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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, OF 1956 (“the Act”) – JC RAUTENBACH v ANGLOGOLD ASHANTI LIMITED & ANOTHER

Introduction

[1] This complaint concerns the calculation of your retirement benefit. The complaint was received by this office on 8 June 2005 and a letter acknowledging receipt thereof sent to you on 14 June 2005. On 14 June 2005 a letter was dispatched to the respondents giving them until 5 July 2005 to file a response to the complaint. The response dated 22 June 2005 was received on 22 June 2005. On 23 June 2005 the response was sent to you for a reply by 7 July 2005. A reply was received from you on 6 July 2005. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter.

Facts

[2] You were previously employed by the Gold Division of the Anglo American Corporation of South Africa (“the employer”) and were a member of Mine Officials Pension Fund. On 18 January 1983, you received a letter from your employer offering you employment on revised terms and conditions.

[3] In terms of clause 4 of the offer, you were required to become a member of the Anglo American Group Pension Fund (“the Anglo fund”) in which event your membership of the Mine Officials Pension Fund (“the Mines fund”) would be frozen and the benefits accruing from membership of this fund would be paid on retirement.

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

- [4] You decided to accept the offer which came into effect on 1 March 1983.
- [5] In or about 1993, you terminated your membership of the Mines fund and received a withdrawal benefit equal to your own contributions plus interest. (Presumably the Mines fund was unaware of the terms of the offer as set out in paragraph 3).
- [6] You subsequently retired with effect from 1 May 2005. You currently receive a monthly pension of R8 356.91 from the Anglo fund which was calculated on the basis of membership from 1 March 1983.

Complaint

- [7] Your complaint is that, according to you, when you accepted the offer, the employer gave you an undertaking that the benefit payable to you from the Anglo fund to which you transferred would not be less than the benefit that would have been payable to you had you continued contributing to the Mines fund until retirement age.
- [8] You believe that your pensionable service with the Anglo fund should be increased by 7,47 years to account for the employer contributions paid to the Mines fund on your behalf but not passed on to you. According to your calculations this entitles you to an additional amount of R31 028.72 which in turn would entitle you to a monthly pension of R10 942.64.
- [9] You also contend that you paid too much tax.

Response

- [10] Both the employer and the Mines fund have responded to your complaint. The employer has raised a technical point that by virtue of section 30I of the Act I am not permitted to investigate and determine your complaint. Given my finding in this matter, I find it unnecessary to canvass the respondents' response on the merits.

Determination and reasons therefor

- [11] Section 30I provides for certain time-limits with regard to the lodging of complaints and reads 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.”

[12] You became aware of your possible claim at the very latest in March 1995 as evidenced by your memorandum dated 20 March 1995 addressed to Ms Swart (attached to your complaint as annexure D1). I refer you in particular to the following paragraph:

“Recently we found out that the rules as were explained to us does not exist (sic). We now realize that the G.D.S pension is only valid from 01/03/83, the date of acceptance of the revised conditions.”

[13] Therefore your complaint ought to have been lodged by the latest 21 March 1998. It was only received by this office on 8 June 2005 which is more than seven years out of time.

[14] There is good reason for a limit being 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.”

[15] 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 good cause to enable me to do that.

[16] 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 532C:

“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 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.”

- [17] A delay of some 7 years in this instance is significant. Your explanation therefor is that you referred the matter to my office as a last resort, your union having failed its members to have the matter resolved. This is not a satisfactory explanation. When after a few years the dispute had still not been resolved, the reasonable person would have considered pursuing the alternative options. Yet you waited until 2005, some 10 years from the date on which you became aware of the possible claim before lodging your complaint with my office.
- [18] Moreover, your prospects of success on the merits are not good. Your complaint concerns the undertaking which you contend was given by your employer when you accepted the changed conditions of employment. This is therefore a matter unrelated to any pension fund. (I note in this regard that your complaint is not directed against either of the funds in question but against the employer and the union). As such, my jurisdiction to investigate and determine your complaint is questionable.
- [19] Furthermore, your claim to a retirement benefit which takes into account your years of service prior to you becoming a member of the Anglo fund is also questionable especially given that you have already received a withdrawal benefit from the Mines fund in respect of those years of service. Again any arrangement between you and the employer does not bind the fund which may only pay benefits in accordance with its rules.
- [20] Taking into account all the circumstances, I cannot find good cause to condone non-compliance with the time limits set out in section 30I. The complaint therefore remains time-barred and I may not investigate it.

Relief

