



HEAD OFFICE  
Johannesburg  
1<sup>st</sup> Floor, Norfolk House  
Cnr 5<sup>th</sup> 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](mailto: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](mailto:enquiries@pfa.org.za)  
Website: [www.pfa.org.za](http://www.pfa.org.za)

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Please quote our reference: PFA/GA/7023/2005/FM

**RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, OF 1956 (“the Act”): M MAPONYA (“the complainant”) v LIBERTY LIFE CORPORATE BENEFITS (“the first respondent”)/ LIBERTY LIFE (“the second respondent”)**

1. Introduction

[1.1] This complaint concerns the alleged failure by the first respondent to effect payment to the complainant of a withdrawal benefit on the complainant ceasing to be a member of the first respondent.

[1.2] The complaint was received by this office on 15 December 2005. A letter acknowledging receipt of the complaint was sent to the complainant on 9 February 2006. On 20 March 2006 a letter was dispatched to the second respondent giving it until 10 April 2006 to file a response to the complaint. A response dated 30 March 2006 and supplemented by a letter dated 19 June 2006 was received from the second respondent on 3 May 2006 and 19 July 2006 respectively. Having considered the written submissions before the tribunal, it is considered it unnecessary to hold a hearing. The determination and reasons therefor appear below.

[1.3] As the background facts are well-known to all parties, only those facts that are pertinent to the issues raised herein shall be repeated.

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M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), E de la Rey (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator), S Mothupi (Assistant Adjudicator), P Mphephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator)

Office Manager: L Manuel, Financial Manager: F Mantsho, Accountant: R Soldaat

## 2. Facts in brief

[2.1] The complainant was in the service of the second respondent since August 1973 until his resignation in March 1983. During the tenure of his employment with the second respondent, the complainant was a member of the first respondent, which was a non-contributory defined benefit pension fund, with the second respondent responsible for the payment of all contributions and costs.

[2.2] On his resignation from employment, no benefit was paid to the complainant by the first respondent.

## 3. Complaint

The complaint appears to be two-fold. Firstly, the complainant is aggrieved by the first respondent's failure to pay him a withdrawal benefit on leaving the first respondent. In the second instance, the complainant is desirous of having the fund benefit arising out the surplus apportionment scheme paid to him.

## 4. Response

[4.1] In its response on behalf of the first respondent, the second respondent firstly raises two technical defences to the complaint. In the first instance, it argues that the complaint refers to a surplus apportionment scheme in terms of section 15B of the Act and that this office has thus no jurisdiction to investigate and adjudicate upon it. Secondly, it avers that the complaint has prescribed and that no reasons have been furnished for this office to grant condonation for the late lodgment of the complaint.

[4.2] On the merits, the second respondent contends that on the date of the complainant's resignation he had completed ten years' service with the second respondent.

[4.3] It further contends that the rules of the first respondent as they stood at the time of the complainant's resignation provided that the benefit payable on resignation was a vesting scale, commencing only after an employee had completed a period of 15 years continuous service with the second respondent.

[4.4] On the basis of the complainant's failure to complete 15 years continuous service with the second respondent, the first respondent then submits that the complainant was legally not entitled to a withdrawal benefit at the time he left the service of the first respondent and withdrew from the first

respondent.

[4.5] As regards the second leg of the complaint, the second respondent avers that it is awaiting approval by the Registrar of Pension Funds of its surplus apportionment scheme and that the complainant qualifies to be considered as a beneficiary in terms of such scheme once it has been approved.

## 5. Determination and reasons therefor

[5.1] The essence of the complaint is that a dispute of fact or law has arisen in relation to the first respondent between the complainant and the first respondent on the one hand, and/or the fund administrator on the other. Although this tribunal considers the provisions of Chapter 3 of the Prescription Act, 68 of 1969, not to be of application in proceedings before it (see *Nyanyeni v Illovo Sugar Pension Fund and Another* [2004] 11 BPLR 6249 (PFA) at paragraphs [16] to [19], there is nevertheless the issue of time-barring in terms of section 30I of the Pension Funds Act which provides for certain time-limits with regard to the lodging of complaints. The section reads:

“(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 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 the expiry of any period prescribed by this Chapter, extend such period; [or]

condone non compliance with any time limits prescribed by this Chapter.”

[5.2] It is clear from the complaint that the events to which it relate occurred more than three years before this complaint was received by or lodged at this office. The complainant left the service of the second respondent and withdrew from the first respondent in March 1983. His complaint should have been lodged at the latest in 1986. His complaint was received by this office on 15 December 2005, substantially more than three years out of time. Thus, it is time-barred for the purposes of section 30I(1) of the Act. 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 *Mahlomi 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.”

[5.3] However, that the complaint has become time-barred in terms of section 301 is not the end of the matter as the adjudicator still has a discretion to extend the three-year period or to condone non compliance therewith. But the complainant needs to show good cause to enable her to do that.

[5.4] The Supreme Court of Appeal 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:

“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 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 the strong prospects of success may tend to compensate for a long delay. And the respondent’s interest in finality must not be overlooked.”

[5.5] The appropriate time for the complainant to lodge a complaint was in 1986, three years after resigning from gainful employment. It is apparent from his complaint that he was, at the time of his resignation, of the opinion that a benefit was owing to him by the first respondent. What is more, he has failed to tender any explanation as to why no complaint, or even an enquiry, was made with the second or first respondents for more than 20 years. Neither did he attempt to approach the courts for relief during this period. The complainant blithely states that the political climate prevailing at the time prevented him from claiming his benefits. This, in my view, is no explanation at all. Furthermore, the respondents in this matter have furnished the adjudicator with documentary proof showing that the rules (rule 28) of the first respondent at the material time made provision for a vesting scale commencing on the member’s completion of 15 years continuous service with the second respondent. In light of the fact that the complainant’s period of continuous service with the second respondent was 10 years and hence did not qualify for a withdrawal benefit in terms of the rules of the first respondent, I am of the view that his prospects of success are not strong.

