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Please quote our ref: PFA/NP/12091/2007/LTN

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 (“the Act”): M L MOKOBO (“the complainant”) v BLACK TOP SURFACES PROVIDENT FUND (“the first respondent”), LIBERTY LIFE (“the second respondent”)

1. Introduction

- 1.1 The complaint concerns the payment of the insured death benefit by the first respondent following the death of Leshiya Bethuel Mokobo (“the deceased”) to the complainant.
- 1.2 The complaint was received by this office on 11 January 2007. A letter acknowledging receipt thereof was sent to the complainant on 23 January 2007. On the same date a letter was dispatched to the second respondent giving it until 22 February 2007 to file its response to the complaint. This office received a response from the second respondent on 23 October 2007. This response was forwarded to the complainant on 30 October 2007. The complainant replied on 7 November 2007.
- 1.3 Having considered the written submissions filed before this office, it is unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), Z Camroodien (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), M Qhali (Assistant Adjudicator),

Office Manager: L Manuel, Senior Accountant: F Mantsho

- 1.4 As the background facts are well-known to all parties, these shall be repeated only to the extent that they are pertinent to the issues raised herein.

2. Factual background

- 2.1 The complainant is the younger brother of the late Leshiya Bethuel Mokobo who passed away on 26 February 2000. The deceased was a member of the first respondent. He withdrew from the first respondent on 30 April 1998 prior to his death. During that period, the deceased was entitled to a withdrawal benefit of R2 723.10. This money was initially paid to the deceased by cheque in April 2000. The second respondent was not aware at this stage that the deceased had passed away. The benefit cheque went stale and in May 2003 the benefit cheque was reissued to the estate of the deceased. This cheque also went stale and was reissued in November 2006, payable to the deceased's estate.

3. Complaint

- 3.1 The complainant complains that he is entitled to the insured death benefit of the deceased not withdrawal benefit.

4. Responses

Second respondent's response on behalf of the first respondent

- 4.1 Sudesh Haridayal filed a response on behalf of the second respondent. He submitted that the complainant's brother was a member of the first respondent and withdrew from the first respondent on 30 April 1998.
- 4.2 He further submitted that he passed away on 26 February 2000. A withdrawal benefit of R2 723.10 was initially paid to the complainant's brother by cheque in April 2000. By that time the second respondent was not aware that the complainant's brother had passed away. The benefit cheque was stale and in May 2003 the benefit cheque was reissued to the complainant's brother estate. This cheque also went stale and was reissued in November 2006, payable to the complainant's brother estate.
- 4.3 He finally submitted that as the complainant's late brother only contributed to the first respondent until April 1998 and passed

away on 26 February 2000, the complainant's brother was not covered for the insured death benefit, as result of a member withdrawal from the first respondent prior to date of death.

5. Determination and reasons therefor

Time-barring

5.1 Section 30I of the Pension Funds Act imposes certain time limits with regard to lodgement 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) The provisions of the Prescription Act, 1969 (Act No. 68 of 1969), relating to a debt apply in respect of the calculation of the three year period referred to in subsection (1).”

5.2 The complainant's cause of action arose on 26 February 2000 when the deceased passed away. However, the complaint was only lodged on 11 January 2007, and was therefore received almost four years out of time.

5.3 There is a 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 issue. 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 interest of justice. They protract the disputes over the rights and obligations are 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

5.4 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 11 of 2007. This subsection read as follows:

“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.”

5.5 Subsection (3) therefore contained a power for the Adjudicator to condone non-compliance with three year time-bar, provided good cause existed. Although that discretion has been removed, the complainant is entitled to have his complaint adjudicated on the legal framework applicable at the time that he lodged his 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). 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.

5.6 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.”

Yours faithfully

**MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR**