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Please quote our reference: PFA/EC/9712/2006/AM

**Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”) – V W Nelo (“the complainant”) v Group Five Pension Fund (“the respondent”)**

1. Introduction

- 1.1 This complaint concerns the alleged failure of the respondent to pay the complainant his withdrawal benefit.
- 1.2 The complaint was received by this office on 26 July 2006. A letter acknowledging receipt thereof was sent to the complainant on 30 August 2006. On the same date a letter was dispatched to the respondent giving it until 29 September 2006 to file its response to the complaint. A response was received on 27 September 2006 and was forwarded to complainant on 19 October 2006. The complainant, however, omitted to reply.
- 1.3 After considering all the written submissions presented, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefore appear below.

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M Mohlala (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), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Nekile (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator), S Mothupi (Assistant Adjudicator)

Office Manager: L Manuel

## 2. Factual Background

2.1 The complainant is a former employee of Savage and Lovemore (Cape)(PTY) Limited (“the employer”) since 17 October 1973 until 19 March 1981, and by virtue of his employment became a member of the respondent.

## 3. Complaint

3.1 The complainant is aggrieved by the alleged failure of the respondent to pay him his pension benefit due to him and requests this Tribunal to order the respondent to pay his benefit.

## 4. Response

4.1 The respondent states that Savage and Lovemore (Cape) (PTY) Limited (“the employer”) was only incorporated into the Group Five Pension Fund (“the fund”) on 1 March 1982.

4.2 The respondent further states that, because the complainant left the employment of Savage and Lovemore on 19 March 1981, he was not a member of the respondent.

## 5. Determination and reasons therefor

### Time barring

5.1 Although the respondent did not raise any point regarding the provisions of section 30I of the Pension Funds Act as at the date prior to the amendment, the peremptory nature of the said provisions precludes this Tribunal from investigating and adjudicating upon any complaint which was received more than three years from the date on which the act or omission giving rise the complaint occurred. Thus, this Tribunal is compelled to consider whether the provisions of the section are applicable in *casu*.

5.2 Section 30I of the Pension Funds Act as at the date prior to the amendment imposes certain 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.”

5.3 There are valid reasons for the imposition of a limit to the period within which proceedings have to be instituted 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 be available to testify. The memories of ones whose testimony can be obtained have faded and become unreliable. Documentary evidence may have disappeared. Such ruled prevent procrastination and those harmful consequences of it. They serve a purpose to which no exception in principle can cogently be taken.”

5.4 The date when the complainant left his employment was 19 March 1981 when he became entitled to a withdrawal benefit in terms of the rules. The respondent allegedly failed to pay him the benefit. Thus the act or omission to which this complaint relates occurred over 13 years before this complaint was received. The complaint is thus time –barred. The matter, however, does not end there as I still have to consider, in accordance with the provisions of section 30I (3), whether good cause has been shown, or exists, for the late lodging of this complaint.

5.5 Whether good cause exists is a matter that can be determined by a consideration of all the relevant factors. The Supreme Court of Appeal (or Appellate Division as it was the 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) at page 532B-, 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 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 therefore, 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 prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."

- 5.6 The delay in the lodging of this complaint is considerably long. This is exacerbated by the absence of an explanation for the failure to lodge the complaint or at least institute proceedings before the ordinary civil courts timeously.
- 5.7 This matter is a typical example of a case in which, due to the passage of time, documentary evidence has gone missing or has been destroyed. Not only would it be inconvenient, but would also be unfair, under the circumstances, to require the respondent to answer to the complainant's claim.
- 5.8 Regarding the prospects of success on the merits, the respondent states that the complainant was not a member of the fund at the time of his retirement on 19 March 1981 as his former employer was only incorporated into the respondent on 1 March 1982. However due cognisance is taken of the fact that should the complainant be able to show salary deductions then the employer could be held liable.
- 5.9 However, based on the issues raised in 5.7 above, clearly to hold this complaint is not time barred would result in considerable prejudice to the respondent due to passage of time.

## 6. Relief

- 6.1 In the result, the complaint is dismissed.

DATED AT JOHANNESBURG ON THIS                      DAY OF                      2007.

Yours faithfully

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**MAMODUPI MOHLALA**  
PENSION FUNDS ADJUDICATOR