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RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 (“the Act”): W S DUBE (“the complainant”) v SAPPI MANAGEMENT SERVICES (PTY) LTD (“the first respondent”)/ SAPPI PENSION FUND (“the second respondent”) AND SANLAM LIFE INSURANCE LIMITED (“the third respondent”)

1. Introduction

[1.1] The complaint relates to the complainant’s dissatisfaction with the first and the second respondents’ alleged failure to effect payment to the complainant of what the complainant terms her late husband’s monies on the death of the complainant’s husband in November 1982.

[1.2] The complaint was received by this office on 5 April 2006. A letter acknowledging receipt of the complaint was addressed to the complainant on 15 May 2006. On the same date a letter was addressed to the first and the second respondents giving each until 5 June 2006 to file a response to the complainant’s complaint. On 31 May 2006 a response of the same date on behalf of the first, the second and the third respondents was received from the third respondent. A response alluding to the third respondent’s response of 31 May 2006 was received from the first respondent on 3 October 2006. A letter was dispatched to the complainant on 23 October 2006 requesting the complainant to furnish a reply to the respondents’ respective responses by no later than 6 November 2006. A reply dated 7 December 2006 was received from the complainant on 10 July 2007. After reviewing the written submissions before the tribunal,

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 Mthupi (Snr Assistant Adjudicator), N van Coller (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

it is considered unnecessary to hold a hearing. The determination and reasons therefor appear below.

- [1.3] As the background facts are well-known to the parties, the tribunal shall not burden this determination by restating them here.

2. Complaint

- [2.1] The complainant is aggrieved by the alleged failure by the first and the second respondents to pay to the complainant her "late husband's money" which, according to the complainant, became due and payable on account of the death of Mr W Dube ("the deceased") on 29 November 1982.

- [2.2] The complainant avers that subsequent to the deceased's death, her late father-in-law assisted the complainant in procuring pension benefits in respect of the complainant's three minor children but that when the complainant attended at the first respondent's premises in 2001 to make enquiries about further monies due to the deceased, the complainant was advised, to put it in her own words, that "I was too late and that his blue book has been taken to pretoria and they told me I have to go to the government for old age pension".

- [2.3] The complainant accordingly seeks the adjudicator's assistance in recovering these monies.

3. Responses

- [3.1] This office received a response from the third respondent on 31 May 2006 and from the first respondent on 3 October 2006.

The third respondent's response

- [3.2] The third respondent points out in its response that it only assumed administration of the second respondent on 1 October 1987 and that, prior to this date, the second respondent was a self-administered fund. It is the third respondent's contention that it is not in possession of the records of the deceased's membership of the second respondent, who, according to the complainant's version, it is pointed out, died on 29 November 1982, five years prior to the third respondent being appointed as the administrator of the second respondent. It is on this basis that the third respondent contends that it is not in a position to comment on the complainant's averments.
- [3.3] The third respondent submits that the complainant's complaint is time-barred in terms of section 30I(1) of the Act even on the

assumption that the complainant first became aware of a possible claim in 2001.

[3.4] It is further contended by the third respondent that the first respondent has advised the third respondent that a period of 24 years has elapsed since the deceased's death in 1982 and that the first respondent is no longer in possession of any records relating to the deceased member.

[3.5] It is submitted by the third respondent in the final instance that the adjudicator is precluded by section 30I(1) from investigating the complaint as the time for lodging the complaint has expired.

The first respondent

[3.6] The first respondent merely makes reference to the third respondent's response and points out that that response also constitutes a response on its behalf.

4. Determination and reasons therefor

Time barring

[4.1] Section 30I of the Act imposes certain time limits with regards to lodgement 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] The complaint relates to a cause of action that arose on 29 November 1982, following the death of the deceased. Thus, a period of approximately 24 years has elapsed prior to the lodgement of the complainant's complaint with this office. It goes without saying that section 30I(1) requires that complaints be lodged within 3 years of the occurrence of the cause of action giving rise to the complaint. The complainant's complaint appears to be time-barred for the purposes of section 30I(1). 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 memory 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

- [4.3] 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-

- (1) either before or after expiry of any period prescribed by this Chapter, extent such period;
- (2) condone non-compliance with any time limit prescribed by this Chapter.”

- [4.4] 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 of 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). 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.

- [4.5] 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 paragraph 532 C-F), 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 strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."

- [4.6] As pointed out above, approximately 24 years passed before the complainant lodged her complaint with this office. The complainant states that her father-in-law assisted her in securing pension benefits in respect of her minor children. Unfortunately, the complainant does not state when this took place. All she says is that when she approached the deceased's erstwhile employer in 2001, she was informed by the employer that she was too late. It is clear in my mind that there has been an inordinate delay in lodging this complaint and on this basis alone the complaint falls to be dismissed. The complainant advances no reasons at all for the delay in submitting her complaint to this office. Neither does the complainant furnish any explanation as to why no complaint, or even an enquiry, was made with the first and the second respondent prior to 2001, more so at the time when the complainant's father-in-law was in the process of procuring pension for the complainant's minor children. Furthermore, no attempt was made by the complainant to approach the courts, the Financial Services Board or this office after its establishment in 1998 for relief. The complainant had also not advanced any reasons motivating the granting of condonation for the late lodgement of her complaint.
- [4.7] It is the view of this tribunal that the complainant's prospects of success in this case are not strong, for the following reasons: The first, the second and the third respondents have all stated, and this evidence is not in dispute, that due to the period of time that has elapsed subsequent to the death of the complainant's husband, neither of the respondents has any records relating to the deceased's employment or membership of the fund. It is clear that the respondents are not in possession of any documentary evidence on which to resist the complainant's complaint. It is also clear that, in view of the foregoing, to grant condonation or an extension of the three-year period in this instance would cause great inconvenience and prejudice to the respondents. In light of the finding that the complainant's prospects of success are non-existent, it would be pointless for this tribunal to exercise its discretion in terms of section

