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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”): M E Shezi (“the complainant”) v Reckitt & Colman Retirement Fund (now known as the Reckitt Benckiser Retirement Fund) (“the respondent”)

1. Introduction

- 1.1 The complaint concerns the respondent’s alleged failure to pay the complainant his cash benefit on retirement.
- 1.2 The complaint was received by this office on 2 March 2007. A letter acknowledging receipt thereof was sent to the complainant on 17 May 2007. On the same date a letter was dispatched to the respondent, giving it until 29 June 2007 to file its response to the complaint. The response was received on 5 July 2007. The response was sent to the complainant on 18 September 2007 requesting a reply by 5 October 2007. No reply has been received from the complainant.
- 1.3 After reviewing the written submissions before me, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.

2. Complaint

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 Ray (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), M Qhali (Assistant Adjudicator),

Office Manager: L Manuel, Senior Accountant: F Mantsho

- 2.1 The complainant states that he retired from employment on 31 March 2000, at which time he also exited from the respondent. However, he never received the cash amount of R154 370.08 due to him. He contends that at various times he consulted both a lawyer and the Durban Law Clinic to investigate the matter but as there were no results, he decided to approach this tribunal for assistance.

3. Response

- 3.1 The respondent states that the complaint should be dismissed as it is time-barred in term of the Pension Funds Act, 1956, preventing the Adjudicator from hearing the matter and in terms of the Prescription Act, 1969 any debt shall be extinguished by prescription after the lapse of three years from the date the debt is due. Here too, it argues, the Adjudicator has no power to condone the late filing of a claim.
- 3.2 The respondent states that I should not condone the late filing as the complainant has failed to pursue any enquiries for a period of seven years and he has not provided reasons for his failure to comply with the time limit to submit a complaint.
- 3.3 On the merits, the respondent states that it has proof of payment of the retirement benefit to the complainant. Cheque number 13515, drawn in favour of the complainant, was paid into his People's Bank account in April 2000. Two further cheques (numbered 13516 and 19853) of R325 712.69 and R5 068.30 respectively were paid on his behalf to Sage Life, administered by Momentum Group Life, for the purchase of a compulsory annuity. From April 2000 the complainant has been receiving an annuity of R3 305.66 per month.
- 3.4 The respondent concludes that it has discharged its duties to the complainant in terms of the rules of the fund. It adds that it paid the complainant the correct amount as determined in the rules.
- 3.5 As mentioned although the complainant was invited to reply to the response, no reply has been received.

4. Determination and reasons therefor

Time barring

- 4.1 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) The provisions of the Prescription Act, 1969 (Act No. 68 of 1969), relating to a debt apply in respect of the calculation of the three year period referred to in subsection (1).”

4.2 The complainant’s cause of action arose in 2000 when he retired from the service of his employer and exited from the respondent. However, the complaint was only lodged in March 2007, and was therefore received four years out of time.

4.3 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.”

Condonation

4.4 However, at the time that the complaint was lodged, section 30I contained a subsection (3) which was subsequently removed by the Pension Funds Amendment Act no 11 of 2007. This subsection read as follows:

“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.”

4.5 Subsection (3) therefore contained a power for the Adjudicator to condone non-compliance with the three year time-bar, provided good cause existed. Although that discretion has been removed, the complainant is entitled to have her complaint adjudicated on the legal framework applicable at the time that she lodged her complaint. Our courts will only hold that a statutory provision which interferes with vested rights or imposes a liability or a burden is retrospective in operation where the legislature either expressly indicates this or clearly intended the

statute to have that effect. (See *Njobe v Njobe & Dube NO 1950(4) SA 545 (C)* at 552). The Amendment Act referred to above contains a specific clause (40B) indicating which definitions and sections will have retrospective effect. The deletion of section 30I(3) is not one of them. Therefore the discretion to condone non-compliance with the time limits set out in section 30I must be exercised in respect of complaints lodged prior to the commencement date of the Amendment Act, which was 13 September 2007.

- 4.6 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.”

- 4.7 The complainant has not provided any explanation for the delay of some four years. Regarding the complainant’s prospects of success on the merits, the respondent has submitted copies of its records in respect of the complainant which evidences that a cheque for R154 370.80 was paid into the savings account of E Shezi held at the People’s Bank on 5 April 2000. In the absence of any evidence to the contrary there is nothing on which to base a finding that the complainant did not receive the cash benefit of R154 370.80. Therefore the prospects of success are not hopeful.
- 4.8 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.

5. Relief

5.1 The complaint is dismissed.

Dated at Johannesburg on this the day of 2008.

Yours faithfully

Mamodupi Mohlala
Pension Funds Adjudicator