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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956 ("the Act") – D MAY v ESKOM PENSION AND PROVIDENT FUND / ESKOM

INTRODUCTION

- [1] The complaint was received by this office on 1 November 2005 and a letter acknowledging receipt thereof sent to you on 3 November 2005. On 3 November 2005 a letter was dispatched to the respondents(giving them until 24 November 2005 to file a response to the complaint. The response dated 23 November 2005 was received on 24 November 2005. On 18 January 2006 the response was sent to you for a reply by 31 January 2006. A reply was received from you on 21 April 2006. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter.

THE COMPLAINT

- [2] You commenced employment with Eskom in 1971 and became a member of the Eskom Pension and Provident Fund ("the fund") on 1 July 1976. You were retrenched in 1987.
- [3] Your complaint is that when the Salt River branch of Eskom was closed down, Eskom retrenched you rather than deploying you to its Brackenfell branch. You also contend that the fund failed to pay you any benefit on your retrenchment.

THE RESPONSE

- [4] The fund states that a benefit of R5 166.79 (after tax) was paid to you on

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)

11 February 1987. The only outstanding benefit was an amount of R24.03 plus interest of R135.17 which was paid to you in March 2006.

DETERMINATION AND REASONS THEREFOR

[5] Regarding your redeployment to Eskom's Brackenfell branch, this is an employment issue over which I have no jurisdiction.

[6] Regarding your contention that you did not receive any benefit from the fund, 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.”

[7] Your complaint relates to the alleged non payment of a pension benefit on your retrenchment in 1987. Your complaint was however only received by my office on 1 November 2005, some 18 years later. Therefore in terms of section 30I(1), I may not investigate your complaint.

[8] 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."

- [9] 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.
- [10] 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."

- [11] A delay of some 18 years in your case is significant. You have also not provided any explanation for the delay. Moreover, according to the fund's records, you were paid the benefit to which you were entitled on your retrenchment.
- [12] Taking into account all the circumstances, I cannot find good cause to condone non-compliance with the time limits set out in section 30I. The complaint therefore remains time-barred and I may not investigate it.

RELIEF

- [13] In the result, your complaint cannot succeed.

**VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR**