HEAD OFFICE
Johannesburg
1st Floor, Norfolk House
Cnr 5th Street & Norwich Close
Sandton, 2196
PO Box 651826, Benmore, 2010
Tel (011) 884-8454 Fax (011) 884-1144
E-Mail: enquiries-jhb@pfa.org.za

Cape Town
2nd Floor, Oakdale House, The Oval
Oakdale Road, Newlands, 7700
P O Box 23005, Claremont, 7735
Tel (021) 674-0209 Fax (021) 674-0185
E-mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Please quote our reference: PFA/GA/2372/2005/FM

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, OF 1956: ("the Act"): M STEYN v IBM SOUTH AFRICA PENSION FUND / ALEXANDER FORBES / IBM SOUTH AFRICA (PTY) LTD

Introduction

[1] Having considered the complaint received by this office on 10 February 2005 and further written submissions, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.

[2] Save for setting out only those facts that are pertinent to the issues raised herein, I shall not burden this determination by repeating the background facts as they are well-known to all parties.

Facts

[3] Your client was in the employ of IBM South Africa (Pty) Ltd (henceforth "the employer") initially as a salaried data processing billing co-ordinator and thereafter as a commission salesman for a period of twenty two years and four months until his retrenchment on 23 April 1999. During the tenure of his employment, he was a member of the IBM South Africa Pension Fund (henceforth "the fund"). Upon his retrenchment, a benefit became payable by the fund which, in terms of its rules (Rule 31A), is equal to his actuarial reserve as determined by the fund's actuary.

[4] In July 1999 an amount of R1 535 097. 00 was paid to a preservation fund on your client's behalf on account of his exiting the fund on being retrenched

by the employer. This amount which constitutes his preservation/retrenchment benefit now forms the subject-matter of this complaint.

Complaint

[5] Your client's challenge is two-pronged. Firstly, he charges that the benefit paid to him by the fund has been incorrectly calculated. In the second instance, he avers that the fund has failed to furnish him with adequate information regarding the manner in which his benefit was calculated to enable him to identify and pursue his claim against the fund.

[6] In substantiation of his first averment that the benefit paid to him was inadequate, your client argues that the fund's actuaries have used a "basic salary" of R 29 694.00 in contradistinction to "annual pensionable emoluments" which was a sum greater than the said salary as the basis for their calculation. This, your client submits, is incorrect. He contends that his pensionable emoluments were, in accordance with the fund rules, constituted by his basic salary and commission or his target earnings if smaller and in terms of paragraph [b] of the definition of "pensionable emoluments", an amount to be determined by his employer from time to time in lieu of bonuses and all other remuneration of any nature whatsoever. It is your client's further argument that the fact that the employer did not determine an amount in lieu of bonuses and all other remuneration in his case does not mean that it should not have made such determination. The wording of paragraph [b], so goes the argument, is peremptory and obliges the employer to determine such an amount and the failure to do so has, according to your client, resulted in the fund's actuaries using the incorrect amounts in making their calculations and on this basis, it is argued, such calculations fall to be revised. Your client further avers that the fund's calculation ignores the definition of "final average emoluments" which means "the highest annual pensionable emoluments in any consecutive period of twelve months of pensionable service over the last three years of a member's pensionable service". This amount in relation to your client was, according to him, in the region of R 38 602. 00 and/or R47 512.50 which, he argues, was substantially more than the amount of R29 694.00 used by the actuary in his calculation. It is further argued that this definition should have been used in the calculation of your client's actuarial reserve and that such failure is also the cause of your client's benefit being significantly inadequate.

[7] Your client explains the relationship, as he understands it, between the expressions "Target Earnings", "On Target Earnings", "Pensionable Salary" and "Base Salary" in the following terms:

"Pensionable Salary x 130% = On Target Earnings

> Therefore, R29 694.00 x 1.3 = R38 602.00 being On Target Earnings.
>
> If all sales are met / exceeded, monthly remuneration is R38 602. or more.
>
> If no sales are done he receives 65% of his On Target Earnings or R25 091.43 which is his Base Salary."

Your client then argues that contrary to the view of both the fund and the employer, his pensionable emoluments are, in terms of the rules, based and calculated on his "On Target Earnings" and that this expression and "Target Earnings" are meant to be used interchangeably. He further denies the employer's argument that the expressions "Target Earnings", "Pensionable Salary", and "Reference Salary" bear the same meaning.

[8] Regarding the second leg of his complaint, your client alleges that he has on several occasions requested the fund to explain how the amount of the benefit was calculated; to state the amounts used in the calculation; the clauses of the fund rules relied on and the method used in calculating the benefit. All these efforts have, according to your client, been to no avail and that the first time he received a "proper" answer was on 19 October 2005 when the employer filed its response with the office of the pension funds adjudicator. Your client submits that prior to the filing of the employer's response, after years of correspondence between him and the fund, no information had been furnished to him to enable him to determine whether he had a claim against the fund or not and contends that he has been prejudiced by the refusal on the part of the fund to "provide any or any proper explanation".

[9] The complainant appears to make a belated retraction of this leg of his complaint after the lodgment by the third respondent of its response to the complaint. In his reply to the third respondent's response, he says:

> "the information required to enable the Complainant to formulate his claim is now contained in the documents now filed by IBM".

[10] As regards the question of time-barring in terms of section 30I of the Act, Mr Steyn admits that his complaint was received out of time by this office but avers that there is good cause to enable the adjudicator to exercise his discretion to condone the non-compliance with the time limit. In explanation for the long delay in submitting his complaint he reiterates the contention that the fund and its representatives failed to provide detailed information upon which he could base his decision and denies the claim that due to the passage of time the employer had destroyed the records needed to defend the complaint. He argues that there appears to be more than adequate documents to enable a proper decision in the matter to be made. He further submits that the claim that memories of witnesses have faded is irrelevant as the information required to enable him to formulate his complaint is contained in the documents filed with this office by the employer. Your client

further argues that in light of the fact that his complaint that he was not paid the full amount due to him appears to be well-founded, it would be inequitable not to condone its late lodgment.

[11] Mr Steyn has also raised the issue of the applicability or otherwise of the provisions of section 14B of Act to the facts of his case and submits that the section applies thereto and that its application will result in an increased pension due to him. He further makes reference to the fact that the fund enjoys a substantial surplus and submits that he ought to benefit therefrom. These issues shall, however, not be dealt with in this determination because they were not raised in your client's original complaint. He is free to lodge a new complaint in that regard.

[12] In summary, Mr Steyn makes the following submissions:

- His Target Earnings are 130% of his Pensionable Salary;
- His Pensionable Salary was his Final Average Emoluments, being his highest Pensionable Emoluments *"in any consecutive period of twelve months of Pensionable Service over the last three years of his Pensionable Service…"*;
- Upon the basis that his basic salary and commission during this period was greater than 130% of his Target Earnings, his Target Earnings fall to be used in the calculation of the benefits due to him;
- Paragraph [b] of the definition of Pensionable Emoluments falls to be implemented according to its terms and an additional amount which must be fair and reasonable must be determined by the employer and added to the Target Earnings.

[13] Your client accordingly seeks that I order the fund to recalculate the benefit due to him using the correct information and in accordance with the relevant fund rules and that interest be added to any additional amount found to be payable and which was not paid at the date of transfer. He further seeks that I order the fund and/or the employer to pay his legal costs to be taxed on the "Supreme Court" scale.

Responses

Fund response

[14] Firstly, the fund raises a point *in limine*. It contends that your client's claim arose on his resignation from the employer on 23 April 1999 and his benefit was paid to him during June 1999. His complaint was raised, it is argued, in November 2003 and therefore any claim he might have had has prescribed.

[15] On the merits, the fund submits that the benefit of R1 535 097 paid to your client by the fund was determined in terms of rule 31A (retrenchment rule) of the fund rules since your client was retrenched prior to attaining retirement age. The rule provides that on retrenchment, a member shall be entitled to a benefit equal to his actuarial reserve as determined by the actuary. The fund then gives an explanation of how the actuary has determined Mr Steyn's actuarial reserve in the following terms:

> "Firstly he calculated Mr Steyn's accrued pension to date of leaving:
> Pensionable service = 22 years and 4 months
>
> Monthly pensionable salary (See Note 1) = R 29 694
> Annual pensionable emoluments = R 356,328 (R29, 694 x12)
> Accrual rate = 2.2%
>
> Accrued pension at date of leaving = R 175,075.82 (22.3334 xR356, 328 x 2.2%)"

[16] The fund states that the amount of R 175 075.82 was then used to determine the value of your client's future benefits in respect of past service using the same actuarial assumptions used during the previous statutory valuation of the fund. Those assumptions related, inter alia, to investment returns earned by the fund, active members' salary and pension increases and allowances made for withdrawals, early retirements and retirements due to ill-health. Those assumptions, so says the fund, applied to your client's age of 48.5 years, resulted in an actuarial reserve factor for him of 8. 768182, which factor was applied to the accrued pension at date of leaving to arrive at the actuarial reserve for your client, that is, R175, 075 x 8. 768182 = R1 535 097 which was then paid to Mr Steyn.

