R117-25 by October 1981.

[2] According to him, he became a contributing member of the fund, which was previously known as the CG Smith & Company Ltd Pension Fund, with effect from August 1973. The name of the fund was changed to the present one with effect from 1 July 1994, after it had amalgamated with the Smith Group Pension

Fund in 1979, and the Smith Group Contributory Retirement Fund and the Smith Group Non-Contributory Retirement Fund in July 1980. However, from the rules that were applicable from 1 January 1974, it is unlikely that the complainant could have been a member of the fund at that stage because an eligible employee was defined as "a person other than a Bantu person." The complainant has also not produced any proof that he was a member of the fund before August 1978.

[3] From the available documentation, his monthly contribution to the fund was R3-32 during 1978 and 1979 and R9-41 during 1981. His last available payslip, dated 26 October 1981 reflects his accumulated pension as being R47-05. According to him, his services were terminated during 1986, and he eventually received a withdrawal benefit in the sum of R65-87 during June 1995. The amount of the withdrawal benefit, which according to the complainant is an inadequate reflection of the amount of the benefit due to him, is the crux of this complaint.

[4] In response, the fund has raised two preliminary points, firstly that the complaint has become extinguished as a result of prescription as is envisaged in section 11(d) of the Prescription Act of 1969, and secondly that it has become time-barred in terms of section 30I(1) of the Pension Funds Act and that no good cause has been shown for condoning its late lodging. Accordingly, it is argued, I

should dismiss it. On the merits, the fund and the employer argue that the complainant has received his proper entitlement in terms of the rules.

The arguments *in limine*

(a) Prescription

[5] Placing reliance on the *obiter dictum* of NC Erasmus J in *Metro Group Retirement Fund & Another v Murphy NO & Another* [2002] 9 BPLR 3821 (C) at page 3823C, the fund and the employer argue that because this complaint was lodged long after the expiry of a period of three years from the date on which the cause of action giving rise thereto occurred, the adjudicator has no jurisdiction to deal with it.

[6] In that decision NC Erasmus J stated as follows:

> "In his first preliminary determination, the Adjudicator rejected the first two contentions raised by the fund and Metcash. In doing so, he failed to distinguish between time-barring under section 30I of the Act, in relation to which he has a power of condonation, and prescription under the Prescription Act 68 of 1969, in relation to which he has no such power."

[7] Thus, the issue is whether, notwithstanding the provisions of section 30I of the Pension Funds Act of 1956, the provisions of Chapter III of the Prescription Act of 1969 are applicable in proceedings before the Pension Funds Adjudicator.

[8] Before making a ruling on this issue, I think it useful to traverse the slow gestation thereof with reference to previous pronouncements. The issue first emerged in the matter of *Sligo v Shell Southern African Pension Fund & Another [1999] 11 BPLR 299 (PFA)*. In that matter, Prof Murphy (the previous adjudicator) took the view that the adjudicator has the power under section 30I(3) "*to revive … a prescribed debt*". He went on to say that the fact that a debt has prescribed does not extinguish the adjudicator's power to investigate the complaint of which such debt is the subject matter, but is rather a relevant consideration to be taken into account in the exercise by the adjudicator of his discretion under section 30I(3) in deciding whether to condone non-compliance with the three-year period within which a complaint must be received by the adjudicator from the date of the event giving rise to such complaint (*308H-309C*).

[9] The matter then came on application to the Cape High Court which elected not to deal with the issue in these words:

> "The basis of this finding renders it unnecessary for me to address the interesting and extremely well presented submissions by both parties relating to prescription in respect of prosecuting the complaint, condonation in respect of non-compliance with the time limits prescribed and the validity of the terms of the order of the Adjudicator.
>
> Suffice to say that the respondent faced a most difficult hurdle particularly regarding the issue as to whether in terms of section 30I(3) of the Act there was good cause shown

> which would have empowered the Adjudicator to condone non-compliance with the time limits as prescribed."

[10] Following the adjudicator's determination in the *Sligo* matter but before the Cape High Court's above remarks, the issue came up again in *Louw v BP Southern Africa Pension Fund & Another [2000] 2 BPLR 171 (PFA)*. Counsel for the complainant, quoting extensively from the remarks made by Prof Murphy in *Sligo*, argued predictably that in light of the provisions of section 30I(3) the provisions of the Prescription Act, 68 of 1969, do not apply. Counsel for BP Southern Africa Pension Fund, equally predictably, argued the opposite. He said that there is nothing in section 30I(3) to suggest that the adjudicator has the power to revive any substantive rights that have been lost through the operation of prescription in terms of the Prescription Act. It is untenable, he said, to suggest that where rights and their corresponding debts have expired as a result of the passage of time in terms of the Prescription Act (with the result that such rights and obligations no longer exist) the rights and obligations may once more be brought into existence by section 30I of the Pension Funds Act. This, he argued, could never have been the intention of the legislature in enacting section 30I and it does not provide the adjudicator with such power either expressly or by implication. In his determination, Prof Murphy remained unmoved in these words:

> "Even if I am mistaken in the conclusion that the Claimant's cause of action does not in all respects constitute a debt, I remain of the view that the provisions of the Prescription Act do not apply in their entirety to complaints made in terms of Chapter VA of the

> Pension Funds Act of 1956 by virtue of the provisions of section 30I of the Pension Funds Act read with section 16 of the Prescription Act." (at 185D)

[11] Section 16(1) of the Prescription Act essentially provides that the provisions thereof apply to any debt arising after the commencement of that Act "*save insofar as they are inconsistent with the provisions of any Act of Parliament which prescribe a period within which a claim is to be made … .*" From this provision, Prof Murphy concluded (at 187H-I) that since section 30I is inconsistent with the key provisions of the Prescription Act, in particular sections 11 and 12, the adjudicator has a discretion to investigate a complaint involving a debt relating to an act or omission occurring more than three years before the date on which the complaint was received.

[12] The issue arose again in *Manzini v Metro Group Retirement Fund and Another [2001] 12 BPLR 2808 (PFA)* where Prof Murphy, in his interim ruling, acknowledged that the complaint had prescribed in terms of section 11 of the Prescription Act but took the view that in terms of section 30I(3) he had the power to condone non-compliance with the time limits prescribed by section 30I notwithstanding the provisions of the Prescription Act.

[13] In his final determination of the matter the issue did not arise. However, before he could make his final determination, his interim ruling in which he had expressed the view that the adjudicator had the power to condone non-

compliance with the time limits prescribed by section 30I notwithstanding the provisions of the Prescription Act, was challenged in the Cape High Court under section 30P of the Act (that matter is reported at [2002] 9 BPLR 3821 (C)). The Cape High Court, per NC Erasmus J, did not address the issue directly but made a passing *obiter* remark to the effect that Prof Murphy had failed to distinguish between time-barring under section 30I (in relation to which he has a power of condonation), on the one hand, and prescription under the Prescription Act (in relation to which he no such power), on the other (at 3823C).

[14] Following NC Erasmus J's remark, Prof Murphy performed a complete about-turn as regards the application of the Prescription Act in proceedings under chapter VA of the Pension Funds Act. In *Manzini v Metro Group Retirement Fund and Another (2) [2003] 11 BPLR 5285 (PFA) at 5291C* he now took the view that if a complaint has prescribed in terms of the Prescription Act, and prescription has been placed in issue by the respondent, the complaint cannot succeed since there exists no power to resurrect a prescribed claim. At 5295A-C he said:

> "There is no problem in reconciling the provisions of both Acts [that is, the Pension Funds Act and the Prescription Act] if one accepts that the time bar contained within the Pension Funds Act applied in addition to the provisions of ordinary prescription. In other words, prescription operates against pension fund claims, and if a claim has prescribed under the Prescription Act the *caedit quaestio*. However, an unprescribed claim is still time barred after the lapse of a period of three years, but in those circumstances the time bar can be condoned if good cause exists.

> For the reasons set out above I am persuaded to the view that the time barring provisions contained in section 30I of the Pension Funds Act must be read in conjunction with the Prescription Act."

[15] I now turn to deal with the merits of the argument that the Prescription Act provisions apply in proceedings concerning complaints as defined.

[16] Chapter III of the Prescription Act applies to claims or legal proceedings instituted for the recovery of a debt. Where the claim or legal process is intended to achieve relief other than a recovery of a debt then chapter III of the Prescription Act can surely not apply.

