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**Please Quote Our Ref: PFA/EC/4412/2005/LS**

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act"): BJ JOYI v SFW PROVIDENT FUND**

**Introduction**

1. This matter concerns the alleged failure of the fund to pay you a withdrawal benefit. The complaint was received by this office on 18 July 2005. A letter was sent to NBC Holdings (Pty) Ltd on 3 July 2005 giving it until 24 August to respond to your complaint. The same letter was also sent to the fund via Alexander Forbes Financial Services giving it until 24 August 2005 to respond to your complaint. NBC's response was received on 5 August 2005. The response was sent to you for a reply on 10 August 2005. Alexander Forbes' response on behalf of the fund was received on 22 August 2005. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.

**Complaint**

2. You were employed by the Stellenbosch Farmers' Winery Group Limited and were a member of the SFW Provident Fund ("the fund"). You left employment and withdrew from the fund with effect from 31 August 1992.
3. Your complaint is that you never received a withdrawal benefit from the fund.

**Response**

*Alexander Forbes*

4. Alexander Forbes, the administrators of the fund until 1992, states that you

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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)

were paid a benefit of R23 516.43 by way of a cheque dated 1 September 1992 which was deposited into a Nedbank account on 2 September 1992.

5. According to Alexander Forbes, NBC Holdings (Pty) Ltd (“NBC”) which took over the administration of the fund in 1992 appears to have issued you with a second cheque in March 2003 for the same amount as the first cheque. It has assumed as much by virtue of a letter dated 4 March 2003 from NBC addressed to the employer. The letter states that a cheque in the amount of R23 516.41 has been enclosed. Alexander Forbes states that since it is no longer the administrator of the fund, it cannot comment on the issuing of this second cheque.
6. Due to the considerable time elapse since you exited the fund, Alexander Forbes states that it has no further information pertaining to your membership.

#### *NBC Holdings*

7. NBC contends that there is *prima facie* proof that you were paid your benefit. Firstly you have not contended that the bank account into which the cheque was paid was not your account. Secondly NBC states that had the cheque issued to you at the time you withdrew from the fund in 1992 not been banked and paid, it would have gone stale and returned to the fund. The benefit would then still reflect as unclaimed in the fund’s records. This is not the case however.
8. Regarding Alexander Forbe’s response, NBC states that it contains an inaccurate version of the facts in that the reason behind the issuing of the letter dated 4 March 2003 is that at that time NBC was requested to furnish proof of payment and a breakdown of the benefit paid to you. According to NBC, the only reason why the letter is dated 4 March 2003 is because that is the date on which it was printed from the records of the fund. It is not because a second benefit cheque was issued. In fact no second cheque was issued according to NBC.

#### Determination and reasons therefor

9. Section 30I of the Pension Funds 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."

10. The act or omission to which the complaint relates occurred in 1992 when you withdrew from the fund and became entitled to a withdrawal benefit. Your complaint was received by this office on 18 July 2005, some 13 years later. Therefore in terms of section 30(1) I may not investigate your complaint.

11. There is good reason for limiting the time during which litigation may be launched. The Constitutional Court has pronounced on this in *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) (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."

12. However, that the complaint was lodged outside the three year time period 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.

13. 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."

14. In your case, the degree of lateness (for which no explanation is given) is some 10 years which is significant.
15. Your prospects of success on the merits are also doubtful. The respondents have provided evidence in the form of a benefit cheque drawn in your favour by Alexander Forbes (the administrators of the fund at the time) in an amount of R23 516.43 which supports their contention that you did in fact receive a withdrawal benefit from the fund. As pointed out by NBC, you have not contended that the bank account into which the cheque was paid is not your bank account. Furthermore, the fund's records do not reflect an unclaimed benefit in respect of your membership. In the absence of any contradictory evidence, *prima facie* it would appear you have no basis for your claim that you did not receive payment from the fund.
16. The respondents have also alluded to the difficulty in tracing records and information dating back as far back as 1992. Therefore if I were to condone your non-compliance with the time-limits it would be prejudicial to the respondents which are not in a position to provide any further information.
17. In the circumstances, I am satisfied that no good cause exists to exercise my discretion in terms of section 30(3) of the Act in your favour.

Relief

18. In the result, your complaint cannot succeed.

Dated at Cape Town on this \_\_\_\_\_ day of \_\_\_\_\_ 2006.

Yours faithfully

**Vuyani Ngalwana  
Pension Funds Adjudicator**