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Our ref:PFA/KZN/3617/2005/SG

Re: COMPLAINT IN TERMS OF SECTION 30A OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): P I Kroneberg v Old Mutual Staff Retirement Fund

Introduction

[1] Your complaint was received by this office on 17 May 2005. The response was received by this office on 7 March 2006. After considering written submissions before me, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.

Factual Background

[2] You were employed by Old Mutual (“the employer”) on 18 March 1974 and became a member of the Old Mutual Staff Pension Spouse’s and Provident (“the fund”). You exited the fund in December 1990. You elected a cash withdrawal benefit. The administrator of the fund issued a cheque of R10 177,93 dated 12 December 1990 in your favour.

Complaint

[3] The essence of your complaint is that you never received the cheque and thus your benefit remains unpaid.

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), N van Coller (Assistant Adjudicator), L Mballo (Assistant Adjudicator), R Maharaj (Assistant Adjudicator), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Thabethe (Assistant Adjudicator)

Office Manager: L Manuel

Response

Point in limine

[4] The fund contends that your complaint is time-barred for the reason that it was lodged outside the time period of lodging a complaint in terms of section 30I of the Act, and thus I lack jurisdiction to investigate and adjudicate upon your complaint.

Merits

[5] The fund contends that it paid your benefit in full by issuing a cheque dated 12 December 1990 in your favour. The cheque was cashed at Nedbank in George on 18 January 2005.

Determination and reasons therefore

Point in limine

[6] I am precluded by Section 30I(i) of the Act to investigate a complaint lodged with this office more than three years after the occurrence of the event which the complaint relates to. However, I have discretion to extend the three year time period or to condone non-compliance therewith, provided there is good cause shown.

[7] 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.”

[8] The complaint relates to the payment of your benefit which took place in 1990. The complaint was received by this office on 17 May 2005. This is more than three years after the occurrence of the event which the complaint relates to. Thus, the complaint is time-barred. However, that does not spell the end of

the matter as I have to determine whether good cause exists for condoning its late lodging.

- [9] 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) 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 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 strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."

- [10] A period of almost 15 years has elapsed since the payment of your benefit. You advanced no reason for taking such a long period of time to query your benefit. In any event, even if I were to condone the late lodgement of the complaint, I consider the prospects of success on the merits to be remote. I say so because the evidence before me suggests that the fund issued a crossed cheque, marked 'not negotiable' on the face of it. Section 78 of the Bills of Exchange Act 34, of 1964 provides that "if a cheque is crossed generally, the bank on which it is drawn shall not pay it to any other person other than a bank". A crossed cheque can only be deposited into a bank account of the recipient and cannot be paid over a counter. By crossing a cheque the drawer ensures that payment will be made to a bank collecting on behalf of someone whose identity and title have to some extent been verified thereby minimizing the risk of paying an unlawful possessor. The bank collecting on behalf of the recipient has a duty to verify his identity before crediting the account. In my view, the fund was not negligent in paying your benefit by means of a cheque as it was the standard mode of payment at the time. By crossing the cheque it took necessary precaution and thus discharged its obligation to you.

- [11] In the result, I find that no good cause exists for me to condone the late lodging of this complaint.

- [12] The complaint is dismissed.

DATED AT CAPE TOWN THIS THE DAY OF 2006.

Yours faithfully

Vuyani Ngalwana
Pension Funds Adjudicator