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Please quote our reference: PFA/NP/5130/2005/RM

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“THE ACT”) – L M TEBAKAE v STILFONTEIN GOLD MINING COMPANY LIMITED (IN LIQUIDATION) (“THE EMPLOYER”)

Introduction

- [1] The complaint concerns the alleged non-payment of a withdrawal benefit when you left employment in 1987. Your complaint was received on 21 October 2005. A letter acknowledging receipt of your complaint was sent on 17 November 2005. On the same date a letter was dispatched to the Mineworkers Provident Fund (“the fund”) giving it until 8 December 2005 to file a response to the complaint. A response was received on 22 November 2005. Having considered the submissions I find it unnecessary to hold a hearing in this matter. The facts are known to the parties, so I will only repeat those that I believe are pertinent to this determination. My determination and reasons therefor appear below.

Background facts

- [2] You were employed by the employer from 17 September 1979 until your employment was terminated some time in 1987.

M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), E de la Rey (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator), S Mothupi (Assistant Adjudicator), P Mphephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator)

Office Manager: L Manuel, Financial Manager: F Mantsho, Accountant: R Soldaat

Complaint

- [3] Your complaint is that your employer failed to pay you your pension or provident fund benefit when you left its service in 1987. You also allege that you never received any payments from the Unemployment Insurance Fund (“UIF”).

Responses

- [4] The employer used to participate in the fund. The fund responded on 22 November 2005 by advising that it was only established in 1989. Since your complaint concerns membership of a fund that was operating in 1987, it cannot proffer a response because it was not in existence at the time so the complaint could not relate to it. This office was also able to ascertain that the employer has been placed in liquidation and its human resources department no longer functions.

Determination and reasons therefor

- [5] I address the point *in limine* regarding time-barring of your complaint in terms of section 30I of the Act. This complaint relates to a cause of action that arose, at the very latest, in 1987 when the employer terminated your employment. The complaint was received by this office on 21 October 2005. Thus, a period of approximately 18 years elapsed before you lodged your complaint. Section 30I(1) of the Act requires that a complaint be lodged within 3 years of the occurrence of the cause of action giving rise to it. Thus, your complaint is time barred for the purposes of section 30I(1) of the Act. 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 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.”

- [6] However, the enquiry does not end there as I still need to satisfy myself as to whether or not good cause has been shown, or exists, for me 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 a 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.”

- [7] As alluded to in paragraph 5, the delay in bringing this complaint is approximately 18 years. This is an extremely long delay. The Constitutional Court, in the *Mohlomi* case cited in paragraph 5 above, confirmed that inordinate delays in litigation damage the interests of justice and that it may not be possible to satisfactorily adjudicate cases that have gone stale due to the lack of reliable evidence. I also need to consider the merits of your case and note that the fund, in which the employer used to participate, had not been established in 1987. Thus, it was unable to provide a response to your complaint since you could not have been a member. You also state in your complaint that you are unaware of the details of the principal officer of the fund and you do not provide any details of the fund to which you allegedly belonged while employed. This office also established that the employer was placed in liquidation and that the human resources department had been disbanded. Thus, neither the fund nor the employer could confirm the details of the fund to which you belonged. Given the lack of information substantiating the veracity of your complaint, it is impossible to determine whether you have a valid case on the merits. Thus, I am of the view that you have little prospects of success with your complaint on the merits.
- [8] Therefore, given the long delay in submitting the complaint to this office, the lack of any explanation for the delay and the very limited prospects of success with the complaint, no reasonable cause exists for me to condone the non-compliance with the time limit of 3 years prescribed in section 30I of the Act. In the circumstances, your complaint is time barred.
- [9] Your complaint relating to the non-payment of any benefits by the UIF is outside the jurisdiction of this office because it is only empowered to deal with complaints against pension fund organisations registered in terms of the Act. The UIF is not a registered fund under the Act so this office cannot adjudicate this aspect of your

