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Please quote our ref: PFA/GA/14447/2007/MD

**RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 of 1956 (“the Act”): M SHABANGU (“the complainant”) v ESKOM PENSION AND PROVIDENT FUND (“the respondent”)**

**1. Introduction**

- 1.1 This complaint concerns the payment of a disability benefit.
- 1.2 The complaint was received by this office on 19 June 2007 and a letter acknowledging receipt thereof was sent to the complainant on 7 February 2008. A letter of the same date was sent to the respondent to file a response to the complaint on 6 March 2008. A response dated 5 March 2008 was received from the respondent. A letter dated 7 April was dispatched to the complainant to file a reply to the response on 16 April 2008, if she wished to do so. However, the complainant has omitted to file a response in this regard.

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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 Muthupi (Snr Assistant Adjudicator), N van Collier (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

- 1.3 Having considered the written submissions before me, I find it unnecessary to hold a hearing. My determination and reasons therefor appear below.

## **2. Factual Background**

- 2.1 The complainant is the wife of Haliwa Philimon Shabangu (“the member”), who was employed by Eskom Holdings Limited (“the employer”) until 1993 when he was injured at work and stopped working. He became a member of the respondent by virtue of his employment, until the termination of his services due to his disability.
- 2.2 The subject matter of this complaint is that, the respondent failed to pay a disability benefit to the member following the termination of his services due to his disability after sustaining injuries in a car accident while on the company car from work.

## **3. Complaint**

- 3.1 The complainant avers that after the member had been injured in a company car accident, he was declared medically unfit to continue with his work and his services were subsequently terminated in 1993. She laments that, after her husband’s declaration of disability by the employer, they have not received any disability benefits from the respondent.
- 3.2 She further states that upon approaching the branch of the employer in Kriel, where the member used to work, to enquire about the member’s disability benefits, she was informed that the same were paid out to the member.
- 3.3 She requests this office to investigate why the member never received his disability benefit from the respondent.

## **4. Response**

- 4.1 Mr J. Buthane, a manager in the legal and technical services of the respondent, submitted a response on its behalf.
- 4.2 He submits that, the respondent’s records show that, following the member’s injury and the subsequent termination of his services, a lump sum of R52 941.92, was paid out to the member on 18 October 1993.

4.3 He further states that, the respondent's records show that the member is in receipt of a gross monthly pension of R2 093.52, less the following deductions:-

- a) Insurance of R47.15
- b) Eskom death benefit of R13.48
- c) Voluntary Burial aid scheme of R302.50

4.4 He avers that, the member receives a net monthly pension of R1 730.39, which is paid into his bank account.

4.5 He makes reference to the rules of the fund and cites rule 25(2) which reads as follows:-

- “Subject to sub-rule (5) hereof, a MEMBER who-
- (a) has not attained the PENSIONABLE AGE;
  - (b) in terms of sub-rule (4) hereof, is determined to be disabled  
and
  - (c) has not been retired from the SERVICE on grounds of disability, shall be entitled to a PENSION calculated in terms of rule 22 with effect from.....”

4.6 He argues that, the respondent is in compliance with the rules referred to above, as the member is in receipt of his monthly pension and reiterates that, the member was paid all benefits due to him, which includes the lump sum payment and the monthly pension.

4.7 He concludes that, the complaint be dismissed as the respondent has discharged its responsibilities in terms of the rules.

## **5. Determination and reasons therefor**

### **Time Barring**

5.1 Section 30I of the Act imposes certain time limits within which complaints must be lodged with the Adjudicator and provides 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 in 1993 following the termination of the member's employment due to his disability. However, the complaint was only lodged on 19 June 2007, and was therefore received 14 years out of time.

5.3 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 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 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 may 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 of the Act 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, extent 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 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 section

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.

- 5.6 The Supreme Court of Appeal (or the 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 a discretion, to be exercised judicially upon a consideration of all the 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.”

- 5.7 It is evident from the facts of this matter that, the complaint was lodged 14 years after the member’s termination of his employment due to his disability and no cogent explanation has been tendered by the complainant to indicate why there was a delay in lodging this complaint. Thus, as outlined by section 30I, I am not permitted to investigate this complaint by virtue of the fact that the occurrence to which the complaint relates, occurred 14 years more than the 3 years prescribed by the statutory prescripts. However, the enquiry does not end there and one must look at the prospects of success of the complaint.
- 5.8 Regarding the complainant’s prospects of success, I have taken cognisance of the fact that the respondent has submitted that a lump sum was paid to the member and that a monthly pension has been and is continuously being paid into a certain stipulated bank account, allegedly belonging to the member. On the other hand, the complainant was afforded an opportunity to refute the response tendered by the respondent, but failed to do so. The evidence submitted by the respondent remains unchallenged and thus, the only plausible conclusion is that the prospects of success are bleak.

5.9 In light of the foregoing, I am not persuaded that good cause exists either to extend the period or to condone non-compliance with the limits contained in Section 30I of the Act.

5.10 In the result, the complaint cannot succeed.

DATED AT JOHANNESBURG ON THIS            DAY OF            2008

Yours faithfully

**MAMODUPI MOHLALA**  
PENSION FUNDS ADJUDICATOR