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Please quote our ref: PFA/EC/12246/2007/PM

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, OF 1956 (“the Act”) – NORUSHU M (“the complainant”) v DISTILLERS CORPORATION PROVIDENT FUND (“the respondent”)

1. Introduction

- 1.1 The complaint concerns the respondent’s failure to pay a withdrawal benefit to the complainant.
- 1.2 The complaint was received by this office on 29 January 2007. A letter acknowledging receipt thereof was sent to the complainant on 13 February 2007. On the same date a letter was dispatched to the respondent giving it until 12 March 2007 to file its response to the complaint. Response was received from the respondent on 23 March 2007. This response was forwarded to the complainant on 25 April 2007. The complainant, however, omitted to reply.
- 1.3 After reviewing the written submissions it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), Z Camroodien (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 Mphhephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), M Qhali (Assistant Adjudicator),

Office Manager: L Manuel, Senior Accountant: F Mantsho

2. Factual Background

2.1 The complainant was the member of the respondent from 1985 to 1990 when he was dismissed by his former employer. He states that the respondent has failed to pay his withdrawal benefit despite repeated requests.

3. Complaint

3.1 The complainant is dissatisfied with the respondent's failure to pay his withdrawal benefit.

4. Response

4.1 This office received a response from the respondent.

Preliminary point

4.2 The respondent contends that your complaint has become time barred in terms of section 30I and therefore I am not permitted to investigate it.

Merits

4.3 The respondent confirms that it is no longer in possession of the complainant's records. It states that it has complied with its obligation to maintain records within a period prescribed by law, and this complaint dates back fifteen years. It states further that a benefit amount of R2 888.32 was in fact paid to the complainant according to the employer's records.

5. Determination and reasons therefor

Time-barring

5.1 Section 30I of the Act imposes certain timeliness with regard to the lodging of complaints before the Adjudicator and states as follows:

“30I. Time limit for lodging of complaints.—

- (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.”

5.2 The complaint was lodged on 29 January 2007. It ought to have been lodged in 1993. The complaint was therefore received almost fourteen years out of time.

5.3 There is a 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 lodged are common in our legal system as well as many others. Inordinate delays in litigation damage the interest of justice. They protract the disputes over the rights and obligations are sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicator 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.”

Condonation:

5.4 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.

5.5 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 therefore, 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."

- 5.3 It is clear that more than seventeen years from the date of termination of employment contract elapsed before the complainant lodged his complaint with this office. In my view, this is an extraordinary long delay. Nor has the complainant provided reasons for the delay to support the condonation of her non-compliance with the time limits set out in the Act.
- 5.5 Regarding the complainant's prospects of success on the merits, it is clear that the respondent has no records pertaining to the complainant. Moreover, if I were to condone the non compliance with the time limits it would be prejudicial to the respondent since it does not have any records pertaining to the complainant's benefit. The respondent is therefore not in a position to provide a substantive response to the complaint.
- 5.6 Taking the above factors into account, I find that no good cause exists for me to condone the non-compliance with the time limit as prescribed in the section. The complaint therefore remains time barred and I may not investigate it.

6. Relief

- 6.1 In the result the complaint is dismissed.

DATED AT CAPE TOWN ON THIS THE DAY OF 2008.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR