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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): S ZUMA v MINE WORKERS PROVIDENT FUND (“the fund”) / ANGLOGOLD FREE STATE OPERATIONS (“the employer”)

Introduction

[1] Your complaint concerns the calculation of the withdrawal benefit that you received from the fund. The complaint was received by this office on 20 September 2005 and a letter acknowledging receipt thereof was dispatched to you on 23 September 2005. A letter was also sent to the first respondent on the same day giving it until 14 October 2005 to file a response to the complaint. On 18 October 2005 a response was received from the fund. The response was sent to you on 18 July 2006. No reply was received from you. I consider it unnecessary to hold a hearing in this matter. My determination, together with reasons therefor, is set out below.

Complaint

- [2] You commenced employment with the second respondent in 1986. You became a member of the fund by virtue of your employment until you were retrenched on 9 December 1999. Upon termination of your service, you received a benefit of R35 248, 73 from the fund.
- [3] You allege that the fund did not include the contributions that you made to it during the years 1996 and 1997 respectively, when calculating your benefit. You accordingly request this tribunal to investigate why your contributions for those years were not included in your benefit.

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

Response

- [4] The fund confirms that you were a member with effect from 25 May 1990. It disputes that you became a member when you commenced employment with the employer and contends that the fund was only established in 1989.
- [5] The fund states that you rely on Form D (“the form”) which is required to be completed in support of an application for a tax directive upon retirement or death of a member. The fund states further that since your salary for the period 1996 and 1997 was not reflected in the form which was completed by your employer, you erroneously assume that your contributions for those years were not included when the fund calculated your benefit.
- [6] The fund states that the form is a declaration by an employer which must be submitted to the fund, setting out the remuneration earned by a member over the last five years of employment to determine the member’s average salary for the purposes of determining the tax liability in terms of the Second Schedule of the Income Tax Act.
- [7] The fund contends that the form is only relevant for tax purposes and has no bearing whatsoever on your period of fund membership or in the calculation of your withdrawal benefit. It accordingly contends that the full period of your membership of the fund was taken into account in determining your retirement benefit including the period of 1996 and 1997. It also states that members receive the same benefit in terms of the rules of the fund irrespective of whether they are retrenched, resign or retire.
- [8] The fund has also advised that in June 1998 you applied for a housing loan for an amount of R15 000.00, which was secured by the fund in terms of a surety agreement concluded between the fund and Standard Bank. It confirms that at the time of termination of your service, your outstanding housing loan was R13 585.02. The fund has set out the calculation of your benefit as follows:

“Member contributions plus fund returns	R19 412.25
Employer contributions plus fund returns	R29 421.50
Gross benefit	R48 833.75
Less –	
Housing loan balance outstanding	R13 585.02
Tax	R 0.00
Net benefit payable	R35 248.73”

Determination and reasons thereof

[9] 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) 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;
 - (b) condone non compliance with any time limit prescribed by this Chapter.”

[10] The date of accrual of your benefit was in December 1999. Your complaint was lodged on 20 September 2005. It ought to have been lodged in December 2002. The complaint was therefore received almost three years out of time.

[11] 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.”

[12] 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 cause to enable me to do that.

[13] 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.”

- [14] More than 5 years elapsed before you lodged your complaint with this office, which, in my view, is an extraordinarily long delay. Nor have you provided cogent reasons for the delay to support the condonation of your non-compliance with the time limits set out in the Act.
- [15] Regarding your prospects of success on the merits, the fund has explained that the “missing years” of service have not been omitted from the calculation of your benefit. Since you have not added anything further by way of reply, the implication is that you accept this explanation. The probabilities are consequently strong that you received your due entitlement in terms of the rules of the fund. The prospects of success on the merits are therefore poor.
- [16] 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. Your complaint therefore remains time-barred and I may not investigate it.
- [17] In the result, your complaint is dismissed.

Dated at Cape Town on this the _____ day of _____ 2007.

Yours faithfully

Vuyani Ngalwana

Pension Funds Adjudicator