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Please quote our reference: PFAKZN/4090/2005/NVC

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”): F A Mbongwe v Orion Money Purchase Provident Fund (“the fund”) and Office Valet Services (“the employer”)

Introduction

[1] You act on behalf of Mrs. F A Mbongwe, whose complaint concerns the respondents’ failure to assist her in claiming death benefits. The complaint was received on 29 June 2005 and a letter acknowledging receipt thereof was sent to you 30 June 2005. On the same date letters were dispatched to the respondents requesting them to submit responses to your client’s complaint by 21 July 2005. The fund’s response dated 25 July 2005 was received on the same date. No response has been received from the employer. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter. As the facts are known I shall not burden this determination by repeating them here. My determination and reasons therefor appear below.

Complaint

[2] Your client is unhappy that the respondents have not assisted her in claiming the death benefits, payable after the death of her son, Mr P Mbongwe, who was employed by Office Valet Services from 1 August 1998 up to his death on 6 December 1998. Regardless of numerous attempts, Mrs. Mbongwe has not received the death benefits.

The fund’s response

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

- [3] The fund states that the employer's participation in the fund discontinued in January 1999 but it had thoroughly searched its records on more than one occasion and it was unable to trace the late Mr P Mbongwe on its records.

Determination and reasons therefor

- [4] This office made the following attempts to obtain a response from Office Valet Services with regard to your client's complaint:

30 June 2005 by letter
20 January 2006 by electronic mail
16 May 2006 telephonically
16 May 2006 by letter
28 June 2006 telephonically
28 June 2006 by letter

- [5] Office Valet Services has opted to ignore all these attempts and it has not submitted a response. It appears that the employer has also disregarded your efforts to obtain information over a period of time. This is undeniably very poor service and shows a total disregard for its duty of good faith to its employee and his dependant(s).
- [6] We contacted NBC Holdings Limited ("NBC") on 13 December 2005 to ascertain if Mr P Mbongwe did not perhaps belong to the Contract Cleaning National Provident Fund due to him being employed as a cleaner. However, NBC advised on 17 January 2006 that it too could not find Mr P Mbongwe on its records.
- [7] Finally we contacted the Financial Services Board ("FSB") on 1 August 2006 but it advised on 17 August 2006 that it does not have information of the current fund in which the employer participates. The FSB suggested that we contact Old Mutual, which we have done, without any success.
- [8] Further, my assistants have, over a period from 17 August to 28 August 2006, again contacted both the complainant and your Law Clinic, to find out if there were any documents, not previously submitted, to prove the deceased's membership of a fund, but these efforts have also not been successful.
- [9] From the evidence the employer participated in the Orion Money Purchase Provident Fund up to January 1999 and if any benefit was held in respect of Mr P Mbongwe, whose membership terminated on his death on 6 December 1998, it should have shown on its records. However, the fund states that it is unable to trace him.

[10] Section 30I of the Act reads:

“(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.”

[11] It is clear from the complaint that the events to which it relates occurred more than three years before this complaint was lodged at this office on 29 June 2005.

[12] 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.”

[13] However, that the complaint was lodged outside the three year time period in terms of section 30I of the Act is not the end of the matter as I still have discretion to extend the three year time period or to condone non-compliance therewith.

[14] 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."

[15] The merits do not favour your client. Despite your client's and this office's numerous attempts to obtain information from the employer and other entities, the deceased's membership of a fund has not been established. Given the time lapse of almost eight years since the death of the deceased in 1998, there is a diminishing chance of extant records which would shed light on the identification of a particular fund of which the deceased may have been a member. I am therefore not persuaded that good cause exists to condone the late submission of this complaint.

[16] The complaint is time-barred and the file is hereby closed.

Dated at Cape Town on this the day of 2006.

Yours faithfully

Vuyani Ngalwana
Pension Funds Adjudicator