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Please quote our reference: PFA/GA/3514/2005/RM

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“THE ACT”) – L PARMEGGIANI v STAX PROVIDENT FUND (“THE FUND”), STAX SUPER STORES, METCASH TRADING AFRICA (PTY) LTD. AND LIBERTY GROUP LIMITED

Introduction

[1] The complaint, which was lodged on your behalf by your legal representative, concerns the alleged failure of the respondents to admit you to membership of the fund when you commenced your employment in January 1991. It was received by this office on 19 May 2005. A letter acknowledging receipt thereof was sent to your legal representative on 30 June 2005. On 29 June 2005 letters were dispatched to Metcash Trading Africa (Pty) Ltd (“the employer”) and Liberty Group Limited (“the administrator”) giving them until 20 July 2005 to file their responses to the complaint. A response from the administrator, in response to the complaint that was also forwarded to it on 19 May 2005, was received on 13 June 2005 and the employer’s response was received on 27 July 2005. This office received your legal representative’s replies on 20 July 2005, 19 August 2005 and 14 November 2006. On 10 October 2006, this office received a further response from the employer. Having considered the submissions before me, I find it unnecessary to hold a hearing in this matter. As the background facts are well known to all the parties, I shall only repeat those facts that are pertinent to the issues raised herein. My determination and reasons therefor appear below.

Factual Background

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

- [2] You were employed by the employer from 17 January 1991 until you were retrenched on 30 September 2004. By virtue of your employment you were a member of the fund from September 1998 until your retrenchment.

Complaint

- [3] Your complaint is that you were never informed about joining the fund when you commenced employment in January 1991 and that its existence was never brought to your attention until September 1998. You aver that according to the rules of the fund you were eligible for membership of the fund after three months of service with the employer, if you had attained the age of 20 but not 55. Therefore, you believe that you were eligible for membership of the fund from March 1991. As a result, you submit that you have been prejudiced by the conduct of the employer and that you have been unfairly deprived of approximately seven and half years of fund membership. You request that this tribunal order the employer to pay into the fund outstanding contributions from January 1991 to September 1998. You also requested that a punitive order should be granted against the employer to the effect that it pay any contributions you would have made to the fund if you had been a member from January 1991, together with interest thereon.

Responses

- [4] This office received a response from the administrator on 13 June 2005. It submitted that it was only instructed to admit you as a new member of the fund from 1 August 1998. The administrator stated that it does not know the reason for the employer only electing to admit you to the fund several years after you commenced employment. Therefore, it was submitted that the matter be referred to the employer or the fund's broker, who would be able to provide reasons for your late admission to the fund.
- [5] The employer also submitted a response to this office on 27 July 2005. It stated that you commenced your employment with the employer on a half-day basis from 17 January 1991. The fund incepted on 1 January 1990. It was submitted that at the time of the commencement of the fund, you were not yet employed by the employer. However, when you commenced your employment in January 1991, the employer informed you about the existence of the fund. The employer submitted that you chose not to join the fund of your own accord. The fund was established for the benefit of all permanent employees.
- [6] It was stated that you only decided to join the fund in September 1998 when you were promoted to the position of salaries administrator, which was a full-time position. The employer submitted that it never withheld

membership of the fund from its employees. According to the rules of the fund all permanent employees are eligible for membership to the fund after three months of service with the employer, if they had attained the age of 20 but not 55. Therefore, it was stated that you prejudiced yourself by deciding to only join the fund in 1998.

- [7] The employer averred that it paid your contributions as well as the employer's contributions to the fund. Therefore, it would be unfair if the employer were to be directed to pay all outstanding contributions from January 1991 until September 1998, as it was your decision not to join the fund in 1991 when you commenced your employment. It also averred that you were a trustee of the fund and should have been aware of the rules.
- [8] Regarding the late submission of your complaint, the employer stated that as a trustee, you were supposed to be aware of the rules of the fund. It was submitted that no good reason exists for the late submission of your complaint.

Determination and reasons therefor

- [9] Before considering 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 complaint that, at the latest, arose in September 1998. Thus, a period of approximately 6 years and 8 months passed before your complaint was lodged 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 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.”

- [10] 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 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.”

- [11] As alluded to in paragraph 9, approximately 6 years and 8 months passed 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 stated that you did not know that you had a possible claim against the employer for arrear contributions to the fund during the period January 1991 until August 1998, when you ought to have been a member. You submitted that you only became aware of this when one of your former colleagues informed you that she had consulted an attorney who was willing to assist her regarding the same issue and that she had referred her complaint to this office. You then decided to lodge a complaint with the employer and the fund in November 2004 and January 2005 respectively. Therefore, you submit that the non-compliance with the time limit in terms of section 30I of the Act should be condoned.
- [12] However, it is clear that by September 1998 you became aware that you should have been a member of the fund, but still failed to lodge a complaint with this office until May 2005. I also take cognizance of the fact that you were a trustee of the fund as well. So, at the very least you ought to have been aware that you had a right to lodge a complaint with this office. Therefore, on a balance of probabilities, it is unlikely that you only found out about the existence of the fund in 1998, or that you never knew that you had a right to lodge a complaint with this office. Thus, the reason proffered for the late submission of your complaint is without merit.
- [13] I turn to consider the prospects of success with your complaint. The employer is incorrect in asserting that in 1991 employees had an election to become a member of the fund. In terms of rule 2.1.3, it is compulsory for employees to be members of the fund. An “employee” is defined in section 1A of the rules to mean any person in the full-time permanent service of the employer. Thus, not only do you need to be a permanent

employee, but you also have to work full-time for the employer. The rules go on to define a “full-time” employee as someone who works for the employer for at least 60% of the employer’s normal working day. The employer submitted that you worked on a part-time basis from 17 January 1991 until 31 August 1998, whereafter you were employed on a full-time basis as a salaries administrator. In your legal representative’s submission dated 14 November 2006 it is stated that you were employed on a permanent, not part-time, basis but that you worked mornings only. In my view there is doubt whether you qualified as an “employee” as defined in the rules. You concede that you worked mornings only until August 1998. Therefore, it is probable that you did not satisfy the criteria for an “employee” as defined in the rules and were not eligible for membership of the fund before September 1998. I am of the view that the prospects of success with your complaint are negligible.

[14] Taking 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.

[15] In the result, your complaint cannot succeed.

DATED AT JOHANNESBURG ON THIS DAY OF 2007

Yours faithfully

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR