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**Please quote our ref: PFA/KZN/13432/07/CN**

**RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 (“the Act”): LJ VERMEULEN (“the Complainant”) v MINE EMPLOYEES PENSION FUND (“the Respondent”)**

**INTRODUCTION**

1. Several issues arise out of this determination, among which are: the complainant’s alleged entitlement to a pension from the respondent; her alleged entitlement to the proceeds of a group life insurance policy that was issued to her late husband; an allegation regarding her late husband’s unfair dismissal from employment, and the alleged incorrect payment to the deceased of a retrenchment benefit instead of a retirement benefit.
2. The reformulated complaint was received by this office on 12 June 2007. On 13 November 2007 a letter was dispatched to the respondent requesting it to submit its response by no later than 13 December 2007. The response was received on 29 November 2007 and was subsequently forwarded to the complainant for a reply. The complainant’s reply was received on 4 December 2007.
3. After considering all the written submissions that have been received, it is considered unnecessary to hold a hearing in this matter. The determination and the reasons therefor are set out below.

**Language policy**

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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

4. Before I proceed to deal with this complaint, I need to address a specific request that the complainant has addressed to this office regarding the use of Afrikaans as the language in which she prefers all correspondence emanating from the office to her to be couched. The reason for the request is stated as being that it is difficult for her to understand all the English terms (“terme”).
5. It is a fact that this country is a multi-ethnic and multilingual society. So much recognition is given to that fact that in criminal proceedings, all accused persons have a constitutionally recognised right to be tried in a language that they understand or, if that is not practical, to have the proceedings interpreted into such language (section 35(3)(k) of the Constitution act of 1996). The same impliedly holds true with regard to litigants in civil proceedings and parties to quasi-judicial (like the present) and administrative proceedings or hearings.
6. However, as Yekiso J opined in *S v Damoyi* 2004 (2) SA 564 (C) at 565, that recognition falls short of addressing the parity of the use of languages in court proceedings. The Court proffered a solution to the problems involving official languages in court proceedings, which is the introduction of one language of record in court proceedings. It went on to state that such a course would not only be economical, but would also be in the interests of justice. The court suggested that English, being the language that is predominantly in use in international commerce, politics and industry, should be used as the sole official language in court proceedings.
7. This Tribunal, being alive to the situation referred to above and also being mindful of its statutory mandate to conduct its investigations in a just, economical and expeditious manner, has adopted the policy of employing English as the official language in which its proceedings are conducted. Were it to treat all the eleven official languages as equal; that would result in a considerable strain on its resources which in turn could impact negatively on the quality of service delivery and efficiency in fulfilling its mandate.
8. Be that as it may, the office accepts complaints and all other correspondence from all parties in whatever official language that they choose. It is only with regard to correspondence emanating from, and determinations issued by, the office that the single language policy applies.
9. Thus, the complainant’s request cannot be acceded to.

### The complaint

10. The complainant, who is the widow of the late Mr. MJ Vermeulen (“the deceased”), a former member of the respondent, contends that she is entitled to receive a pension from the respondent, and to receive payment of the proceeds of the deceased’s group life insurance.
11. Her further contention is that the deceased was unfairly dismissed from employment, and that the respondent incorrectly paid him a retrenchment benefit during January 1992 and January 1994, instead of paying him a retirement benefit.

### The response

#### Preliminary points

12. Firstly, the respondent submits that this matter is time-barred by the provisions of section 30(1) of the Act, since the complaint was received more than three years after the occurrence of the act or omission to which it relates.
13. Secondly, it is submitted that the aspects of this complaint which pertain to the group life insurance policy and the unfair dismissal fall outside the jurisdiction of this Tribunal since they do not relate to a pension fund organization.

#### The merits

14. The respondent states that the deceased was a contributory member of the respondent from February 1975 to May 1989, whereafter he became a non-contributory member until his retrenchment during or about November 1991.
15. It further states that a retrenchment benefit was paid out to him on 2 January 1992. According to the respondent, the deceased was re-employed by a participating employer on 2 December 1991 and thus became a contributory member until 23 April 1993 when he was retrenched again. It is further stated that as the deceased met all the criteria for a retrenchment benefit in terms of the rules, he claimed the said benefit and it was paid out to him on 27 January 1994.
16. The respondent concludes that although the deceased qualified for a retrenchment benefit, he also had the option to be a deferred member until he had attained the early retirement age, was incapacitated or had reached normal retirement age, an option that was fully explained to him. Despite being fully informed of that option, it is stated, the deceased elected to receive a retrenchment benefit. By doing so, it is submitted, the

deceased forfeited any advantages of membership, including the payment of benefits upon his subsequent death.

### Determination and reasons therefor

#### Preliminary points

17. Of all the issues raised by the complainant in this complaint, only two issues fall within the jurisdiction of this Tribunal, namely her entitlement or otherwise to a pension from the respondent and the issue whether or not the deceased received the correct benefit from the respondent.
18. The issue relating to the group life insurance policy and the alleged unfair dismissal fall outside the jurisdiction of this Tribunal because they relate to neither the administration of a fund, the investment of its funds, nor the application and interpretation of its rules. Thus, this Tribunal does not have the legal authority to investigate and adjudicate upon them.
19. Regarding the remaining issues, which relate to acts or omissions that occurred during January 1992, January 1994 and 7 August 2001, respectively, the provisions of section 30I(1) preclude the Adjudicator from investigating and adjudicating upon any complaint if the act or omission to which it relates occurred more than three years prior to the receipt of the written complaint. Subsection (2) thereof further provides that the provisions of the Prescription Act of 1969 relating to a debt apply in the calculation of the three-year period.
20. In light of the fact that the acts or omissions to which this complaint relates occurred more than three years before this complaint was received, the complaint is out of time or time-barred by the provisions of section 30I (1).
21. 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.”

### Condonation

22. However, at the time that the complaint was lodged, section 30I contained a subsection (3) which was subsequently removed by the Pension Funds Amendment Act No. 11 of 2007 (“the Amendment Act”). The subsection empowered the Adjudicator to condone non-compliance with the three year time-bar, provided good cause was shown, or was found to exist.
23. Although that discretion has been removed, the complainant is entitled to have her complaint adjudicated on the legal framework applicable at the time that she lodged her complaint. Our courts will only hold that a statutory provision which interferes with vested rights or imposes a liability or a burden is retrospective in operation where the Legislature either expressly indicates this or clearly intended the statute to have that effect. (See *Njobe v Njobe & Dube NO 1950(4) SA 545 (C)* at 552).
24. The Amendment Act referred to above contains a specific clause (40B) indicating which definitions and sections will have retrospective effect. The deletion of section 30I (3) is not one of them. Therefore the discretion to condone non-compliance with the time limits set out in section 30I must be exercised in respect of complaints lodged prior to the commencement date of the Amendment Act, which was 13 September 2007.
25. 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.”
26. The periods varying from 2 years (in respect of the date of the deceased’s death) to 22 years (in respect of the date of payment of the first retrenchment benefit), by which the lodging of this complaint has been delayed are exceedingly long in the circumstances. No explanation has been proffered for the delay, which further exacerbates the situation.

27. The virtually non-existent prospects of success on the merits also militate against the finding of good cause for condoning the late lodging of this complaint. The deceased would not have qualified for a retirement benefit when he was retrenched for the first time in 1991 because he was only 53 years old at the time. He had also not elected the option to remain a deferred member of the fund until early or normal retirement age. Although he would have qualified for an early retirement benefit in 1994, the deceased opted for a retrenchment benefit in spite of having been informed of the other available options.
28. Insofar as the complainant's entitlement to a pension is concerned, when the deceased died during August 2001, he was no longer a member of the respondent. Thus, no death benefit, be it in the form of a lump sum or a spouse's pension, was payable by the respondent to his dependants.
29. On a conspectus of all the above factors, this Tribunal finds that no good cause exists for it to either condone the late lodging of this complaint, or extend the three-year time limit.
30. The complaint can thus not be investigated.

**SIGNED IN CAPE TOWN ON THIS                      DAY OF                      2008**

Yours faithfully,

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**MAMODUPI MOHLALA**  
**PENSION FUNDS ADJUDICATOR**