[17] The fund further states that the actuary in its said letter of 6 November 2003 erroneously referred to the amount of R29 694 as "monthly salary" rather than "monthly pensionable emoluments". The fund further submits that the member contributions payable on pensionable emoluments in terms of rule 17 of the fund rules were paid by your client to the fund on this amount of R29 694.00.

[18] In the final analysis, the fund submits that your client's benefit was correctly calculated in terms of the records of the fund and in accordance with the fund rules.

[19] On the question of the alleged failure to furnish information, the fund states that your offices sent a request for information on behalf of your client on 3 November 2003 and the fund replied thereto on 6 November 2003. The fund further states that after the said correspondence, there has not been any correspondence between your firm and/or your client, on the one hand, and the fund on the other. The fund says further that your letter dated 21

November 2003 was received by it on 14 April 2004 and that your subsequent letters of 10 December 2003 and 7 January 2004 were sent to facsimile numbers unknown to the fund.

The employer's response

[20] The employer also firstly raises a technical point of prescription. For reasons which will become apparent later in the determination, it is not my intention to dwell on this point.

[21] In the alternative, the employer raises the issue of time-barring in terms of the provisions of section 30I of the Act and argues that your client's complaint is time-barred. The employer submits that your client has failed to show good cause for the exercise by the adjudicator of his discretion to condone the late filing for, inter alia, the following reasons:

- failure by your client to tender any explanation or satisfactory explanation for the long delay in lodging his complaint, including delays of 14 months from August 1999 to to September 2000 and of two and a half years from May 2001 to December 2003 when he remained inactive;

- the contention that your client needed further information to lodge the complaint has no factual and legal basis.

- the company destroyed the records needed to resist the complaint when your client failed to lodge the complaint;

- memories of witnesses have faded and some staff are no longer in the employ of the employer ,while others have left the country and are no longer readily available to assist in the employer's defence;

- the fund and its actuary have taken decisions affecting the employer based on the premise that there are no outstanding complaints, particularly the determination by the actuary that the employer can take a contribution holiday;

[22] Before delving into the merits, the employer first attempts to elucidate its own version of how certain concepts/terminology as were in use at the workplace were understood and interpreted during the tenure of your client's employment. These concepts were also expressly incorporated into the fund rules. A clear understanding of the actual meaning of these concepts is, in my view, critical to the determination of the issues in dispute in this matter.

[23] "Pensionable Emoluments" are defined in the rules as follows:

> "**PENSIONABLE EMOLUMENTS** shall mean, for any Member, the sum of –
>
> a. (i) if he is not remunerated by commission, his basic salary or wages (excluding payments for overtime and shift allowance); or
>
> (ii) if he is remunerated by commission, the sum of his basic salary or wages and commission (excluding payments for overtime and shift allowance), or his target earnings if smaller; and
>
> b. an amount to be determined by his Employer from time to time in lieu of bonuses and all other remuneration of any nature whatsoever".

The rules define "Target Earnings" as follows:

> **"TARGET EARNINGS** shall mean, for a Member who is remunerated by commission, his annual target earnings as defined in the current Sales Plan agreed between the Member and the Company".

"Final Average Emoluments" are as far as is relevant for the purposes of this case, defined thus:

> "**FINAL AVERAGE EMOLUMENTS** shall mean, for a Member, his highest annual pensionable emoluments in any consecutive period of twelve months of Pensionable Service over the last three years of his Pensionable Service…"

[24] The employer submits and it is common cause that "Pensionable Emoluments" are defined in the fund rules to mean the lower of actual earnings and "Target Earnings". The employer further submits that paragraph [b] of the definition of "Pensionable Emoluments" is to be ignored and has no relevance for present purposes as no such amount was at any time determined by the employer. It is the employer's further submission that "Target Earnings" were at all times from the adoption of the expression in the fund's rules intended to mean and were at all times used to mean, the amount a commission salesman would have earned had he been a salaried employee instead of being remunerated in part by commission and this is how the expression was defined in the Sales Plans.

