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Please quote our reference: PFA/GA/3735/2005/RM

**Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“THE ACT”) – L E MAKUA (“complainant”) v ANGLOVAAL GROUP COMPANIES PENSION FUND (“first respondent”); SILVER STAR PENSION FUND (“second respondent”); CONSOL GLASS (PTY) LTD. (“third respondent”) AND RUTO MILLS (PTY) LTD. (“fourth respondent”)**

1. Introduction

1.1 The complaint concerns the alleged non-payment of withdrawal benefits by two pension funds following the complainant’s dismissal from employment.

1.2 The complainant’s initial complaint was received on 6 June 2005 and after requesting that he provide further information his re-formulated complaint was received by this office on 8 August 2005. A letter acknowledging receipt of the complaint was sent on 27 September 2005. On the same date letters were dispatched to the respondents giving them until 18 October 2005 to file responses to the complaint. Responses were received on 18 October 2005, 21 July 2006, 21 September 2006 and 1 December 2006. These responses were copied to the complainant and he sent replies on 9 November 2005, and 18 October 2006.

1.3 Having considered the submissions, it is found unnecessary to hold a hearing in this matter. The facts are known to the parties, so only those that are pertinent to this determination will be repeated. The determination and reasons therefor appear below.

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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. Factual background

2.1 According to the information provided the complainant was employed by the first employer, i.e. the fourth respondent, from February 1975 until January 1977 when his employment was terminated. From May 1982 until December 1984 the complainant was employed by the third respondent, i.e. the third respondent, as an assistant electrician.

2.2 The fourth respondent's pension fund at the relevant time was the Silver Star Pension Fund ("the first fund"), while the third respondent's pension fund at the relevant time was the Anglovaal Group Companies Pension Fund ("the second fund").

## 3. Complaint

3.1 In essence the complainant's complaint is that the 2 pension funds failed to pay the complainant a withdrawal benefit when his employment was terminated. The complainant now claims compensation from the funds or the respective employers for the loss he allegedly suffered.

## 4. Responses

4.1 Alexander Forbes Financial Services ("the administrator") submitted a response on behalf of the second respondent and the fourth respondent on 18 October 2005. The administrator advised that it is unable to locate the relevant documentation pertaining to the complaint. In view of this fact the complainant's membership of the second respondent could not be ascertained. Further, the second respondent no longer exists. The standard document retention policy is to retain documents for a period of 5 years and the parties also use the services of an off-site document warehouse company, but no information relating to the complainant's claim could be found by the parties or in storage.

4.2 The administrator raises the preliminary point that the complainant's complaint is time-barred in terms of section 30I of the Act. In support of this averment it states that the complainant failed to pursue his claim for the past 26 years since leaving employment in 1977 and the complainant have not taken any legal steps to interrupt prescription. The complainant also failed to provide sufficient reasons for the delay except to state that he only became aware of it when he saw the administrator's advertisement in a newspaper. The administrator submits that in view of the alleged non-payment of the complainant's benefit it is incomprehensible that the complainant forgot about his benefits. It further submits that condonation of the complaint would place an unfair burden on the parties to defend a complaint that arose more than 26 years ago and for which no relevant documents exist to answer the complaint. Lastly, the administrator submits that the probabilities of succeeding with the complainant's claim are low.

4.3 The principal officer of the first respondent responded on behalf of itself and the third respondent on 21 September 2006. The parties also raise the point *in limine* that the complainant's complaint is time barred in terms of section 30I of the Act. They aver that the complainant failed to pursue any enquiries for over 22 years after the complainant left employment. The complainant also failed to provide reasons for the delay and in view of the complainant's allegation that the complainant were never paid his fund benefit it is incomprehensible that the complainant forgot about the benefit. They also argue that condonation of the complainant's complaint will place an unfair burden on the parties to defend an act that occurred more than 22 years ago and for which no relevant records to answer it exist. Further, the complainant's probabilities of success are low as his claim cannot be proved. It is averred that it is surprising that the complainant would not have made any enquiries since 1984 because the complainant was aware that deductions were made from the complainant's salary and no benefit statements were received since 1984. Lastly, condonation would place an unfair burden on the respondents to defend a complaint that arose 22 years ago and for which no relevant records to defend the complaint exist.

