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Please quote our reference: PFA/GA/3391/2005/RM

**Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“THE ACT”) – M N MALULEKA v MUNICIPAL GRATUITY FUND (“THE FUND”) AND EKURHULENI METROPOLITAN MUNICIPALITY**

### Introduction

[1] The complaint concerns alleged maladministration by the fund and the Ekurhuleni Metropolitan Municipality (“the employer”), which resulted in the fund’s failure to pay a disability benefit. It was received by this office on 13 May 2005. A letter acknowledging receipt thereof was sent to you on 30 May 2005. On 26 May 2005 letters were dispatched to the employer and the fund giving them until 17 June 2005 to file their responses to the complaint. A response from the fund was received on 17 June 2005. This office received the employer’s response on 24 November 2005. These responses were forwarded to you on 24 July 2006, however no reply has been received. Having considered the submissions before me, I find it unnecessary to hold a hearing in this matter. Since the facts are known to the parties I will not repeat them here, save for those that are pertinent to this determination. My determination and reasons therefor appear below.

### Factual background

[2] You are the widow of Mr. M.W. Maluleka (“the deceased”). He passed away on 4 July 1994. The deceased was a member of the fund by virtue of his employment with the erstwhile Edenvale Town Council, until he resigned from employment in February 1994. The fund paid a resignation benefit of R6 234.96 to the deceased.

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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

## Complaint

- [3] Your complaint is that the fund failed to pay a disability benefit to the deceased because he left employment due to ill health rather than having resigned. You allege that the fund should have realised that the deceased was applying for a disability benefit when he terminated his employment, so you now claim payment of this benefit.

## Responses

- [4] In a response that was sent to you on 24 April 2002, the fund submitted that the deceased joined the Municipal Employees Pension Fund in 1983. He transferred to the fund on 1 January 1994. He resigned from employment in February 1994 and the fund did not receive any application for retirement due to medical disability. You were informed that the fund could only pay a benefit to a member in terms of the rules of the fund and it will only proceed with the payment of a claim in terms of the "termination of service" form it receives from the employer. In the situation where a member is too ill to work such a member, or the employer, can submit an application for a disability benefit. The member will then be entitled to the benefit if it is approved by the fund. There was no application for a disability benefit in this case, so the fund paid R6 234.96 as a resignation benefit to the deceased.
- [5] In its response to this office, which was received on 17 June 2005, the fund raised the issue of time-barring in terms of section 30I of the Act. It states that the time limit for lodging the complaint has expired in terms of section 30I of the Act. The fund avers that the act or omission to which the complaint relates occurred on 11 April 1994 being the date when the resignation benefit was paid or, alternatively, the date when the deceased became aware of such an omission.
- [6] It was submitted that you did not advance any reasons for non-compliance with the prescribed time limit. Therefore, no good cause has been shown to extend or condone the non-compliance with the time limit.
- [7] Regarding the merits of your complaint, the fund stated that a member or an employer may apply for a disability benefit in terms of section 35 of the rules of the fund. The fund never received such an application, either from the deceased or the employer. The clinical notes of the doctor, which were submitted by you together with your complaint, do not assist to prove that an application for medical disability was submitted to the fund. The note of Dr. D.M. Ngwenya, which is also attached to your complaint, does not prove that an application for a disability benefit was in fact made to the fund.

- [8] The form received from the employer indicated that the deceased wished to resign. Accordingly, a resignation benefit was paid to the deceased. It goes on to assert that the deceased could himself have proceeded with an application for a disability benefit, but this was not done.
- [9] Regarding the fund's procedure for disability benefit claims, it asserts that it is not the prerogative of a doctor, or the employer, to determine whether a member qualifies for payment of a disability benefit. In terms of section 35 of the rules, it is the function of the board of management of the fund to determine whether a member is entitled to a disability benefit. Therefore, your claim that the deceased qualifies for a disability benefit is presumptuous. The opinion of a doctor does not necessarily imply that the requirements for payment of a disability benefit, as defined in the fund rules, are satisfied. This is because a member may be found to be medically unfit by a medical practitioner, but this does not necessarily mean that such a member qualifies for payment of a disability benefit in terms of the rules of the fund.
- [10] The employer responded on 24 November 2005, apologising for its late response. It advised that it is the practice of the municipality to only keep personnel files and documents for a period of 5 years. Since this matter relates to issues arising 10 years ago it does not have any records for the deceased, nor can it verify the information relating to this complaint.

#### Determination and reasons therefor

- [11] Before determining the merits of the complaint, I need to consider the issue of time-barring in terms of section 30I of the Act. This complaint relates to a matter that arose, at the very latest, in April 1994 following the resignation of the deceased from his employment and the payment of his resignation benefit. Thus, a period of approximately 11 years passed before you lodged your complaint with this office. Section 30I (1) of the Act requires that complaints be lodged within 3 years of the occurrence of the cause of action giving rise to the complaint. 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 *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 may 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.”

- [12] However, the enquiry does not end there 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. 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) at 532C-F 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 the 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 strong prospects of success may tend to compensate for a long delay. And the respondent’s interest in finality must not be overlooked.”

- [13] As alluded to in paragraph 11, approximately 11 years passed before you lodged your complaint with this office. This, in my view is an extraordinarily long delay. You state in your complaint that the present complaint was the subject-matter of a dispute with the fund since 1995. It is also evident from the annexures to the complaint that you employed the services of a legal representative in 1999 and correspondence regarding this matter was exchanged between the fund and your representative. However, no complaint was lodged with this office until May 2005 and no explanation was given for the long delay in doing so.

- [14] Regarding the prospects of success with your complaint, I note that the fund submitted a form, which was also provided to your legal representative in 1999, which indicates that the deceased resigned from his employment. Further, it is written on the form that the deceased chose that his termination be handled as a resignation. The employer has advised that it is custom at their offices to keep personnel files and documents for only five years. Consequently, the employer has no record of the deceased and cannot verify any information in this regard.

- [15] I take cognisance of the submission by the fund that it pays benefits to its members in terms of its rules and can only proceed with payment of a claim in terms of the instructions it receives. In this matter the fund did not receive any application for a disability benefit. In terms of rule 35 of the

fund a member, or an employer, may apply for a disability benefit. This implies that even if it were the case that the employer failed to lodge a disability claim with the fund, the deceased, or you on his behalf, could have done so instead. Neither the deceased nor you did this after receiving payment of the resignation benefit on 11 April 1994. The reason for this is probably because the deceased wished to receive a resignation benefit, as stated on the "reason for termination" form received by the fund.

- [16] I concur with the fund's submission that it is the fund's prerogative, rather than that of a doctor, to determine whether a member qualifies for payment of a disability benefit in terms of the rules. I also note that the employer is unable to defend its actions because it only keeps personnel records for 5 years and is not in a position to confirm or deny any of the allegations since this matter relates to events that transpired 11 years ago. Having regard to the limited information that was provided by you and the fund, it would be iniquitous for me to order the employer to pay the disability benefit instead of the fund. This is especially so in light of the fact that it appears that the deceased preferred to receive his resignation benefit rather than a disability benefit and also because neither the deceased nor you submitted a disability application to the fund even though the rules permit it. In the result, I am satisfied that the fund paid the benefit due to the deceased in terms of its rules. Therefore, there is little prospect of success in your complaint against the respondents.
- [17] Taking all these factors into consideration, I find that no good cause exists for me to extend the time limit prescribed for lodging a complaint in terms of section 30I(1), nor do I condone the non-compliance with the time limit prescribed in the section.
- [18] In the result, your complaint cannot succeed.

DATED AT JOHANNESBURG ON THIS                      DAY OF                      2007

Yours faithfully

**VUYANI NGALWANA**  
PENSION FUNDS ADJUDICATOR