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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): J MANKOSI (“the complainant”) v BOART PROVIDENT FUND (“the respondent”)

1. Introduction

- 1.1 The complaint concerns the alleged non-payment of a benefit to the complainant when he exited the respondent, a registered pension fund, in 1991.
- 1.2 The complaint was received by this office on 20 October 2006 and a letter acknowledging receipt thereof was sent to the complainant on 14 November 2006. On the same day a letter was dispatched to the respondent requesting it to file a response to the complaint by no later than 15 December 2006. The response was received on 23 January 2007 and a copy of same was sent to the complainant. A reply was received on 12 April 2007 requesting that the matter proceed to determination.
- 1.3 After reviewing the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

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), S Mothupi (Assistant Adjudicator)

Office Manager: L Manuel

2. Complaint

- 2.1 The complainant was employed by Boart International (no citation provided) from 1961 to 1991. He claims that he contributed to the Boart Provident Fund, and has attached a salary slip indicating deductions for provident fund contributions. The complainant claims that he was not paid a benefit at the time that he left employment, and now approaches this tribunal to assist him.

3. Response

Time barring

- 3.1 A response has been filed by Alexander Forbes Group (Pty) Ltd, the current administrator of the respondent, on its behalf. It has taken the preliminary point that the complaint is time-barred.

Merits

- 3.2 The response records that the member, on his own version, left the respondent in 1991 when it was administered by a different service provider. It states that no records have been located in respect of the complainant's membership despite a diligent search.
- 3.3 The respondent claims that it would be unfair for it to have to defend a claim in respect of which no records exist. It further points out that the complainant has failed to substantiate the total amount that he is claiming from the fund, and the basis upon which any such benefits are due to him. It therefore requests that the complaint be dismissed.

4. Determination and reasons therefore

Time barring

- 4.1 Section 30I of the Pension Funds Act imposes certain time limits with regard to lodging of complaints before the Adjudicator and states 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;
 - (b) condone non compliance with any time limit prescribed by this Chapter.”

4.2 It seems that the complainant’s cause of action arose in 1991. His complaint was lodged in October 2006, and was therefore received almost 12 years out of time.

4.3 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

4.4 However, that the complaint has become time-barred in terms of section 30I of the Act (as the contents were prior to the legislative amendment) 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 good cause needs to be shown to enable me to do that.

4.5 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."

- 4.6 There has been an extraordinarily long delay in the submission of this complaint (almost seventeen years after the complainant left the first respondent). The complainant states that he has only recently become aware of the existence of this office, but he has not explained why he failed to seek any other legal redress in the intervening period.
- 4.7 Regarding the complainant's prospects of success on the merits, there are no records in existence, which is not surprising after an elapse of fifteen years. The complainant has also not provided any documentation or information on which to establish whether a benefit was due, and if so, on what basis it should be computed. There is therefore nothing on which to base a finding in favour of the complainant.
- 4.8 Taking the above factors into account, I find that no good cause exists for me to condone the non-compliance with the time limit as prescribed in the section. The complaint therefore remains time-barred and I may not investigate it.

5. Relief

- 5.1 The complaint is dismissed.

DATED AT CAPE TOWN ON THIS THE day of 2007.

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR