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Please quote our reference: PFA/GA/5370/2005/SM

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”) – B TSUMI (“the complainant”) v ABI PENSION FUND (“first respondent”), ABI (PTY) LTD (“second respondent”), ALEXANDER FORBES FINANCIAL SERVICES (“third respondent”) AND LEKANA EMPLOYEE BENEFITS (“fourth respondent”)

1. Introduction

[1.1] The complaint concerns the failure of the respondents to advise the complainant about a death benefit that became payable to her following the death of the complainant’s husband, Mr E Tsumi, and further, the failure of the respondents to pay a child’s pension for her disabled minor child.

[1.2] The complaint was received by this office on 12 September 2005. A letter acknowledging receipt thereof was sent to you on 12 October 2005. On the same date a letter was dispatched to ABI (Pty) Ltd giving it until 2 November 2005 to file its response to the complaint. Another letter was dispatched to the fund on 10 October 2005 giving it until 1 November 2005 to file its response to the complaint. Responses were received from the first respondent on 3 November 2005, from the third respondent on 26 October 2005 and from the South African Breweries Limited on 14 November 2005. This office also received a response from fourth respondent on 3 March 2006. These responses were forwarded to the complainant on 29 November 2005 and 14 July 2006 respectively. The complainant however omitted to reply.

M Mohlala (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), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Nekile (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator)

Office Manager: L Manuel

- [1.3] Having considered the submissions it has been found to be unnecessary to hold a hearing in this matter. As the background facts are well known to the parties, only facts that are pertinent to the issues raised herein shall be repeated. The determination and reasons therefor appear below.

2. Factual Background

- [2.1] The complainant is the common law wife of Mr E Tsumi (“the deceased”) who passed away on 18 August 1981. The deceased was a member of the first respondent from 1969 until he passed away. Upon his death, the complainant started receiving a pension from the first respondent in the sum of R1191.00 from January 1982 which was later increased to R1370.00.

3. Complaint

- [3.1] The complaint is that the respondents failed to advise the complainant that a pension benefit was payable to the estate of the deceased. The complainant contends that she started receiving an amount of R1191.00 from the second respondent in January 1982. The complainant further submitted that she also received a further amount of R1370.00 during the same year. She also alleges that the second respondent informed her that she should come to their offices every month to collect her monthly pension in 1983. She further submitted that the second respondent failed to explain to her what the payment was for and the terms and conditions thereof.
- [3.2] The complainant submitted further that the respondents failed to advise her about the pension benefits that accrued to the estate of the deceased, the extent or total amount of the benefits due to the estate. She submitted further that they failed to pay a pension for her disabled minor child.
- [3.3] The complainant requested this office to direct the respondents to furnish her with the total benefit due to the estate of the deceased at the time of his death, the breakdown of the benefits and the amount of the benefit that was paid to the estate. She further requested that the respondents should be ordered to pay her a special benefit that is due to her minor child who passed away in 2002 of cerebral palsy.

4. Responses

- [4.1] Responses were received from the first respondent, second respondent, third respondent, fourth respondent and South African Breweries Limited.

Responses from First, Second, Third and Fourth respondent

- [4.2] It was submitted on behalf of second respondent that the company is not in a position to furnish the complainant with the information she requested as it is no longer in possession of all personal files relating to her complaint. It was submitted that there were significant changes in systems and people over the past 24 years. Moreover, it was submitted that second respondent did not exist as a company or a legal entity at the time of the deceased's death. Further, the deceased was employed by the Coca-Cola Company at that time.
- [4.3] It was further submitted on behalf of third respondent that it does not have access to all the information needed to provide the complainant with a breakdown of payment as she requested. It submitted that it had requested the information from Sanlam and it had not received anything to date.
- [4.4] Mrs E Nieuwoudt, the senior legal advisor of fourth respondent, also submitted that they are unable to find any record relating to the distribution of the deceased's death benefit as he passed away 25 years ago. She submitted that no payment of benefit would have been made to the estate of the deceased as section 37C of the Act only allows payment to an estate if a member does not have any dependants. Further, she submitted that the complainant have been receiving a monthly pension over the years and therefore no special benefits is payable to her deceased child. Moreover, she submitted that the complainant's complaint falls outside the three-year period for lodging a complaint to this office.

SAB response

- [4.5] Mr N R Ewing, the benefits manager of SAB, filed a response on behalf of SAB and the fund. He submitted that the deceased's death benefit was paid in terms of rule 29(1) of the fund's rules. Rule 29(1) reads as follows:

“...a lump sum of four-times his Annual Pensionable Salary at the date of his death and a pension equal to sixty percent of the pension to which he would have been entitled to in terms of Rule 24 if he had remained in the Service to the Pensionable Age and his Annual Pensionable Emoluments at the date of his death had remained unchanged...”

- [4.6] He also referred to rule 29(7) of the fund's rules which read as follows:

“When a child ceases to be an Eligible Child, the Pension payable in respect of him shall cease, and the Pension payable in respect of any other Eligible Children shall be recalculated, if necessary,”

- [4.7] It was submitted that the first respondent paid the complainant a pension as a guardian of her minor child while he was still alive. It was submitted

the first respondent has no record of the deceased having any other eligible children and the complainant did not mention any other eligible children to the first respondent. Therefore, the pension that was payable to the eligible child ceased upon his death. Further, it was submitted that the complainant continued to receive a pension from the fund which currently amounts to R1 368.72 per month.

- [4.8] It was further submitted that the first respondent is unable to trace the records that show how and when the complainant received the deceased's death benefit due to the period of time that had passed since the payment was made. Moreover, it was submitted that it would be unreasonable to expect the fund to have records of these transactions as it keeps its records for a period of five years. It submitted further that in terms of section 30I(1) of the Act, the Adjudicator was precluded from investigating a complaint in respect of a complaint which arose more than 3 years from the date that the complaint was lodged. Further, it was submitted that the complainant's complaint should not be condoned because she failed to make any enquiries since the death of the deceased in 1981 that she failed to pursue any alleged claim at all for the past 24 years, that she has taken no legal steps to interrupt prescription. It further submits that she failed to provide sufficient reasons for the delay, that condonation with the time limit would place an unfair burden on the fund and that the probability of success of her complaint is low.

5. Determination and reasons therefore

Time Barring

- [5.1] Prior to considering the merits of the complaint there is a need to consider the issue of time-barring in terms of section 30I of the Act. This complaint relates to a complaint that arose in August 1981, following the death of the deceased. Thus, a period of approximately 24 years passed before the complainant lodged her complaint with this office. Section 30I (1) of the Act requires that complaints be lodged within 3 years of the occurrence of the cause of action giving rise to the complaint. 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 issue. 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.”

- [5.2] However, the enquiry does not end there is still a need to be satisfied on whether or not good cause has been shown, or exists, for one to extend the three 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 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.”

- [5.3] As stated above, approximately 24 years passed before the complainant lodged her complaint with this office. Further, the complainant states in her complaint that she was not aware that she was receiving a pension benefit until 1992, however, even on such realisation she waited for a period of thirteen years prior to approaching this office. There has been an inordinate delay in lodging this complaint and on this basis alone this complaint falls to be dismissed. The complainant failed to provide any cogent reasons for the delay in submitting her complaint to this office. It is clear that she failed to submit any explanation as to why no complaint, or even enquiry, was made with the fund or ABI (Pty) Ltd for more than 20 years. Nor did she attempt to approach the courts, the Financial Services Board or this office after its establishment in 1998 for relief. The complainant submitted that she started receiving some money from ABI (Pty) Ltd in 1982 but that it failed to explain to her what the payment was for or the terms and conditions therefor. However, it is clear that she failed to make enquiries regarding the payment until ABI (Pty) Ltd informed her about the monthly pension that is payable to her. The complainant also failed to advance reasons for the grant of condonation for the late lodgment of this claim. I cannot find any reason to condone the non-compliance with the time limit as set out in section 30I of the Act.

- [5.4] Regarding the complainant's prospects of success, I take cognisance of the respondent's submissions that they are no longer in possession of records or information which shows a breakdown of payment of the deceased's death benefit and the terms and conditions thereof. As stated in the response, this is due to the time that had passed since the date on which the payment of the death benefit was made. If I were to grant the complainant any relief in respect of the payment of a death benefit at this late stage the respondents will be severely prejudiced thereby. Relevant documents would in all probability be missing, there could be an unravelling of benefits already paid to others, it would further cause great inconvenience to the first respondent if the complainant were to be awarded the relief sought. Moreover, it is clear that in terms of section 37C(1)(c) of the Act payment of the amount of a death benefit may be made into the deceased's estate only if the fund has not discovered any dependants and nominees, the deceased has no dependants and did not designate a nominee in writing or the deceased has designated a nominee only to receive a portion of the benefit. Given the foregoing, there is little prospect of success in the complainant's complaint against the respondents.
- [5.5] With regards to the payment of a child's pension for the complainant's disabled minor child, I take cognisance of the respondent's submission that the complainant had been receiving a monthly pension over the years. Further, it was pointed out that the complainant received a pension as a guardian of her minor child and that the pension ceased upon his death. It is clear that the complainant did not submit anything to dispute the respondent's submissions in this regard. Moreover, Rule 29(7) of the fund's rules read as follows:
- "When a child ceases to be an Eligible Child, the Pension payable in respect of him shall cease, and the Pension payable in respect of any other Eligible Children shall be recalculated, if necessary, in accordance with section (5) of the rule."
- [5.6] *In casu*, the pension that was payable to the complainant's disabled child ceased upon his death. It was indicated that the fund has no record of any other eligible children of the complainant. It follows that the complainant is not entitled to receive a child's pension following the death of her child.
- [5.7] Taking all these factors into consideration, there exists no good cause for the time limit prescribed for lodging a complaint in terms of section 30I(1) to be extended. The complaint remains time-barred and this complaint will not be investigated further.
- [5.8] In the result, the complaint cannot succeed and is therefore dismissed.

DATED AT JOHANNESBURG ON THIS DAY OF 2007.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR