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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): V T WILLS v O T H BEIER GROUP PENSION FUND (“the fund”) / ALEXANDER FORBES FINANCIAL SERVICES (“the administrator”) / ISIPINGO TEXTILE CORPORATION (O T H BEIER GROUP) (“the employer”)

Introduction

[1] Your complaint concerns the alleged unfair withdrawal benefit that you received when you exited the fund. The complaint was received by this office on 17 August 2005 and a letter acknowledging receipt thereof was dispatched to you on 25 January 2006. A letter was also sent to the respondents giving them until 15 February 2005 to file a response to the complaint. On 14 February 2006 a response from the second respondent was received. The administrator also copied you with the response. A reply was received from you on 10 March 2006. No further submissions were received from either you or the respondents. 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 not satisfied with the amount of the withdrawal benefit that you received and contend that you are entitled to a greater benefit. You commenced employment with the third respondent on 4 February 1970 and left the services of the company after you resigned in 1983. You state that upon your resignation, you received a cheque in the sum of

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

- R5 233.18, representing your withdrawal benefit from the fund, after having been employed for a period of 13 years and 3 months.
- [3] You further aver that you have been prejudiced as a result of poor administration of the fund, considering the amount you received and the period of service.
- [4] In your reply you have stated that you never pursued your claim initially as the adjudicator's office was inundated with complaints and you realized that you had to be patient.
- [5] The reason you did not pursue your complaint in the initial 19 years is that you were employed in an ideal and secure position at South African Breweries. You also state that you saw various articles in the media dealing with retirement fund surpluses and you recognized that you were not alone.

Response

- [6] The administrator has filed a response to your complaint on behalf of the fund. At the outset, it raises a preliminary point that according to section 30I of the Pension Funds Act the Adjudicator shall not investigate the 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 in writing. It contends that your complaint was lodged outside of this time limit. It also states that the adjudicator is given authority to condone non-compliance with the time periods in terms of the act and contends that condonation should not be granted in this matter for the following reasons:
- [6.1] You received a response to your query regarding the payment and the quantum of your withdrawal benefit on 12 December 2001;
- [6.2] You have not pursued your alleged claim at all for the past 4 years and you had not pursued it for 19 years prior to that;
- [6.3] You have not taken legal steps to interrupt prescription;
- [6.4] You have failed to supply reasons for the delay;
- [6.5] Condonation of the complaint would place an unfair burden on the fund to defend a complaint concerning events that occurred 23 years ago; and
- [6.6] Your prospects of success on the merits are not good.
- [7] The administrator alleges that the fund records were destroyed by fire in 2005.
- [8] On the merits, the administrator contends that your benefit was calculated correctly in terms of the rules of the Fund. Rule 11.1.1 states that if a

member who is not retiring in terms of rule 5 resigns, he shall become entitled to a lump sum benefit equal to his accumulated contributions at the date of leaving service. It further contends that “accumulated contributions” is defined in terms of rule 2 of the fund’s rules as excluding the employer’s contributions. It concludes that your allegation that you are entitled to a greater benefit based on your years of service is unfounded, and submits that you are not entitled to more than the rules provide for.

- [9] It accordingly contends that you have received your full benefit entitlement in terms of the rules of the fund, but that, in any event, the complaint has become time-barred, and for that reason I may not investigate it.

Determination and reasons therefor

- [10] 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; [or]
 - (b) condone non compliance with any time limit prescribed by this Chapter.”

- [11] The date of accrual of your benefit was in 1983. 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 17 August 2005, seven years after the establishment of this office.

- [12] 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.”

[13] 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.

[14] 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.”

[15] It is clear from the evidence which is before me that more than 21 years elapsed before you lodged your complaint with this office. This, in my view, is an extraordinarily long delay. In attempting to explain the reasons for the delay, you have stated that you were employed in an ideal and secure position at South African Breweries. In my view your reasons are wholly inadequate to justify the late lodgement of your complaint.

[16] Regarding your prospects of success on the merits, I note the submission made by the administrator that your withdrawal benefit was correctly calculated in terms of the rules of the fund. Furthermore it is clear in terms of rule 11.1.1 that your withdrawal benefit does not include your employer’s contribution as this is specifically excluded in terms of rule 2 of the rules of the fund. In my view, this explains why you received a benefit which is far less than the amount you allege you ought to have received considering the number of years you worked for the employer and contributed to the fund. Your prospects of success on the merits are therefore not promising.

- [17] In addition to the above, if I were to condone your non-compliance with the time limits, it would severely prejudice the fund as the records which are relevant to this complaint were destroyed by the fire in 2005. It is therefore not in a position to provide a substantive response to your complaint.
- [18] Taking all these 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.
- [19] In the result, your complaint cannot succeed.

Dated at Cape Town on this the day of 2006.

Yours faithfully

Vuyani Ngalwana
Pension Funds Adjudicator