



**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR
(HELD IN CAPE TOWN)**

CASE NO: PFA/EC/9108/06/KM

In the complaint between:

L E M P O N D O

Complainant

and

**GLAXO WELLCOME SOUTH AFRICA
PENSION FUND**

Respondent

**DETERMINATION IN TERMS OF SECTION 30M OF THE
PENSION FUNDS ACT 24 OF 1956 (“the Act”)**

1. Introduction

- 1.1 The complaint concerns the cessation of the pension payable to the complainant as an “eligible child” consequent on the death of his father.
- 1.2 The complaint was received by this office on 1 June 2006. On 6 July 2006 a letter was dispatched to the respondent, giving it until 27 July 2006 to file its response to the complaint. The response was received on 28 July 2006, and the complainant replied on 15 August 2006.
- 1.3 After reviewing the written submissions before me, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.

2. Complaint

- 2.1 The complainant’s father (“the deceased”) passed away when the complainant was 9 years of age (date unspecified). The deceased was a member of the respondent, and as a consequence of his death the complainant and his younger brother became entitled to pensions from the respondent as they qualified as “eligible children” in terms of its rules. The complainant’s pension ceased in March 2002 when he reached 23 years of age.

2.2 He also brings this complaint on behalf of his brother, Mr Z Godlo, who was similarly in receipt of a pension which was suspended in August 2004. However, it appears from the response that this pension has been re-instated and the arrears paid. This aspect of the complaint therefore falls away and will not be dealt with further.

2.3 The complainant seeks an explanation for why his pension ceased in 2002. He wishes to know what the capital amount invested was, and what balance is owing to him as a lump sum.

3. **Response**

3.1 The respondent has referred to its rules concerning the payment of pensions to eligible children. It refers in particular to rule 7.1 which provides that the pension shall be payable from the respondent, or that an annuity may be purchased from a registered insurer in respect of such pension, if the Fund Committee in consultation with the actuary so directs, or if the eligible spouse or child so elects.

3.2 It states that an election was made to outsource the pension to a registered insurer, and that in terms of the rules the liability of the respondent to the complainant ceased on purchase of the annuity. It points out that the duration of such pension, in accordance with the policy provisions is until the age of 21, unless the child can

show that he is in full time study, in which case it continues until age 26.

- 3.3 The respondent therefore contends that the complainant is not entitled to a lump sum on cessation of the pension, and that, further, its liabilities towards him have ceased.

4. Reply

- 4.1 In his reply the complainant challenges the election made to outsource the pension, claiming that his permission was not sought. He further contends that he was a full time student at the time that his pension was terminated. In this regard he claims he was studying at the University of Port Elizabeth, and that he can furnish proof of registration. He has also raised a query concerning the applicability of a 13th cheque in the calculation of the annuity purchased from the insurer.

5. Determination and reasons therefor

Time barring

- 5.1 At the time the complaint was lodged, Section 30I of the Pension Funds Act imposed certain time limits with regard to lodging of complaints before the Adjudicator and stated 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 -

either before or after expiry of any period prescribed by this Chapter, extend such period;

condone non compliance with any time limit prescribed by this Chapter.”

5.2 Although section 30I(3) was subsequently removed by the Pension Funds Amendment Act no 11 of 2007 which came into operation on 13 September 2007, and subsection(2) was modified to incorporate certain provisions of the Prescription Act 68 of 1969, the complainant is entitled to have his complaint adjudicated on the legal framework applicable at the time that he lodged his complaint. Our courts will only hold that a statutory provision which interferes with vested rights or imposes a liability

or a burden is retrospective in operation where the legislature either expressly indicates this or clearly intended the statute to have that effect. (See *Njobe v Njobe & Dube NO 1950(4) SA 545 (C)* at 552).

5.3 The Amendment Act referred to above contains a specific clause (40B) indicating which definitions and sections will have retrospective effect. The alterations to section 30I are not referred to in 40B. Therefore the discretion to condone non-compliance with the time limits set out in section 30I in its previous formulation must be exercised in respect of this complaint since it was lodged prior 13 September 2007, the commencement date of the Pension Funds Amendment Act.

5.4 It seems that the complainant's cause of action arose in March 2002 when his pension ceased. His complaint was lodged in June 2006, and was therefore received more than a year out of time.

5.5 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.”

5.6 However, I still have a discretion to extend the “three-year” time period or to condone non-compliance therewith. But good cause needs to be shown to enable me to do that.

5.7 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."

5.8 There has been a delay of a year in the submission of this complaint. No reasons have been furnished for this delay, presumably because the complainant is unaware of the time-barring restrictions.

5.9 I turn now to the merits of the complaint. Since on both the complainant's and the respondent's version the pension ceased in March 2002, I cannot accept the respondent's contention that the pension was outsourced to Sanlam life Insurance Ltd. The policy that the respondent has annexed in support of this clearly shows an inception date of 22 October 2002, in other words some seven months after the pension payments ceased. I am therefore not satisfied that the liabilities of the respondent to the complainant have been discharged. That being the case, the complainant was entitled at that stage to have his right to receipt of a pension reviewed by the respondent on the basis that he was still studying. This does not appear to have been considered. In this regard the definition of "Eligible Child" states, in part,

“provided that such child:

has not been married;

- (i) is under the age of 18 years, provided that if the Committee are satisfied that the child is receiving full-time education such age limit may be extended to the age applicable at the date of completion of his studies; ...”

5.10 I would point out that the age of 26, which has been mentioned by both parties, does not appear in the rules. It seems to originate from the policy document, which, as stated above, is inapplicable to the complainant. The rules as framed allow the respondent’s management committee a discretion to extend the period for which the pension is payable, provided the eligible child is in full time study.

5.11 Since the complainant has good prospects of success on this aspect of the complaint, I am prepared to condone non-compliance with section 30I(1), and direct the management committee of the respondent to exercise its discretion in respect of payment of the pension for the time that the complainant was studying full time, provided he can furnish suitable documentation in support thereof.

5.12 Regarding the remainder of the complaint, the complainant is patently not entitled to a lump sum payment. The pension is calculated as a monthly amount payable for the duration of eligibility under the rules. This is a benefit that is cross-subsidised over the fund membership, or risk insured. In all probability, a lump sum benefit was paid at the time of the deceased's death to his surviving spouse, or otherwise in accordance with the provisions of section 37C. However, that is a separate benefit not to be confused with a child's pension, and is not the subject matter of this complaint. Finally, the query raised about the 13th cheque is speculative and not founded on any *prima facie* evidence to the contrary. Given the passage of time since the deceased's death (presumably in or about 1988 according to the facts in the complaint), and the likelihood of difficulties in procuring documentary substantiation, I am not prepared to condone this aspect of the complaint, which was belated raised in reply.

6. **Relief**

6.1 My order is as follows:

6.1.1 The complainant is directed to furnish the respondent with any evidence required by it to consider his claim for a pension in respect of the period that he was studying full time;

6.1.2 The Committee of Management of the respondent is directed to exercise its discretion in terms of the provisions of rule 2, and to advise the complainant of such decision **within four weeks** of receipt of the above information.

DATED AT CAPE TOWN ON THIS THE day of 2008.

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR