



HEAD OFFICE
Johannesburg
1st Floor, Norfolk House
Cnr 5th Street & Norwich Close
Sandton, 2196
PO Box 651826, Benmore, 2010
Tel (011) 884-8454 □ Fax (011) 884-1144
E-Mail: enquiries-jhb@pfa.org.za

Cape Town
2nd Floor, Oakdale House, The Oval
Oakdale Road, Newlands, 7700
P O Box 23005, Claremont, 7735
Tel (021) 674-0209 □ Fax (021) 674-0185
E-mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Please quote our ref: PFA/WE/1278/05/NS

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): M JULIUS v TELKOM PENSION FUND (“the fund”) / OLD MUTUAL LIFE ASSURANCE (“the insurer”)

Introduction

[1] Your complaint concerns the non-payment of your pension fund benefit when your employment was terminated. The complaint was received by this office on 7 October 2005 and a letter acknowledging receipt thereof was dispatched to you on 2 November 2005. A letter was also sent to the first respondent on the same day giving it until 23 November 2005 to file a response to the complaint. On 6 February 2006 a response from the fund was received. The response was sent to you on 7 February 2006. No reply was received from you. I consider it unnecessary to hold a hearing in this matter. My determination, together with reasons therefor, is set out below.

Complaint

- [2] You are aggrieved by the alleged failure on the part of the fund to pay you a benefit when you resigned from your employment and withdrew from the fund in 1995. You commenced employment with Telkom SA in 1984, and became a member of the fund as a consequence of your employment. You therefore became entitled to a benefit from the fund on termination of your employment.
- [3] You further aver that you have made enquiries with the fund about your outstanding benefit and were advised that an amount in sum of R8000.00 had been paid to you. You deny that you received payment since it was never paid into your account and you would also like to find out what

V Ngalwana (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrosbree (Snr Assistant Adjudicator), Z Camroodien (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Thabethe (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator)

Office Manager: L Manuel

happened to the rest of your benefit since you exited the fund after 13 years of service with Telkom. You accordingly request this tribunal to investigate your complaint and order payment of your full pension fund benefit.

Response

- [4] The fund states that your benefit at the date of your resignation amounted to R8 845.87. It states further that according to your erstwhile employer you were indebted to it in respect of a housing loan which amounted to R12 600.00. It says that the amount in relation to your benefit was used to settle your outstanding debt which was due and payable to your erstwhile employer.
- [5] Furthermore, it avers that since the housing loan exceeded the benefit that was due to you, there was no balance left for you.
- [6] The fund contends that it is a defined benefit fund which means that the benefits are calculated according to the formula and not according to the contributions plus growth. It accordingly states that your benefit was calculated as follows:

“Member details:

M Julius – 53330/2506250
 DOB - 26/08/1962
 Member Type: B-member, B category
 Period of service: 01/04/1984 – 31/01/1995 - 10.838 years
 Last annual salary: R19 371.00
 Average salary (last 36 months for A & B members: R17079.58

Breakdown of calculation

Period of qualifying service x rate of contributions x average annual salary x
 period of qualifying service x factor

10.838 X 0.05 x R17 079.58 x 0.7646
 = R7 076.70 + Enhancement
 Enhancement: R7076.70 x 2.5 x 10 years / 100
 = R1769.17
 Total benefit = R7 076.70 + R1 769.17 =R8 845.87”.

Determination and reasons therefore

- [7] Section 30I of the Pension Funds Act imposes certain time limits with regard to lodging of complaints before the Adjudicator and states as

follows:

- “(1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.
- (2) If the complainant was unaware of the occurrence of the act or omission contemplated in subsection (1), the period of three years shall commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.
- (3) The Adjudicator may on good cause shown or of his or her own motion -
 - (a) either before or after expiry of any period prescribed by this Chapter, extend such period;
 - (b) condone non compliance with any time limit prescribed by this Chapter.”

[8] The date of accrual of your benefit was in 1995. Even though this Tribunal had not yet come into existence at that time (as it was established in 1996 and became operational in 1998), your complaint was lodged on 7 October 2005, seven years after the establishment of this office.

[9] There is good reason for a limit to be imposed on the time during which litigation may be launched and the Constitutional Court has pronounced on this. In *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) the Court said (at paragraph [11]):

“Rules that limit the time within which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigation damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can be obtained have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They serve a purpose to which no exception in principle can cogently be taken.”

[10] However, that the complaint has become time-barred in terms of section 30I of the Act is not the end of the matter as I still have a discretion to extend the “three-year” time period or to condone non-compliance therewith. But you need to show cause to enable me to do that.

[11] The Supreme Court of Appeal (or Appellate Division as it was then known) has pronounced upon the standard that must be met for condonation to be granted in circumstances like these. In *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (A) the court said (at 532B-E):

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has discretion, to be exercised judicially upon a consideration of all facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant is

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."

[12] It is clear from the evidence which is before me that more than 10 years has elapsed before you lodged your complaint with this office. This, in my view, is an extraordinarily long delay. You have also failed to provide reasons for the delay to enable this tribunal to condone your non-compliance with the time limits as set out in the Act.

[13] Regarding your prospects of success on the merits, I note that you were indebted to your erstwhile employer in respect of a housing loan and you have not contested the aforesaid allegation which is raised by the fund. In my view the fund was entitled in terms of rule 5.10(7) to pay your erstwhile employer in settlement of your housing loan.

[14] With regard to your contention that you have received a benefit which is less than the benefit that you were entitled to receive from the fund, I have examined the rules of the pension fund and found that the relevant rule in regard to the calculation of your benefit is rule 5.8(2) which states as follows:

"BENEFITS ON RESIGNATION/DISCHARGE

If a B –member resigns or his services with his employer are terminated and he does not become entitled to benefits provided for elsewhere in the Statutes, he shall receive a gratuity which is the larger of the amounts calculated in one of the following manners:

- (1) $R \times Z \times N \times D$, increased by 2.5 per cent of the said amount for each completed year of pensionable service, where the symbols have the same meanings as set out in subelause (1), save that in the case of N and D, the reference to qualifying service shall be a reference to pensionable service subject to the provisions of clause 5.10(7)". (Sic)

[15] In terms of rule 5.8(1) R is the rate at which the member the member contributed to the fund at the date of termination of his services and Z is the member's average terminal salary on his last day of service.

[16] On proper interpretation of rule 5.8(2), referred to above, it is quite clear that the fund in question is a defined benefit fund. The benefits under this rule are not based on an accumulation of the contributions together with investments returns, as is normally the case in defined contributions funds. The benefits are calculated in accordance with formulae specified in the rules.

