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Please quote our reference: PFA/WE/5988/2005/NVC

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 ("the Act"): G M H Simelane v South African Pension, Spouses and Provident Fund ("the fund")

Introduction

[1] Your complaint concerns the alleged failure of the fund to pay you your withdrawal benefit. The complaint was received on 24 October 2005 and on 1 November 2005 a letter acknowledging receipt thereof was sent to you, but inadvertently sent to the incorrect address. On 2 November 2005 a letter was dispatched to the fund requesting it to submit a response to your complaint by 23 November 2005. The fund's response was received on 24 November 2005. On 11 May 2006 the response was sent to you for a reply by 9 June 2006. Your reply was received on 8 June 2006. 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. As the background facts are known to the parties, I shall not burden this determination by repeating them here.

Complaint

[2] You are unhappy about the fund's alleged failure to pay you your withdrawal benefit after you left the service of Old Mutual Life Assurance Company (South Africa) Limited ("Old Mutual") on 31 October 1982, after more than six years' service. You state that if the fund retrieved its files from the archives, or if the Receiver of Revenue had your past IRP5 forms, many questions would be answered.

The fund's response

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)

- [3] The fund states that although you have submitted proof of your employment with Old Mutual, you have failed to provide it with proof of membership of the fund, and proof that you have not been paid your withdrawal benefit.
- [4] The fund contends that it has not been able to find any record of your membership and it is not required to keep records for a period of longer than five years. It states that its current membership data base commenced in 1983, and therefore would not retain membership information prior to 1983.
- [5] It is further stated by the fund that in terms of rule X.2 the Management Committee has the discretion to pay an unclaimed benefit if it is satisfied that a valid claim exists, and the fund has exercised its discretion. It alleges that it is not satisfied that you have a valid claim and is denying you the benefit.
- [6] The fund states that your complaint ought to be dismissed.

Determination and reasons therefor

- [7] It is of grave concern to me that you have taken 23 years from the time that you left Old Mutual to the date you submitted a complaint to this tribunal on 24 October 2005, to recover the withdrawal benefit that you claim you never received.
- [8] Section 30I of the 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.”

- [9] It is clear from the complaint that the events to which it relates occurred substantially more than three years before your complaint was received by this office.
- [10] 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.”

- [11] However, that the complaint was lodged outside the three year time period in terms of section 30I of the Act 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.
- [12] 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.”

- [13] Your prospects of succeeding in this matter are poor as there appears to be no documentary evidence to substantiate your claim. Since leaving Old Mutual in 1982 you should reasonably have become aware that a benefit was due to you by the fund. You have not offered any explanation for why you have waited this considerable period of time to submit your complaint, nor have you submitted proof of any steps that you may have taken in the interim to rectify this grievance. It is self evident that it would work to the extreme detriment of the fund to require it to unearth evidence or witnesses from 23 years ago. I am therefore not persuaded, in the

absence of compelling reasons, which are not present in this case, that good cause exists to condone the late submission of this complaint.

- [14] The complaint is time-barred and the file is hereby closed.

Dated at Cape Town on this the day of 2007.

Yours faithfully

**Vuyani Ngalwana
Pension Funds Adjudicator**