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Please quote our ref: PFA/GA/7905/2006/EMD

**RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 (“the Act”): DR ML SNAIL (“the complainant”) v UNIVERSITY OF SOUTH AFRICA (“the first respondent”) / VISTA UNIVERSITY PENSION FUND (“the second respondent”) / VISTA UNIVERSITY PROVIDENT FUND (“the third respondent”) / SANLAM LIFE INSURANCE LIMITED (“the fourth respondent”)**

1. Introduction

- 1.1 This complaint, dated 23 March 2006, concerns deductions made from the complainant’s salary for the period 26 May 1998 to 30 June 2000 for payment to a pension and a provident fund, as well as the commencement date of the complainant’s membership of the second and third respondents.
- 1.2 On 5 April 2006, a letter acknowledging receipt was sent to the complainant. On the same day a copy of the complaint was sent to the first respondent and to Alexander Forbes, assumed to be the administrator. A further request was addressed to the first respondent on 24 July 2006 as well as on 10 August 2006, 1 February 2007 and 4 April 2007, and to Alexander Forbes. The latter responded on 31 July 2006 that the complaint seemed to relate to the second and third respondents, administered by the fourth respondent. The fourth

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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 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), M Qhali (Assistant Adjudicator),

Office Manager: L Manuel, Senior Accountant: F Mantsho

respondent replied on 2 August 2006. The first respondent replied on 12 April 2007. This reply was forwarded to the complainant on 5 June 2007 for a response. The complainant answered on 26 June 2007. On 21 September 2007, the complainant was invited to make further specific submissions and submit specific documentation. He responded on 24 September 2007. At the request of the complainant's legal representative, a final extension of time was granted until 2 November 2007 to enable the complainant to provide further evidence to substantiate the complaint. On 25 February 2008 the complainant was again requested to clarify certain issues, to which he responded on 25 and 28 February 2008.

- 1.3 Having considered the written submissions filed before this tribunal, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.
- 1.4 As the background facts are well-known to all parties, these shall be repeated only to the extent that they are pertinent to the issues raised herein.

## 2. Facts in brief

The complainant was dismissed by Vista University at the end of May 1998 and reinstated on 1 July 2000 following a decision by the Labour Court.

According to the fourth respondent, the complainant withdrew from the second and third respondents on 31 May 1998 and became a member again on 1 July 2000. No contributions were received for the period June 1998 to June 2000.

The complainant requests that his pension benefits be credited with contributions made by him and his employer for the period 1 June 1998 to 30 June 2000.

## 3. Complaint

The complainant contends that upon being reinstated in his employment, pension and provident fund contributions for the period June 1998 to June 2000 were deducted from his salary, but that the records of the second and third respondents reflect that his employment only commenced on 1 July 2000. He contends that his membership commenced from January 1995.

#### 4 First Respondent's Response

- 4.1 The first respondent replied that according to the complainant, he initially lodged his complaint with his previous employer, Vista University, in 2000.
- 4.2 The complaint was thoroughly investigated, without success.
- 4.3 The incident leading to the complaint took place in 2000 whilst the complainant was employed by Vudec, a centre within Vista University, before it was incorporated with the first respondent in January 2004.
- 4.4 The first respondent could not find any evidence of a complaint lodged with Vista University as alleged. No documentary proof could be found of any deduction or payment on behalf of the complainant to any pension or provident fund. Neither was the complainant able to produce evidence of such proof of payments or deductions from his salary.
- 4.5 The first respondent was therefore unable to establish whether indeed the complainant's former employer, Vista University, made any pension deduction from his salary.

#### 5. Fourth Respondent's Response

The fourth respondent stated that according to their records, the complainant withdrew from the fund on 31 May 1998 and re-entered on 1 July 2000. No contributions were received for the period June 1998 to 1 July 2000.

#### 6. Complainant's reply

- 6.1 In the complainant's first response, dated 25 June 2007, he emphasises that his complaint was first raised with Vista University in 2002. This was followed by various verbal enquiries to both Vista University and the first respondent as early as 2004, when the merger of the universities took place. A second written enquiry followed in September 2005, and the present complaint was lodged on 23 March 2006.
- 6.2 The complainant submits that the first respondent is duty bound to investigate the matter thoroughly and to make the necessary disclosure on which the matter could be determined.
- 6.3 The complainant further submits that a staff member advised him that his personnel file could not be found, but that she could see from other

records that his employment commenced on 1 July 2002. This date should presumably read 1 July 2000. The complainant was also advised that his finance file was missing.

- 6.4 It is further submitted that the first respondent's duty to keep proper records cannot be excused because its predecessor lost or destroyed such documents.
- 6.5 In the result, this Tribunal is urged to draw a negative inference from the failure of the first respondent to disclose the necessary records.
- 6.6 The complainant concludes with a prayer that the first respondent be ordered to pay the shortfall to the second and third respondents for his service from 1995; that the first respondent be ordered to investigate the matter and to provide proof of the investigation within 14 days from the date of the determination; that the first respondent be ordered to provide the complainant with a full statement of all pension payments and deductions made from 1995 to date; that the matter be postponed pending the disclosure stipulated in the second and third prayers; further relief.

## 7. Invitation to submit further reasons and documents

- 7.1 In order to proceed with the determination of the complaint, the complainant was on 21 September 2007 requested by this Tribunal to provide the following:
  - 7.1.1 Substantive reasons why the claim should not be time-barred in terms of section 30I of the Pension Funds Act, 24 of 1956;
  - 7.2.1 Documentary proof of deductions from salary for transmission to the second respondent for the period 1 June 1998 to 1 July 2000.