4.4 On the merits of the complaint the principal officer advises that the only records that still exist for the period 1982 to 1984 are the first respondent's cashbooks. It was ascertained that a payment was made to an "L Makua" in February 1982, but this could not have been the complainant since the complainant claims that he only commenced employment at the third respondent in May 1982. There is no documentary evidence, either from the complainant or the first respondent, confirming that the complainant were ever a member of the first respondent. The principal officer notes that during the period of employment the complainant refers to weekly paid staff were not necessarily members of any of the employer's fund, although they could have belonged to an industrial council fund.

4.5 The principal officer advises that they were unable to locate the relevant documentation pertaining to the issues raised in the complainant's complaint. They are unable to prove the complainant's membership of the first respondent, neither are they in a position to quantify any benefit that may be payable to the complainant.

4.6 The respondents pray that the complaint be dismissed.

## 5. Determination and reasons therefor

5.1 This tribunal first addresses the point *in limine* raised by the respondents regarding time-barring of the complainant's complaint in terms of section 30I of the Act. This complaint relates to causes of action that arose in January 1977 in respect of the second respondent and fourth respondent and in December 1984 in relation to the first respondent and third respondent. The complaint

was initially received by this office on 6 June 2005. Thus, a period of approximately 27 years elapsed in regard to the complainant's complaint against the second respondent and fourth respondent and approximately 20 years and 6 months passed before the complainant lodged his complaint against the first respondent and third respondent. 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, the complainant's complaint 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.”

- 5.2 However, the enquiry does not end there as this tribunal still needs to satisfy itself as to whether or not good cause has been shown, or exists, for it to extend the three year limit or to condone the non-compliance therewith. The complainant submitted that his complaint should not be time-barred because, in the 1980's he had no support from a trade union, or the employer for that matter, to prosecute his claim. He also submitted that only when he saw the administrator's advertisement in the newspapers in 2005 and the contact details of this tribunal did he realise he could proceed with his pension claim. 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."

5.3 As alluded to in paragraph 11, the delay in bringing this complaint is approximately 20 years at the very least. This is an extremely long delay and, as argued by the respondents, places an undue burden on them to defend a matter that has been protracted for so long. The Constitutional Court, in the *Mohlomi* case cited in paragraph 11 above, confirmed that inordinate delays in litigation damage the interests of justice.

5.4 This tribunal also needs to consider the merits of the complainant's case bearing in mind that, as stated in *Melane supra*, if there are no prospects of success there is no point in granting condonation. This tribunal notes that there is no evidence whatsoever to prove that the complainant was a member of any of the pension funds cited as respondents in this complaint. To compound matters further, even if this tribunal were to find in the complainant's favour it would be unable to quantify any damages the complainant could claim because there is no record of the complainant's membership, contribution rate to the funds, period of membership, or even a record of the benefit to which the complainant would have been entitled.

5.5 This tribunal notes for the sake of completeness that the copy of the Unemployment Insurance Fund card the complainant submitted in respect of the complainant's employment with the third respondent merely proves that the complainant was employed by it. This record does not prove membership of the first respondent. Thus, in the absence of any proof of membership of these pension funds, there are no prospects of success with the complainant's complaint.

5.6 The respondents are correct in submitting that it would be unreasonable to expect them to defend a matter without having any relevant information at hand. I am of the view that it would not be in the interests of justice to permit this to happen. In the result, no reasonable cause exists for me to condone the non-compliance with the time limit of 3 years prescribed in section 30I of the Act. Therefore, the complainant's complaint is time barred.

5.7 The complainant's complaint cannot succeed.

DATED AT JOHANNESBURG ON THIS                      DAY OF                      2008

Yours faithfully

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**MAMODUPI MOHLALA**  
**PENSION FUNDS ADJUDICATOR**