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Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 1956 ("THE ACT") – M N KHOZA ("COMPLAINANT") v FNB PENSION FUND ("FIRST RESPONDENT") AND LEKANA EMPLOYEE BENEFIT SOLUTIONS ("SECOND RESPONDENT")

[1.0] Introduction

- [1.1] The main complaint concerns the cash payment of a lump sum amount that had earlier been allocated by the first respondent to provide a monthly pension to the complainant. The complainant also alleges that the first respondent has not sent sufficient information or communication to him regarding its operation and investment decisions through the years. He also objects to the second respondent allegedly controlling the fund's investments. The complaint was received on 8 November 2005. A letter acknowledging the receipt of the complaint was sent on 14 November 2005.
- [1.2] On 14 November 2005 a letter was sent to the respondents giving them until 5 December 2005 to respond to the complaint. A response, which was also forwarded to the complainant, was received on 14 July 2006. A further response was received on 4 September 2006. Replies from the complainant were received on 15 August 2006 and 13 March 2007.
- [1.3] After considering the submissions before this tribunal, it is unnecessary to hold a hearing in this matter. The facts are known to the parties so they will not be repeated here, save for that which has a bearing on the outcome of this determination. The determination and reasons therefor appear below.

M Mohlala (Adjudicator), C Nkuhlu (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), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator)

[2.0] Factual background

- [2.1] The complainant was an employee of the erstwhile Barclays Bank from 1980. He continued as an employee when Barclays Bank was taken over by First National Bank, until he went on early retirement in 1994. By virtue of the complainant's employment he was a member of the first respondent. He became a pensioner of the first respondent in 1994 once he had taken early retirement. On 31 March 1994 one-third of the complainant's pension benefit, in the sum of R39 682.58 after tax, was commuted to cash and paid into his cheque account. The remaining two-thirds of the benefit was used to provide the complainant with a pension of R5 759.76 *per annum* in 1994, which had increased to R13 227.84 *per annum* by October 2004.

[3.0] Complaint

- [3.1] It was difficult discerning the complainant's specific complaints, but it appears that his primary complaint is that he wants a refund of all his contributions to the first respondent, or the capital that is used to provide the pension he is now receiving, so that he can invest it himself, presumably in a business that he intends establishing, rather than have the second respondent allegedly manage his pension fund money. He also believes that his pension fund contributions are still being held by his erstwhile employers, Barclays Bank and First National Bank.
- [3.2] The complainant also complains about the alleged lack of benefit statements or other communication from the first respondent, which means that he is unaware of the rules or the latest developments at the first respondent. He also alleges that there were no trustees managing the first respondent and that they were only appointed after he complained in 2004. The complainant also avers that he was employed by a multinational company in 1980, so he believed his employment was guaranteed. He further alleges that he was given a guarantee that he will get a pension in 2003, but he was disappointed when he had to take his pension 10 years earlier without any reasons being provided. He goes on to allege that he was not paid the lump sum amount of R40 000, contrary to the assertion of the respondents that he did in fact receive payment.

[4.0] Responses

- [4.1] Joint responses were received from the second respondent on behalf of both the respondents. In its initial response to the complainant's complaint, dated 1 October 2004, the second respondent confirmed that the complainant was an active member of the first respondent from 1 January 1980 to 31 March 1994. In accordance with the fund rules at the time, members were only permitted to take a full pension from the fund or commute a portion in cash (to a maximum of one-third of the benefit) together with a reduced pension. The complainant

apparently elected to take the maximum commutation of R40 893.58, less tax of R1 211.00, together with a reduced pension of R5 759.76 *per annum*. By October 2004 the complainant received a pension of R13 227.84 *per annum*, which included all pension increases granted over the years since his retirement. The second respondent advised the complainant that only a monthly pension is due to him rather than any lump-sum amount. This is in terms of the fund rules, the Act and the Income Tax Act, 1962.

- [4.2] The second respondent again responded directly to the complainant on 2 November 2004, attaching to the response copies of the tax deduction directive as well as a copy of the deposit slip showing an amount of R39 682.58 deposited into the complainant's bank account. Also attached in the correspondence to the complainant was a copy of a letter from the employer's pensions department advising him of the details of his retirement benefit.
- [4.3] The respondents informed this tribunal that they had responded to the complainant's initial complaint within a few days of receiving it. With regards to the complaint that the complainant did not know how the first respondent was run and by whom, they advised that the first respondent is managed by a board of trustees ("the board") as required by section 7 of the Act. Similarly, the trustees' duties, obligations, rights and authority is determined in terms of legislation and the fund rules.
- [4.4] They went on to advise that the board formally communicates with all pensioners at least once a year. As proof of this, reference was made to the communication letter of 2004 which was attached to the complainant's complaint. In addition, due to the pensions being paid by the fund and payslips being issued to the pensioners by First National Bank's payroll department, *ad hoc* correspondence is sent to pensioners along with their payslips when required. Therefore, the respondents aver that it is inconceivable that the complainant could allege that he was unaware that first respondent was managed by the board, since pensioners are also involved in the nomination and election of trustees. They suggested that if the complainant didn't receive his monthly payslip he should contact the first respondent to update his address so that receives all future communications.
- [4.5] The respondents refer once again to the pensioner communication attached to the complaint and aver that detailed communication is provided to pensioners regarding the performance of their fund, changes in legislation, their benefits and pension increases. In their view this provides the complainant with "significant" information regarding the operation of the first respondent. Again, they invite the complainant to contact the second respondent, the trustees or the company's pensions department if he has any questions about communication or management of the first respondent.
- [4.6] With regard to the complaint that the complainant never received monthly or annual investment statements to show how his money was invested the

respondents submit that since the complainant is a pensioner he is entitled to a monthly pension in terms of the first respondent's rules. Since he is a defined benefit member his pension was determined in accordance with the formula contained in the rules. While the determination of the pension amount is unrelated to investment performance, the respondents agree that pension increases are determined with reference to the first respondent's investment performance. However, in the annual communication sent to all pensioners it is set out in detail what the first respondent's investment strategy is, its performance in the preceding year, the pensioner increases granted and the reasons for the declaration. Pensioners also receive monthly payslips setting out their pension amounts and any deductions.

- [4.7] With regard to the complaint about not being provided with a booklet about the first respondent's rules and how it operates the respondents advised that since the complainant retired in 1994, and although they have been assured by long-standing staff that booklets were in fact made available to staff at the time, it is impossible to determine whether the complainant ever actually received such a booklet. The respondents advise that the complainant is entitled to receive such information and he is entitled to request a copy of the first respondent's rules, which the respondents will provide on request.
- [4.8] With regard to the complaint about his guaranteed employment and his retirement 10 years earlier than what he was promised, the respondents submit that these are labour-related issues and it is inappropriate for the respondents to respond to them. They do confirm though that the first respondent uses various asset managers for the investment of its assets. Further, the rules and legislation prevent the commutation of a pension into a lump sum after retirement. Since the complainant received the maximum cash commutation on his retirement, he can now only receive a monthly pension.
- [4.9] With regard to the complaint against the second respondent managing the first respondents investments the respondents advise that the second respondent is the administrator of the first respondent, appointed as such by the board to administer the records of the first respondent. As administrator the first respondent does not hold or manage the investments of the first respondent. The first respondent owns all its assets in its own name. The investment strategy and appointment of investment and asset managers is determined by the board. The respondents also appear to have discerned from the complaint that the complainant alleged that he was accused of theft whilst in employment and that money was deducted from his salary. In response they advise that they cannot comment on this because it falls outside of pensions matters. But, they point out that the complainant retired in March 1994 and it is unlikely that any records exist 15 years later to show whether such an incident occurred or not. The respondents do note that since the complainant belonged to a defined benefit fund he was entitled to and received a pension based on his full pensionable period of service, namely from January 1980 to 31 March 1994.

- [4.10] With regard to the alleged disappointment of the complainant about being compelled to belong to the first respondent and the allegation that he would have achieved better investment returns if he managed his own benefit, the respondents note that legislation compels employers to make fund membership a condition of employment. Therefore, the complainant was compelled to be a member of the first respondent and the respondents cannot comment on the complainant's investment expertise.
- [4.11] Concerning the allegation of a secret deal between First National Bank and the second respondent regarding the investment of assets, the second respondent notes that it is not an asset manager and does not hold any assets for the complainant. Lastly, with regard to the demand that the complainant's retirement monies be paid to him it is noted that legislation prevents the first respondent from paying the balance of the benefit to him so that he can start his own business. This was communicated to the complainant *via* his former attorney.
- [4.12] In a further response received on 4 September 2006 the respondents advise that the rules of the first respondent clearly show that a board was established on 1 August 1958 in terms of a trust deed. They also note that since 1996 the Act requires pension funds to have boards of trustees. Therefore, the respondents deny that the first respondent had no board of trustees until 2004. Secondly, with regard to the pamphlet on surplus apportionment payments referred to by the complainant, the respondents advise that the first respondent did not have a surplus and it submitted a nil surplus scheme to the Financial Services Board, which has been approved by the Registrar of Pension Funds.

[5.0] Determination and reasons therefor

Points in limine

- [5.1] Before considering the merits of this case it needs to first be determined whether parts of this complaint are time barred in terms of section 30I of the Act. The complainant's complaints relating to the circumstances leading to him taking early retirement and the payment of the R40 000 lump sum amount relate to complaints that, at the latest, arose in March 1994 following the complainant's retirement from service and receipt of a pension from the first respondent. Thus, a period of approximately 11 years and 7 months passed before the complaint was lodged with this tribunal. 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(1) 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."

- [5.2] However, the enquiry does not end there as this tribunal still needs to satisfy itself as to whether or not good cause has been shown, or exists, for it 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 Melane case") the court said:

"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 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."

- [5.3] Therefore, all the facts need to be objectively weighed before deciding whether to condone the late submission of this complaint. As alluded to in paragraph 5.1, more than 11 and a half years passed before a complaint was lodged with this office. This is an extraordinarily long delay and no reason for it was provided.
- [5.4] As regards the prospects of success of the complaint regarding the circumstances leading to the complainant taking early retirement, it is noted that the respondents have advised that this is a labour-related issue rather than a pensions one. Further, they noted that the complainant retired in March

1994 and it is unlikely that records still exist to verify what occurred then. It is also concerning that the complainant only complains about the manner in which he was placed in retirement some 11 and a half years after the event occurred. As the Constitutional Court stated in the *Mohlomi* case (quoted in paragraph 5.1 supra), inordinate delays in litigation damage the interests of justice and it may not be possible to satisfactorily adjudicate these disputes since witnesses may no longer be available, memories may have faded and documentary evidence may have disappeared. This is precisely what has happened in the present matter. There is no documentary evidence available pertaining to the circumstances leading to the complainant's early retirement. It would be remiss of this tribunal to find against the respondents in these circumstances given the lack of evidence substantiating the complainant's bald allegation.

- [5.5] The complaint regarding the payment of the one-third cash commutation amount of R39 682.58 also falls to be time barred since it arose on 31 March 1994. On the merits of this complaint it is noted that the complainant was provided with a deposit slip showing that the money was deposited into his First National Bank account on 31 March 1994. That the complainant alleges some 11 and a half years later that he never received this payment is extraordinary and places an undue burden on the respondents to prove that payment was made at the time. In this tribunal's view a bald allegation by the complainant that he did not receive payment contrasted with the respondent's submission of a deposit slip evidencing payment to him is enough to suggest that there is little prospect of success with this complaint and, as stated in the *Melane* case, if there are no prospects of success with a case there is no point in granting condonation for the late filing of the complaint.
- [5.6] Taking all these factors into consideration, no good cause exists for this tribunal to extend the time limit prescribed for lodging a complaint in terms of section 30I(1), nor does this tribunal condone the non-compliance with the time limit prescribed in the section. Therefore, the complaints relating to the circumstances leading to the complainant's early retirement and the payment of the one-third cash amount to him are time-barred.
- [5.7] The complainant also complains about the alleged guarantees of employment until 2003 that were provided to him by the multinational company he started working for. This is a labour-related matter that falls outside the purview of this specialist tribunal which, in terms of the definition of a "complaint" in section 1 of the Act is only empowered to deal with complaints against pension funds relating to their administration, the investment of their assets or the interpretation and application of their rules. Thus, this aspect of the complaint cannot be adjudicated upon by this tribunal because it does not fall within the definition of a complaint as envisaged by the Act.

The merits

- [5.8] The remaining complaints concern, firstly, the alleged lack of information about the operation of the fund and the non-provision of benefit statements or information updates. Secondly, the complainant complains that he wants the respondents to pay whatever capital amount is remaining in the first respondent so that he can manage it himself and start a new business with it, rather than leaving it in the hands of the second respondent to manage and control.
- [5.9] The respondents submitted that they do provide regular information to pensioners regarding the operation of the first respondent as well as its investment strategies and performance. As evidence of their submission they note that the complainant attached to his complaint a detailed pensioner communication brochure dated 31 March 2004. Further, the pensions department provides monthly payslips to pensioners. It is noted that in the complainant's reply dated 14 August 2006 it is admitted that he receives monthly payslips. The respondents suggest that if the complainant's address has changed, he inform them so that he receives regular communications from them in future. In terms of section 35 of the Act any fund member is entitled to receive on demand, and on payment of a sum determined by each fund's rules, a copy of the fund's rules and the latest revenue accounts and balance sheet of the pension fund. Further, in terms of section 35(2), members are permitted to inspect certain documents at the registered office of funds.
- [5.10] From the information available it is impossible to determine with any certainty whether the complainant received fund communication letters before 31 March 2004. However, it is clear though that he received the communication of 31 March 2004 and he admits to receiving payslips showing his monthly pension and any deductions each month. I also note that it is the complainant's responsibility to inform the first respondent of any changes in addresses so that he may continue receiving fund information. The respondents have undertaken to provide information documents and rules to the complainant if he required them and they can also be obtained from the first respondent's website. Therefore, I am not in a position to find against the respondents regarding this complaint.
- [5.11] Further, with regard to the operation of the first respondent, the respondents have clearly stated that the first respondent is controlled by a board of trustees as required by the Act and this has been the case since 1958. This tribunal has no reason to doubt the veracity of this submission. The board also has the prerogative to appoint administrators and it has done so by appointing the second respondent. No cogent reason exists for this tribunal to interfere with the board's decision in this regard. The respondents have also advised that the first respondent's assets are managed by independent asset managers and not the second respondent as alleged by the complainant. Again, this tribunal has no reason to doubt their submission in this regard. The complainant also needs to know that the first respondent is a separate entity in law from the erstwhile employer. It is registered as a pension fund organisation

in terms of the Act and is governed by a board of trustees. Thus, the allegation that the complainant's former employer still controls or holds his pension monies is incorrect.

- [5.12] The last complaint to be determined is the complainant's allegation that the respondents have refused to permit him to take a cash payment of his pension capital, which is presently being utilised to provide him with a monthly pension. Allied thereto is his assertion that he could manage these funds better than the respondents by using it to start a new business. It is evident that this is the crux of the complainant's complaint.
- [5.13] The first respondent is a registered fund in terms of the provisions of the Act and it is bound by its rules in the same way as its members, officials, shareholders and persons claiming under the rules (see section 13 of the Act). By virtue of the binding nature of the rules, the trustees of the first respondent, the members, the employer and any service provider such as the administrator of the first respondent may only do that what is set forth in the rules (see *Tek Corporation Provident Fund & Another v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D-E).
- [5.14] In terms of rule 15 of the rules applicable to defined benefit fund members such as the complainant, retiring members are allowed to commute for cash a maximum of one third of their benefit entitlement. The rule reads as follows:

"15. COMMUTATION:

A Member to whom a pension has been granted (whether immediate or deferred) may at the time when the pension becomes payable have the option of commuting a proportion of his pension entitlement up to a maximum of one third for a cash payment to be calculated on the expectation of life according to actuarial tables on a 5% basis or on the basis of such other rate as may be fixed by the Directors from time to time and which will not lead to the withdrawal of the approval of the Fund under the provisions of the Income Tax Act; provided that no greater proportion of his pension shall be commuted than that proportion which leaves the balance of his pension equal to or greater than the minimum amount determined for the purposes of this Rule by the Trustees from time to time."

- [5.15] Pension funds are defined in section 1 of the Income Tax Act, 58 of 1962. In terms of the definition, not more than one-third of the total value of an annuity that becomes payable from a pension fund may be commuted for a single lump-sum payment. The relevant sub-sections read as follows:

"'pension fund' means-

- (a) ...
 - (b) ...

(c) ... Provided that the Commissioner may approve a fund subject to such limitations or conditions as he may determine, and shall not approve a fund in respect of any year of assessment unless he is in respect of that year of assessment satisfied-

 - (i) that the fund is a permanent fund *bona fide* established for the purpose of providing annuities for employees on retirement from employment or for the dependants or nominees of deceased employees, or mainly for the said purpose and also for the purpose of providing benefits other than annuities for the persons aforesaid; and
 - (ii) that the rules of the fund provide-
 - (aa) ...
 - (bb) ...
 - (cc) ...
 - (dd) that not more than one-third of the total value of the annuity or annuities to which any employee becomes entitled, may be commuted for a single payment, except where the annual amount of such annuity or annuities does not exceed R1 800 or such other amount as the Minister of Finance may from time to time fix by notice in the *Gazette*;

...”

[5.16] The complainant received his maximum one-third cash commutation when he retired in March 1994. Thus, as is clear from the preceding two paragraphs, both the rules and the Income Tax Act prohibit the first respondent from paying the remaining two-thirds of his pension annuity in cash to him. The Supreme Court of Appeal has confirmed in the *Tek Corporation* case that the board has to act in terms of its rules and the law. Therefore, the respondents were correct in refusing the complainant's request for payment of what is left of his pension annuity in cash to him.

[5.16] In the result, the complaint cannot succeed.

DATED AT JOHANNESBURG ON THIS DAY OF 2008.

Yours faithfully

MAMODUPI MOHLALA PENSION FUNDS ADJUDICATOR