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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956 (“the Act”): JS MADSEN (“the complainant”) v NORWICH GROUP INDOOR STAFF PENSION FUND (“the respondent”)

1. Introduction

- 1.1 The complaint concerns the non-payment of the complainant’s retirement benefit by the respondent.
- 1.2 The complaint was received by this office on 17 October 2005. The complainant was requested to furnish additional information in order to enable this office to investigate the complaint. The complainant submitted this on 11 November 2005. On 25 January 2006 a letter was dispatched to the respondent requesting it to file a response to the complaint by no later than 15 February 2006. The response was received on 13 June 2006 and a copy of same was forwarded to the complainant. A reply was received from the complainant on 18 January 2008.
- 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.

2. Complaint

M Mohlala (Adjudicator), C Nkuhlu (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), S Mothupi (Senior Assistant Adjudicator), L Mbalo (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), P Mphephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator), AP Lehana (Assistant Adjudicator), S Mokgara (Assistant adjudicator), L Molete (Assistant Adjudicator), T Nawane (Assistant Adjudicator)

Financial Manager: F Mantsho, Accountant: R Soldaat

- 2.1 The complainant commenced service with Norwich Life Assurance Limited (“the employer”) in November 1978. The complainant claims that he became a member of the respondent by virtue of his employment until he resigned from his employment in 1991. According to the complainant, he is no longer in possession of documentation relating to his employment due to his travels to the United Kingdom and Japan. He alleges that at the time he exited the respondent he did not request or receive his pension benefit. His intention was to leave his benefit to accumulate interest until his normal retirement.
- 2.2 The complainant states that since his return to South Africa he has been anxious to ascertain the status of his benefit but has been made aware of the fact that a time limit was placed on claims for benefits. He states that he finds it hard to believe that his contributions for a period of 13 years will be forfeited.
- 2.3 The complainant is aggrieved by the non-payment of his benefit by the respondent.

3. Response

- 3.1 The respondent states that the complainant’s employment records with Norwich no longer exist and there is no possibility of verifying this information. It contends that the complainant is obliged to prove on a balance of probabilities that he was a member of the respondent and that he did not receive a withdrawal benefit. It submits that the complainant has not been able to demonstrate any of these facts.
- 3.2 The respondent records that it was originally a defined benefit fund which was converted to a defined contribution fund on 1 March 1998. According to the respondent the complainant is not registered as a member of the respondent because either:
- 3.2.1 he was no longer a member as at 1 March 1998 having already received his benefit; alternatively
- 3.2.2 he had not claimed his withdrawal benefit within three years of terminating his employment and, in accordance with its rules, the benefit had reverted to the respondent’s surplus.

4. Determination and reasons therefor

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) 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).”

4.2 It seems that the complainant’s cause of action arose in 1991. His complaint was lodged on 17 October 2005. It ought to have been lodged in 1994. The complaint was therefore received almost 11 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, at the time that the complaint was lodged, section 30I contained a subsection (3) which was subsequently removed by the Pension Funds Amendment Act no 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.”

- 4.5 Subsection (3) therefore contained a power for the Adjudicator to condone non-compliance with the 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 Amendment Act referred to above contains a specific clause (40B) indicating which definitions and sections will have retrospective effect. 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.
- 4.6 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.”
- 4.7 It is clear that more than 14 years elapsed before the complainant lodged his complaint with this office. In my view, this is an extraordinarily long delay. Nor has the complainant provided adequate reasons for the delay to support the condonation of the non-compliance with the time limits set out in the Act.
- 4.8 Regarding the complainant’s prospects of success on the merits, the respondent has no records or documentation pertaining to the complainant’s membership. The complainant likewise has furnished no information surrounding his membership or alleged entitlements from the

fund. For this reason, there is nothing on which to base a finding in favour of the complainant.

- 4.9 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 2008.

Yours faithfully

Mamodupi Mohlala
Pension Funds Adjudicator