## 8. Complainant's response

- 8.1 In his response, the complainant reiterates what was said in his previous reply. In addition, he argues that the prescribed time limits for the referral of the dispute should only run from January 2004 as he only then became aware of the omission.
- 8.2 The complainant asks for Condonation for not submitting his complaint sooner.
- 8.3 A further extension of time was requested in which to furnish documentary proof of what had transpired.

9. Further request for information

9.1 On 25 February 2008, the complainant was requested to clarify the name or names of the pension fund(s) against which he expected any determination should be made; to confirm the date of payment, the amount received and the name(s) of the fund(s) that paid him his withdrawal benefits after 31 May 1998; and to submit a copy of the Labour Court decision setting out the terms on which he was reinstated in 2000.

9.2 On 28 February 2008, the complainant submitted a copy of the ruling in *Nehawu & Others v Vista University* by the Labour Court (Johannesburg) case number J2558/99.

10. Determination and reasons therefor

*Time limit for submission of claims*

10.1 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 in writing (section 30I(1)). This period may be extended and the Adjudicator may condone non-compliance with the period on good cause shown or on his or her own motion (section 30I(3)).

10.2 Section 30I(3) was deleted by section 21(b) of the Pension Funds Amendment Act, 11 of 2007, which came into force on 13 September 2007.

10.3 There is good reason for a limit to be imposed on the time during which litigation may be launched. The Constitutional Court explained this in *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) (at paragraph [11]) as follows:

Rules that limit the time during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating 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 still be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They thus serve a purpose to which no exception in principle can cogently be taken.

*Condonation*

- 10.4 The question arises whether or not the Adjudicator has, in this matter, the power to condone non-compliance with the period as envisaged by section 30I(3), in spite of the deletion of the section.
- 10.5 The point of departure is that amendments do not retroactively affect vested rights. In this regard, a distinction is made between amendments of a substantive nature as against amendments of a purely procedural nature. It has customarily been said that in the absence of a contrary intention on the part of the legislature, pending litigation must be decided in accordance with the substantive law which prevailed when the events in question took place or when the legal proceedings were instituted, but that subsequent amendments relating to the procedure governing disputes of the kind in question apply not only to future cases but also to pending cases. However, more recently it has been recognised that this distinction is not always a safe guide to the correct answer (see *Minister of Public Works v Haffejee NO 1996 (3) SA 745 (A)* at 752B-753C and the cases there cited). In that case, Marais JA observed as follows (at 753B-C):

In other words, it does not follow that once an amending statute is characterised as regulating procedure it will always be interpreted as having retrospective effect. It will depend upon its impact upon existing substantive rights and obligations. If those substantive rights and obligations remain unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply. *Aliter* if they are not.

- 10.6 The complaint was submitted on 23 March 2006. Receipt of a complaint by the Adjudicator interrupts prescription (section 30H(3)). The amendment of section 30I(3) is with effect from 13 September 2007. The raising of prescription as a defence is not purely procedural.
- 10.7 I am satisfied in the circumstances of this particular case that the period for the lodging of the complaint may be extended on good cause shown.
- 10.8 The next question is whether or not good cause has been shown why in this particular instance, the period for the lodging of the complaint should be extended. As stated, the complaint was received on 23 March 2006. The complaint relates to events that transpired between 1995 and 30 June 2000.
- 10.9 I am not convinced that the circumstances of this particular complaint warrant the extension of the period for the lodging of a complaint that should have been pursued by no later than 1 July 2003.
- 10.10 I now wish to deal with the merits of the matter, should I be wrong in my decision not to extend the period for the lodging of a complaint in

this matter.

*Proof of complaint*

- 10.11 It is trite law that in a dispute which is being adjudicated, he or she that avers must prove.
- 10.12 In the present instance, the complainant was formally requested by this Tribunal to furnish *documentary proof of deductions from salary for transmission to the second respondent for the period 1 June 1998 to 1 July 2000*.
- 10.13 No copies of documents relating to the deductions or the events leading to the present dispute have been submitted.
- 10.14 The employer at the time of the events, Vista University, no longer exists. Vista was taken over by the first respondent with effect from 1 January 2004. Any proceedings relating to events during the period ending on 30 June 2000, should at best have been instituted by no later than 30 June 2003, in which event the first respondent may have been made aware of the problem when it stepped into the shoes of the former employer.
- 10.15 This was not done. The first respondent says that despite investigations, no documentary proof could be found of any deduction or payment on behalf of the complainant to any pension or provident fund. Neither was the complainant able to produce evidence of such proof of payments or deductions from his salary.
- 10.16 The first respondent submitted that it was therefore unable to establish whether indeed the complainant's former employer, Vista University, made any pension deduction from his salary.
- 10.17 The fourth respondent confirms that that according to their records, the complainant withdrew from the fund on 31 May 1998 and re-entered on 1 July 2000. No contributions were received for the period June 1998 to 1 July 2000.
- 10.18 In the absence of any proof to the contrary, this information has to be accepted.
- 10.19 The complainant submits that it is the responsibility of the respondents to provide the necessary documentary evidence from their records.
- 10.20 In the absence of any *prima facie* documentary evidence from the complainant, the complainant cannot reasonably require the



**MAMODUPI MOHLALA  
PENSION FUNDS ADJUDICATOR**