[17] The concept of "debt" in the context of the Prescription Act has been given a wide and general meaning. It embraces not only debts sounding in money but also rights of action for enforcement of obligations flowing from a particular right (*Evins v Shield Insurance Company Ltd 1979 (3) SA 1136 (W) at 1141F-G; HMBMP Properties (Pty) Ltd v King 1981 (1) SA 906 (N) at 909A-C; ESCOM v Stewarts and Lloyds of South Africa (Pty) Ltd 1981 (3) SA 340 (A) at 344E-F; CGU Insurance Ltd v Rumdel Construction (Pty) Ltd 2004 (2) SA 622 (SCA)*).

[18] However, notwithstanding its wide ambit as judicially interpreted, the concept of a debt is not synonymous with that of a complaint as defined in the Pension Funds Act. A complaint as defined covers a wider spectrum than a debt. It may

well be that in some circumstances a complaint may involve the recovery of a debt. But that does not alter the character of a complaint as defined. From its very definition, it is clear that the jurisdiction of the adjudicator is not limited to claims designed for the recovery of a debt. It extends to the determination of matters relating to the administration of pension funds, including decisions on the investment of pension fund monies, or the application of pension fund rules, or disputes of fact or law relating to pension funds. The appropriate orders which the adjudicator is entitled to make would inevitably include declaratory orders, prohibitory interdicts or determinations of law or fact which may not necessarily entail the recovery of a debt or payment of money or the performance of an obligation. It is conceivable that in making a determination the adjudicator may make an order which entails payment of money or fulfillment of an obligation, thus relating to the recovery of a debt. But that in itself does not mean that the provisions of chapter III of the Prescription Act apply.

[19] I say so because section1 of the Act defines a complaint without making a distinction between complaints that involve the recovery of a debt, on the one hand, and those that do not, on the other. It would be anomalous if such a distinction were imputed and the adjudicator entitled only to extend the three year period in regard to complaints that do not involve the recovery of a debt but not entitled to do so in regard to complaints that do. Such a result could never have been intended by the legislature. Moreover, section 30I creates a just

power. It provides for statutory machinery deliberately designed by the legislature for the resolution of a wide variety of issues relating to pension funds in a just and expeditious manner. When the legislature devised the scheme described in chapter VA of the Act it was mindful of the Prescription Act, including chapter III thereof. It nonetheless elected to include in chapter VA the provisions of section 30I which, although regulating similar issues, are materially different from the provisions of chapter III of the Prescription Act. It would, in my view, make nonsense of section 30I(3) if the legislature had intended at the same time that chapter III of the Prescription Act should apply to chapter VA proceedings. In any event, section 16(1) of Chapter III of the Prescription Act sets out the scope of application of the Act as follows:

> "Subject to the provisions of subsection (2) (b), the provisions of this chapter shall, save insofar as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of the recovery of a debt or imposes a condition on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act."

[20] In *Manzini (2)* at 5295C Prof Murphy seems to suggest that the provisions of section 30I(3) were intended to apply in circumstances where a complaint is time barred but has not prescribed. In other words, the suggestion seems to be this: if the act (or omission) giving rise to the complaint occurred more than three

years before the date on which the complaint is received by the adjudicator, but the complaint has not prescribed for purposes of the Prescription Act, then (and only then) the adjudicator has the power to extend the three year period or condone non-compliance therewith. This argument cannot, with respect, be correct for a number of reasons. First, the need for condonation does not arise where a claim has not prescribed. The only instances where that could conceivably happen are those where prescription has been delayed (section 13 of the Prescription Act) or interrupted (sections 14 and 15) or where the debtor has no knowledge of the debt (section 12(2)) or the creditor has no knowledge of the debtor's identity (section 12(3)). Secondly, and in any event, complainants are not necessarily creditors, and pension funds or employers are not necessarily debtors. Where a complainant argues for the interruption or delay of the running of prescription or alleges that he was not aware of the identity of the employer or fund, he could well conceivably be met with the argument that he is not a debtor and so that argument does not assist him. Thirdly, if section 30I were intended for such limited and narrow application, it would simply be superfluous because then the Prescription Act already takes care of the difficulty (assuming for the moment that a complainant is a creditor, the respondent a debtor and the relief sought the recovery of a debt). The legislature is presumed not to legislate superfluously. Fourthly, in practice it is complaints that are older than three years and that fall outside sections 12 to 15 of the Prescription Act that make up a considerable majority of cases requiring the invocation of section

30I(3). A typical refrain by complainants usually goes something like “I did not know I was entitled to a benefit until my neighbour who worked with me at the same mine (or factory etc) those 5 years ago told me he received a benefit”. The section would simply be a woefully inadequate remedy if the difficulty it was intended to address was so circumscribed.

[21] In addition, one must not lose sight of the public policy underpinning chapter VA of the Pension Funds Act by which the complaints adjudication process was introduced as recently as 1996 in the same year as the final constitution. Prof Murphy, with respect, captured the essence of the process accurately when he said in *Sligo*:

> “The complaints adjudication process established by chapter VA of the Act constitutes a unique and special process granting complainants extensive statutory rights in relation to their pension benefits. It is an interventionist instrument of policy enacted in the interests of greater social security. Pension rights build up over a period of years and represent the most significant property entitlements of a vulnerable sector of society. The aim of the complaints adjudication process is to provide a mechanism of enhanced protection of those benefits. To accomplish this end the Adjudicator is given extensive investigative powers which can be exercised in an inquisitorial manner. The grant of a power to go beyond the three year prescriptive period, considered normal in commercial transactions, should be construed in this context.”

[22] In the result, considering the public policy underpinning the complaints adjudication mechanism, the provisions of section 16 of the Prescription Act, the provisions of section 30I as a whole and the clear definition of “complaint” in

section 1 of the Act, I am of the view that the provisions of chapter III of the Prescription Act were never intended to apply to proceedings before the adjudicator under chapter VA of the Pension Funds Act.

(b) Section 30I(1)

[23] The present complaint was lodged on 18 February 2004, almost ten years after the complainant received payment of his withdrawal benefit. Thus, it is time-barred for the purposes of section 30I(1).

[24] The enquiry does not end there, however, as I still need to satisfy myself as to whether or not good cause has been shown, or exists, for me to extend the three-year limit or to condone the non-compliance therewith. Whether good cause exists is determined by an examination of the following factors: the length of the delay, the explanation therefor, the importance of the case, the existence or otherwise of *bona fide* measures to resolve the dispute, the prospects of success on the merits, and the possibility of prejudice to either party that will be occasioned by the condonation.

[25] The complainant received payment of his benefit during or about June 1995, thus this complaint should have been lodged at the latest by the end of May 1998. The delay of over five years in lodging this complaint is inordinately long.

[26] Although at some stage he was represented by an attorney, the complainant did not take any legal steps, like the issuing of summons against the fund, to prosecute his claim. Surely, it must have become clear to him or to his legal representative after some time that the continuous exchange of letters between himself and the fund was not achieving the desired results.

[27] Because of the length of time that has elapsed since the complainant withdrew from the fund, the fund is no longer in possession of most of the documentation relating to the period of his membership. Thus, it would be more prejudicial towards the fund for it to be required to respond to allegations that arose more than seventeen years since the complainant's employment terminated.

[28] The merits of the complaint hardly seem to favour the complainant either, in that the resignation rule that was applicable at the time entitled a resigning member to a benefit equal to his own accumulated contributions, or to an election to become a deferred pensioner if he had ten years' pensionable service. "Pensionable service" is defined as *inter alia*, a member's continuous service after becoming a member of the fund.

[29] If it is accepted that the complainant became a member of the fund during 1978, it follows that during 1986 he only had eight years' pensionable service. Thus,

he would have been entitled to a withdrawal benefit equal to his own accumulated contributions. His last available salary advice slip, which is dated 26 October1981 reflects his monthly contribution rate to the pension fund as being R9-41 and his gross salary as being R147-87. It is thus not inconceivable that he would have been entitled to such a negligible amount as a withdrawal benefit.

[30] Having considered all the foregoing factors, I am unable to find that good cause exists for condoning the complainant's failure to comply with the provisions of section 30I(1) of the Act. Thus, I will neither extend the three-year time limit, nor condone the late lodging of this complaint.

[31] In the result, therefore, the complaint is dismissed.

DATED AT JOHANNESBURG THIS 11th DAY OF OCTOBER 2004.

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VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR

Appearances:

1. **Complainant- not represented**

2. **Illovo Sugar Pension Fund- not represented**
3. **Illovo Sugar Ltd- not represented**