[25] The employer states that in 1995 a new concept was introduced into the Sales Plans: the earnings the commission salesmen would earn if all targets were met. These earnings were referred to as "On Target Earnings" and fluctuated between 20% and 30% higher than the existing concept of "Target Earnings". The employer further states that in order to avoid confusion, the old concept of "Target Earnings" was then called "Reference Salary" or "Pensionable Salary". The employer stresses the point that it was expressly stated in the Sales Plans that Reference Salary was the amount on which pension contributions and benefits would be calculated, in order to link it to the fund's rules. The employer further states that the 1998 Sales

Plan is the only one that it has been able to locate. In the said Sales Plan which I have had sight of, your client's "On Target Earnings" are reflected as 120%; his "Base Salary" is reflected as 70% of "On Target Earnings" or 84% of the "Reference Salary" and his "Reference Salary" is reflected as 81,33% of "On Target Earnings". It is also stated therein that the reference salary is used to calculate any other salary related benefits such as pension/provident fund calculations. The Sales Plans were, according the employer, supplemented by a "Territory Agreement" entered into with each individual salesman and the employer has apparently only managed to obtain an unsigned copy of the agreement entered into with your client wherein the following section appears:

> "**Territory Agreement for Participation in the 1999 Sales Incentive Plan**
>
> I am pleased to inform you that as discussed, you will participate in the IBM South Africa Sales Incentive Plan in 1999.
>
> - Your On Target Earnings (OTE) will be 130% of your pensionable salary
> - You will be paid a base salary of 65% of your OTE".

The employer finally submits that the Sales Plans, Territory Agreements and letters to your client in the other years from 1996 to 1999 would have been in similar terms.

[26] On the merits, in dealing with the first leg of your client's complaint, the employer avers that your client's allegation that the fund used his basic salary as the basis of the calculation is incorrect and that his Reference Salary or Pensionable Salary was used. The employer further avers that in accordance with the fund rules, the actuary used your client's highest Reference Salary in any twelve consecutive months preceding his retrenchment. It is the employer's further averment, and this is borne out by the documentary evidence, that your client's actual earnings at all times exceeded his Reference Salary and therefore his Pensionable Emoluments were equal to his Reference Salary, being the smaller of actual earnings (basic salary plus commission) and Reference Salary (Target Earnings) and that his highest Reference Salary during any twelve consecutive months during the last three years of his employment was R29 694.00 per month. Expressed differently, the employer's contention is that contrary to your client's view, the definition of Pensionable Emoluments expressly provides that Pensionable Emoluments are the smaller of actual earnings and Target Earnings (Reference Salary). R29 694.00 was, according to the employer, your client's highest Reference Salary during any twelve consecutive months in the last three months of his employment with the employer and it was used by the actuary to calculate his benefit because it was smaller than his actual earnings. Your client's actual earnings were, the employer

submits, accordingly irrelevant to the calculation of his Pensionable Emoluments.

[27] As regards your client's contention that Target Earnings and On Target Earnings are one and the same thing and his submission that his benefit should be calculated on the basis of his Target/On Target Earnings, the employer makes the submission that the complainant confuses the two concepts and explains that when it became evident that he was confusing these concepts, the employer addressed a letter to your client pointing out that the Sales Plans, Territory Agreements and letters to him made it absolutely clear that pension contributions and benefits are based on Reference Salary/Target Earnings and not on On Target Earnings. The employer alleges that after your client was sent the said correspondence, he remained inactive for two and a half years. The employer further submits that there was no scope for any misunderstanding that the new expression "On Target Earnings" and the new concept it enshrined, were what was referred to in the rules as "Target Earnings". The third respondent further submits that in any event the fund rules could not be indirectly amended by a change in the essential nature of Target Earnings in the Sales Plans without an appropriate rule amendment.

[28] The third respondent has referred me to a schedule apparently listing your client's actual earnings from January 1996 until the date of his retrenchment on 23 April 1999, with the breakdown between base salary and commissions on the one hand and his reference salary on the other. The employer submits that from the schedule it is evident that your client's actual earnings at all times exceeded his reference salary and therefore his pensionable emoluments were equal to his reference salary, being the smaller of actual earnings (basic salary plus commission) and reference salary (target earnings) and that the highest reference salary during any twelve consecutive months during the last three years of your client's employment was R29 694.00 per month.

[29] In view of your client's apparent retraction of the second leg of his complaint, suffice it to say that the third respondent denies the allegations and submits that your client has persistently ignored the explanations furnished to him regarding the manner in which his benefit was calculated.

[30] Finally, the employer submits that in formulating and persisting with his complaint, your client has failed to take cognizance of the relevant provisions of the fund rules read with contractual entitlements and has further ignored the careful explanations furnished to him regarding the manner in which his benefit has been calculated.

[31] In light of its foregoing submissions, the employer seeks me to dismiss your client's complaint.

Determination and reasons therefor

[32] Although I consider the provisions of Chapter 3 of the Prescription Act, 68 of 1969, not to be of application in proceedings before this tribunal (see *Nyanyeni v Illovo Sugar Pension Fund and Another* [2004] 11 BPLR 6249 (PFA) at paragraphs [16] to [19], there is nevertheless the issue of time-barring in terms of section 30I of the Pension Funds Act which provides for certain time-limits with regard to the lodging of complaints. The section reads:

> "(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 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 the expiry of any period prescribed by this Chapter, extend such period; [or]
>
> (b) condone non compliance with any time limits prescribed by this Chapter."

[33] It is clear from the complaint that the event to which it relates occurred more than three years before this complaint was received by or lodged at this office. Your client's benefit accrued in April 1999 and was paid in July 1999. The complainant's complaint was received by this office on 10 February 2005, almost six years out of time. His complaint should have been lodged at the latest in March 2002 or in June 2002.

[34] 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 *Mahlomi 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."

[35] The third respondent has submitted that due to the inordinate period that has elapsed since the events complained of occurred, it destroyed records needed to resist the complaint. It has further submitted that staff have left its employ and in some cases emigrated so that they are no longer readily available to assist in the employer's defence.

[36] An inordinate period has elapsed since the cause of the complaint occurred. The complaint has thus become time-barred.

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

[38] The Supreme Court of Appeal 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:

> "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 the strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."

[39] In light of the factors that I have mentioned, I now proceed to determine whether good cause exists to condone your client's non-compliance with the time limits.

[40] As I have pointed out earlier, the event to which this complaint relates occurred in April 1999. It is clear that your client became aware of his claim against the fund in July 1999 and his complaint should have been lodged at the latest in June 2002. Your client lodged his complaint on 10 February 2005, nearly three years later. Your client concedes that a long time has elapsed between the transfer of his benefit and the lodgment of his complaint but adds as some sort of a justification ground that he has nevertheless doggedly persisted in asking questions from as early as July 1999 despite receiving assurances from the fund and the employer that his benefit has been correctly calculated. This, in my view, should have been more than a reason for him to lodge a complaint when it became clear to him that his queries were not resolved to his satisfaction. There is also the

uncontested evidence of the third respondent that after the fund's actuary had addressed a letter to your client on 15 July 1999 detailing the basis of the calculation of your client's benefit, nothing was heard from your client by either the fund or the employer for a period of 14 months from August 1999 to September 2000. Furthermore, the third respondent's evidence that after it had written a letter to the complainant in May 2001 in an attempt to clear up the complainant's apparent confusion regarding the distinction between the concepts of "Target Earnings" and "On Target Earnings", your client became supine for two and a half years from May 2001 to December 2003 is not in dispute.

[41] Your client's further explanation for the delay that no information has been given to him by the fund or the employer to enable him to determine whether or not he had a claim against the fund is not borne out by the documentary evidence. It is clear that as far back as July 1999, he was already disputing the substantive basis on which his benefit was calculated. Furthermore, your client appears to have been loath to initiate legal proceedings. In his reply to the employer's response, he makes reference to his "natural reluctance to become involved in any sort of contentious litigation and/or arbitration and/or adjudication against the Fund" without any further elaboration of what he means by that statement. Be that as it may, I do not find the complainant's explanation for the delay persuasive.

[42] In summary, the event to which this complaint relates occurred in April 1999. Your client's complaint should have been lodged in June 2002. He lodged his complaint on 10 February 2005, six years after the event to which the complaint relates and nearly three years since when the complaint should have been lodged. Such delay is, in my view, inordinately long. I have also already made the point that the explanations tendered by your client for the delay are not persuasive. I accept the employer's submission that the passing of such a long period of time would be enormously prejudicial to it in that its records needed to defend the complaint have been destroyed and that such staff as may have been required to give evidence on these issues have left

its employ and some have emigrated and are no longer available to assist in its defence.

[43] The prospects of success are, moreover, not strong. It is clear in my mind that the first leg of your client's complaint is premised on a misapprehension that the amount of R29 694.00 used by the fund's actuary to calculate his benefit was his "Basic Salary" in contradistinction to his "Pensionable / Reference Salary" coupled with the inability to distinguish between the concepts "Target Earnings" and "On Target Earnings" as incorporated in the fund rules. Furthermore, your client appears to have abandoned the second

leg of his complaint. In his reply to the third respondent's response, he says the following:

> "the information required to enable the Complainant to formulate his claim is now contained in the documents now filed by IBM."

[44] Taking into account all the circumstances, I find that no good cause exists for me to exercise my discretion in terms of section 30I(3) of the Act in your client's favour. The complaint therefore remains time-barred and I may not investigate it.

[45] For the foregoing reasons, your client's complaint cannot succeed.

DATED AT JOHANNESBURG ON THIS DAY OF 2006.

Yours faithfully

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR