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Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 of 1956 (“THE ACT”): N A VERMEULEN (“the complainant”) v H A SWANEPOEL GROUP PENSION FUND (“first respondent”) AND LIBERTY GROUP LIMITED (“second respondent”)

1.0. Introduction

- 1.1 The complaint concerns the mode of payment of a pension to the complainant by the respondents.
- 1.2 The complaint was received by this office on 20 October 2005. On 1 November 2005 a letter was dispatched to the second respondent, who is the administrator of the first respondent, giving the respondents until 22 November 2005 to file a response to the complaint. A response, which was forwarded to the complainant, was received on 16 January 2006. Replies and further correspondence from the complainant were received on 21 February 2006, 15 March 2006, 28 April 2006, 30 November 2006, 19 February 2007 and 1 March 2007.
- 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.

M Mohlala (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), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Nekile (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator)

Office Manager: L Manuel

2.0 Factual Background

2.1 The complainant was an employee of the erstwhile H.A. Swanepoel Enterprises (Pty) Limited (“the employer”) and by virtue of his employment became a member of the first respondent. He opted for early retirement in January 1992 with the consent of the employer. The complainant’s total pension benefit was R81 495.36. He elected to take one-third of this amount as a cash lump-sum, i.e. he was paid a gross amount of R27 165.12 in cash. The remaining two-thirds of his early retirement benefit, in the sum of R54 330.24, was used to purchase a pension annuity with the second respondent which provides a monthly pension of R738.41 paid in arrears every month from February 1992.

3.0 Complaint

3.1 The complainant complains that he was under the impression that the capital amount of R54 330.24 was invested with the second respondent for ten years, whereafter it would have been paid out to him. On enquiry with the second respondent the complainant was advised that the annuity was in the name of the first respondent rather than him and that the capital sum could not be paid as a lump sum.

3.2 The complainant now wants the second respondent to pay out the R54 330.24 in cash so that he can use the money to purchase a house or a motor vehicle.

4.0 Response

4.1 Mrs. L. Bezuidenhout responded on behalf of the second respondent. She first raised two preliminary points regarding this tribunal’s jurisdiction to adjudicate the complaint. Firstly, she averred that the complaint relates to matters that arose thirteen years ago, so the claim has “prescribed” in terms of section 30I of the Act. Secondly, she avers that the complaint concerns a post-retirement annuity between the complainant and the second respondent, rather than a pension fund. Since this tribunal is only empowered to deal with pensions-related complaints, it does not have jurisdiction in the present matter.

4.2 On the merits the second respondent advises that the complainant signed a group benefits retirement notification form advising that he wanted to take early retirement from the first respondent. The complainant signed for an application for a compulsory annuity on 21 February 1992. The proceeds from the first respondent, being the

two-third amount of the complainant's portion in the sum of R54 330.24, was applied to a single life with guarantee compulsory annuity effective 1 January 1992. Payments are made on a monthly basis in arrears.

- 4.3 Mrs. Bezuidenhout goes on to confirm that monthly payments of R738.41 have always been made into the complainant's bank account and no payments were ever made to a Mr. Swanepoel. The letter sent to a Mr. Swanepoel on 15 May 1992 had been addressed to him in error and Mrs. Bezuidenhout apologised for indicating that Mr. Swanepoel was the owner of the policy. Since the first respondent transferred the annuity purchase amount to the second respondent, it will always reflect on the computer system that the first respondent had purchased the annuity on behalf of the complainant.

5.0 Determination and reasons therefor

- 5.1 The crisp issue for determination in this complaint is whether the complainant is entitled to receive a cash payment of the annuity amount of R54 330.24 from the respondents. However, before deciding on the merits of the complaint, this tribunal first needs to satisfy itself whether the complaint should be time-barred or not in terms of section 30I of the Act and whether it falls within the ambit of a pensions-related complaint rather than an insurance-related matter.

Points in limine

- 5.2 The complainant's complaint relates to the mode of payment of an early retirement benefit that was granted by the first respondent in January 1992 and the first monthly pension was paid in February 1992. However, the complainant avers that he was under the impression that he would be paid the lump sum annuity amount of R54 330.24 after the expiry of a ten year period, i.e. in March 2002. This view arose because in the amended application for an annuity form, the guarantee period was changed from the initial five year guarantee to a ten year guarantee period. Even though the complainant has misconstrued the meaning of the guarantee period, it is evident that he believed the ending of the guarantee period would mean that he would receive a lump sum amount from the respondents. Therefore, contrary to the second respondent's averment that the complaint arose thirteen years ago in February 1992, it in fact only arose in March 2002 when the ten year period expired and no lump sum amount was paid by the second respondent.

5.3 The complaint was submitted to this tribunal on 20 October 2005. Thus, a period of approximately three years and seven months passed before the complaint was lodged with this tribunal. Section 30I(1) of the Act requires that complaints be lodged within three years of the occurrence of the cause of action giving rise to the complaint. Thus, it is time barred for the purposes of section 30I(1) of the Act.

5.4 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 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.”

5.5 However, the enquiry does not end there as this tribunal still needs to satisfy itself as to whether or not good cause has been shown, or exists, for it to extend the three year limit or to condone the non-compliance therewith. 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) at 532C-F (“the Melane case”) 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 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.”

5.6 Therefore, all the facts need to be objectively weighed before deciding whether to condone the late submission of this complaint.

As alluded to in paragraph 5.3, approximately three years and seven months passed before a complaint was lodged with this office. The complainant, while having written to the second respondent on several occasions during the intervening period, does not explain why he delayed over three and a half years before submitting his complaint to this tribunal. From the correspondence received it is evident that the complainant engaged the services of an attorney in 2005. The complainant's legal representative ought to have advised him about the conduct of this complaint, but despite this he only submitted the complaint in October 2005. It also is the case that even though the complainant supposedly believed that he should have been paid the capital amount at the latest by March 2002, he chose to only lodge his complaint more than three and a half years later. In the circumstances, there was a long delay, without justifiable explanation, before the complainant submitted a complaint to this tribunal.

- 5.7 As regards the prospects of success of the complaint, it is trite law that the first respondent is bound by its rules in the same way as its members, officials, shareholders and persons claiming under the rules (see section 13 of the Act). By virtue of the binding nature of the rules, the trustees of the first respondent, the members, the employer and any service provider such as the administrator of the first respondent may only do that what is set forth in the rules (see *Tek Corporation Provident Fund & Another v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D-E).
- 5.8 Applying the rules to the facts of this case it is common cause that the complainant applied for and was granted early retirement by the first respondent. The rules pertaining to the payment of an early retirement pension reads as follows:

“4.5 PAYMENT OF PENSIONS

- 4.5.1 All pensions payable by the Fund shall be paid monthly on the last day of each month, the first payment being made on the last day of the month in which the Member retires. Payment shall continue throughout the Pensioner's life terminating with the payment due on the last day of the month immediately preceding the Pensioner's death, subject to a minimum of 60 payments.
- 4.5.2 In the event of a Pensioner dying before sixty monthly payment of the pension have been made, the pension shall continue to be paid until sixty monthly payments have been made. If the Pensioner has no Dependants, the benefit shall be paid in accordance with the provisions of clause 7.15.2.

4.6 COMMUTATION OF PENSION

Subject to the consent of the Employer a Member may elect, not less than one month prior to his retirement, to commute up to one-third of his pension for a lump sum payment. Where the pension before commutation is less than R250.00 per annum, or such other amount as may be permitted by law from time to time, the whole of the pension may be commuted for a lump sum payment."

5.9 Thus, the first respondent was only allowed to commute one-third of the total pension amount to a cash lump sum. It is common cause that the complainant received this amount. The remaining two-thirds had to be used to purchase a pension annuity that would provide the complainant with a monthly pension. This is what the first respondent did. Further, in terms of the definition of a "pension fund" in section 1 of the Income Tax Act, 58 of 1962 ("the Income Tax Act"), pension funds are only permitted to commute a maximum of one-third of the total value of a pension benefit to cash. The relevant sub-section of the definition of a pension fund reads as follows:

"(dd) that not more than one-third of the total value of the annuity or annuities to which any employee becomes entitled, may be commuted for a single payment, except where the annual amount of such annuity or annuities does not exceed R1 800 or such other amount as the Minister of Finance may from time to time fix by notice in the *Gazette*;"

5.10 From the foregoing it is clear that the complainant cannot succeed with his complaint. This is so because the respondents are prohibited, both in terms of the first respondent's rules and the definition of a pension fund in the Income Tax Act, from paying to the complainant the remaining two-thirds of his pension benefit as a cash lump-sum. Therefore, on the merits of the complaint this tribunal finds that there are no prospects of success for the complainant. As stated in the *Melane* case *supra*, if there are no prospects of success with a case there is no point in granting condonation for the late filing of the complaint.

5.11 Taking all these factors into consideration, no good cause exists for this tribunal to extend the time limit prescribed for lodging a complaint in terms of section 30I(1), nor does this tribunal condone the non-compliance with the time limit prescribed in the section. Therefore, the complaint is time-barred.

5.12 For the sake of completeness this tribunal also addresses the second respondent's submission that the complaint relates to an annuity between the complainant and the second respondent in its capacity as an insurer, therefore it is not a pensions-related complaint. The pension details in the "contract schedule" that was issued by the second respondent clearly states that the purchaser of the pension annuity is the first respondent rather than the complainant. Therefore,

