



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/3764/05/FM

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, OF 1956 (“the Act”) – D GQOLI v AMALGAMATED BEVERAGE INDUSTRIES PROVIDENT FUND/ LEKANA EMPLOYEE BENEFITS

Introduction

- [1] Your complaint concerns the alleged non-payment of a withdrawal benefit when, on 27 July 1992, you were dismissed from employment by Amalgamated Beverage Industries –Coca Cola (“the employer”) and exited the Amalgamated Beverage Industries Provident Fund (“the fund”) of which you were a member by virtue of such employment.
- [2] The complaint was received by this office on 8 June 2005 and a letter acknowledging receipt thereof was sent to the complainant on 29 June 2005. A letter was also on 29 June 2005 sent to the second respondent giving it until 20 July 2005 to file a response to the complaint. After various correspondences between this office and the second respondent, a response dated 6 December 2005 was filed by the second respondent on behalf of the first respondent on 7 December 2005. After considering the written submissions before me, I consider it unnecessary to hold a hearing.

Complaint

- [3] You are aggrieved by the alleged failure on the part of the fund to pay you a withdrawal benefit when you left the service of the employer and withdrew from the fund on 27 July 1992. You allege and this is not contested by the

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)

Office Manager: L Manuel

second respondent, that you were a member of the fund during your tenure of employment with the employer. You further aver that on contacting the fund, you have been advised that no record of your fund membership could be traced.

Response

- [4] In its response on behalf of the fund the second respondent which administers the fund, raises a preliminary point that you have lodged a complaint some 13 years after leaving the service of the employer and further that your complaint is 10 years out of time in terms of the time-barring provisions as contained in section 30I of the Act. It is further argued that you have not tendered any explanation for the protracted delay in approaching the fund with your complaint and the respondent further submits you have not shown any cause to allow this Tribunal to condone the non compliance with the time limits set out in the Act.
- [5] On the merits, the respondents state that every effort has been made on their part to find a confirmation of payment of your withdrawal benefit to no avail. This situation is, according to the respondents, exacerbated by the fact that there has been a change of administrators during the intervening period.
- [6] Finally, the respondents submit that the fund is not legally required to retain records in respect of withdrawing members indefinitely; that a period of 13 years is a long time and that it is not unreasonable for the fund to have advised you that no record of your fund membership could be traced.
- [7] The respondents seek that I dismiss your complaint.

Determination and reasons therefor

- [8] Section 30I of the Act imposes certain time limits with regard to the lodging of complaints before the Adjudicator and provides thus:
- “(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.”

[9] The date of accrual of your benefit is 27 July 1992. Even though this Tribunal had not yet come into existence at that time (was established in 1996 and became operational in 1998), your complaint was lodged on 8 June 2005, some 7 years after the establishment of this office.

[10] 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.”

[11] 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 cause to enable me to do that.

[12] 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 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 the strong prospects of success may tend to compensate for a long delay. And the respondent’s interest in finality must not be overlooked.”

[13] It is clear from the complaint that the event to which it relates occurred substantially more than three years before this complaint was lodged or received by this office on 8 June 2005. The appropriate time to take issue

with non-payment of your withdrawal benefit was in 1992 when you left the fund. Even allowing a three year period from that time, your complaint has been lodged nearly 11 years late. It goes without saying that the passing of such a long period of time would probably be prejudicial to the respondents for the reasons set out in the Mohlomi case above. Your prospects of success are, moreover, not strong. You have no documentary evidence whatsoever pertaining to your membership of the fund.

[14] Finally you have not tendered any explanation for the lengthy delay between 1992 when you left the fund and the eventual lodging of your complaint in 1995. Taking into account all the circumstances, I cannot find good cause to condone the non-compliance with the time limits set out in section 30I. The complaint therefore remains time-barred and I may not investigate it.

[15] In the result, your complaint cannot succeed and our file herein is now closed.

DATED AT JOHANNESBURG ON THIS DAY OF 2006.

Yours faithfully

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR