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Please quote our reference: PFA/GA/5062/2005/RM

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“THE ACT”) – M MICHALOPOULOS v LIBERTY PENSION FUND (“THE FUND”) AND LIBERTY GROUP LIMITED (“THE EMPLOYER”)

Introduction

- [1] The complaint concerns the alleged under-payment of a withdrawal benefit by the fund when you left employment in 1993. Your complaint was received on 14 July 2005. A letter acknowledging receipt of it was sent on 31 August 2005. On the same date a letter was dispatched to the employer giving it until 21 September 2005 to file a response to the complaint. A response, which was forwarded to you, was received on 9 September 2005. This office received your reply on 22 November 2006. Having considered the submissions I find it unnecessary to hold a hearing in this matter. The facts are known to the parties, so I will only repeat those that I believe are pertinent to this determination. My determination and reasons therefor appear below.

Background facts

- [2] You were employed by the employer from 1 March 1984 until 30 September 1993. By virtue of your employment you were a member of the fund and became entitled to a withdrawal benefit in terms of fund rule 7 when you left the employer’s service.

Complaint

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)

Office Manager: L Manuel, Financial Manager: F Mantsho, Accountant: R Soldaat

- [3] You complain that the fund did not pay you your full withdrawal benefit when you exited it in September 1993. You also complain that you heard through the media that the fund did not have any surplus to distribute in terms of its surplus apportionment scheme, which you find “very strange.”

Response

- [4] A joint response was received from the respondents advising that you only lodged your complaint 12 years after exiting the fund so it has prescribed and is time barred in terms of section 30I of the Act. You do not provide any reasons for the delay in lodging your complaint.
- [5] On the merits they advise that the fund rules stipulate that members who had 9 or more years of service received 100% of their notional deferred pension entitlement. Since you had more than 9 years service you would have received your full entitlement. They were not able to provide any details of the benefit paid to you because they no longer have any member records for the period in question. With regard to the complaint relating to the fund’s surplus apportionment scheme they advise that the fund does have a surplus but that it would be distributed to those members and former members who had less than 9 years of service.

Determination and reasons therefor

- [6] I first address the point *in limine* raised by the respondents regarding time-barring of your complaint in terms of section 30I of the Act. This complaint relates to a cause of action that arose in October 1993, when you left the employer’s service. The complaint was received by this office on 14 July 2005. Thus, a period of approximately 11 years and 9 months elapsed before you lodged your complaint. Section 30I(1) of the Act requires that a complaint be lodged within 3 years of the occurrence of the cause of action giving rise to it. Thus, your complaint 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.”

- [7] However, the enquiry does not end there as I still need to satisfy myself as to whether or not good cause has been shown, or exists, for me to extend the 3 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 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.”

- [8] As alluded to in paragraph 6, the delay in bringing this complaint is approximately 11 years and 9 months. This is an extremely long delay. The Constitutional Court, in the *Mohlomi* case cited in paragraph 6 above, confirmed that inordinate delays in litigation damage the interests of justice and that it may not be possible to satisfactorily adjudicate cases that have gone stale due to the lack of reliable evidence. The respondents have not been able to find records to substantiate the payment you received and you have not provided any detail of the alleged underpayment of your withdrawal benefit. Thus, there is a dearth of evidence in this matter which makes it impossible for me to ascertain with any certainty whether you were paid the correct benefit. This lack of evidence is attributable to the length of time that it has taken for you to lodge your complaint.
- [9] I also need to consider the merits of your case and note that rule 7 requires that members with 9 years or more of service receive 100% of their notional deferred pension entitlement when they leave employment. Since you had more than 9 years of service, you would have received your full share of the fund when you exited the fund. Thus, I am of the view that you have little prospects of success with your complaint on the merits.
- [10] Therefore, given the long delay in submitting your complaint to this office, the lack of any explanation for the delay and the very limited prospects of success with the complaint, no reasonable cause exists for me to condone the non-compliance with the time limit of 3 years prescribed in section 30I of the Act. In

the circumstances, your complaint regarding the quantum of the withdrawal benefit you received from the fund is time barred.

[11] Your complaint relating to the fund's surplus apportionment scheme falls outside the jurisdiction of this office. Section 30H(4) of the Act removes my jurisdiction to consider complaints relating to decisions taken about surplus apportionment schemes in terms of section 15B of the Act. Your complaint in this regard should first be lodged in writing with the board of management of the fund, who will thereafter notify you of the process to follow if you are dissatisfied with their response.

[12] In the result, your complaint cannot succeed in this forum.

DATED AT JOHANNESBURG ON THIS DAY OF 2008

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR