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Please quote our ref: PFA/WE/3801/05/LS

## **DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, OF 1956 (“the Act”) – JJ KOTZE v SAMANCOR GROUP PENSION FUND & SANLAM LIFE INSURANCE LIMITED**

### Introduction

[1] This complaint concerns the disability benefit which you received from the fund. The complaint was received by this office on 7 June 2005 and a letter acknowledging receipt thereof sent to you on 14 June 2005. On 14 June 2005 a letter was dispatched to the respondent(s) giving them until 5 July 2005 to file a response to the complaint. The response dated 17 June 2005 was received on 17 June 2005. On 24 June 2005 the response was sent to you for a reply by 1 July 2005. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter.

### Complaint

- [2] You became a member of the Samancor Group Pension Fund (“the fund”) on 1 August 1979. With effect from 30 April 1996, you went on ill health retirement.
- [3] According to Sanlam’s letter dated 20 July 1998 addressed to you, you became entitled to a monthly pension equal to 75% of your salary as well as a lump sum disability benefit. The fund states that both disability benefits are reinsured with Sanlam Life Insurance Limited (“Sanlam”).
- [4] Your complaint concerns the lump sum disability benefit which Sanlam Life calculated on the basis of the salary you were earning as at 24 August 1995 (R138 541 per annum), your last day of active service according to

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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)

Office Manager: L Manuel

Sanlam.

- [5] You state that you subsequently went on paid sick leave and received your full salary from your employer up until 30 April 1996. With effect from 1 January 1996 your annual salary was increased from R138 541 to R154 930. Therefore, according to you, the higher salary should have been used in the calculation of the lump sum disability benefit.

### Response

- [6] Sanlam have raised a technical point that I am precluded from investigating your complaint in terms of section 30I(1) of the Act.
- [7] On the merits, Sanlam states that at the time of your application it was furnished with a medical report in which 24 August 1995 was indicated as the date on which you became disabled. Your disability benefit was calculated with reference to this date accordingly. The fact that your services were only formally terminated on 30 April 1996 is irrelevant according to Sanlam.
- [8] Sanlam also points out that in terms of the policy of insurance Sanlam has the right to determine when the disability benefit should commence.

### Determination and reasons therefor

- [9] Section 30I of the Act provides for certain time-limits with regard to the lodging of complaints and reads as follows:
- “(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] Your complaint relates to the lump sum disability benefit which you received in May 1996 whereas your complaint was only received by this office on 7 June 2005, some 9 years later. The complaint is therefore time-barred in terms of section 30I(3) of the Act.

- [11] 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.”

- [12] However that the complaint has become time barred in terms of section 30I of the Act is not the end of the matter as I still have a discretion to extend the three year time period or to condone non-compliance therewith. But you need to show good cause to enable me to do that.

- [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 532C:

“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 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.”

- [14] The factors to be considered in the determination of good cause are therefore elastic and complimentary. For example a long delay may be shored up by a very strong case on the merits, and vice versa.

- [15] In the present case, you ought to have lodged your complaint in or about May 1999 (3 years after you received your benefit). It was only received in June 2005, some 6 years later. One of the policy considerations underlying the imposition of time limits in bringing claims is the establishment of legal certainty and finality of disputes. There would accordingly have to be compelling reasons to entertain a complaint which is lodged so long after its due date.

- [16] The explanation offered by you for the delay is that you received no positive response from the fund or Sanlam when you took the matter up with them. You refer in particular to the negative response you received from Sanlam in a letter dated 12 October 1998 and state that this was the reason for you deciding not take the matter further. In any event you state that you would not have been in a financial position to pursue the matter further and that it was only in May 2005 that it came to your knowledge via the radio that there was a Pension Funds Adjudicator to whom you could complain without incurring any costs.
- [17] Firstly a negative response from the other party is not a compelling reason for failing to take any further action for some 6 years thereafter (October 1998 to June 2005).
- [18] Secondly if financial means were indeed an obstacle to pursuing the matter further, you could have availed yourself of legal assistance from the various legal bodies in South Africa that assist people who are unable to meet the costs of legal representation. In any event financial considerations generally do not excuse the failure to pursue a claim within the time limits imposed by law.
- [19] The fact that you only found out about my office in May 2005 is also not a compelling reason for the delay in pursuing your claim. Firstly you always had the option to go to the ordinary courts. Secondly, in accordance with first principles, ignorance of the law is no excuse.
- [20] I turn now to the prospects of success. The fund has placed a question mark over my jurisdiction to investigate the matter.
- [21] In the absence of a thorough investigation on my part, it would be inappropriate to pronounce definitively on the issue. However what is clear is that the disability benefit in question is housed in an insurance product. Therefore it is not entirely improbable that this is indeed a matter for the Long-Term Insurance Ombudsman over which I have no jurisdiction.
- [22] The fund has submitted a copy of the policy of insurance. Clause 5 of part 4 provides that Sanlam shall determine when the total and permanent disability commences (and may do so without taking into account the requirement that the member has to experience loss of income). Therefore it is within Sanlam's discretion to determine the commencement date. Provided Sanlam exercises this discretion properly and rationally, there would be no grounds upon which I could interfere with its decision in relation to you.

