



Please quote our ref: PFA/NP/4022/05/FM

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, OF 1956 (“the Act”)- S L MAAHLO v MULTIKOR PENSION FUND / LIMPOPO DEVELOPMENT CORPORATION

- [1] Your complaint relates to the alleged failure by the Multikor Pension Fund (“the fund”) to enhance your withdrawal benefit, after a decision was taken by the trustees of the fund to enhance fund members’ benefits, utilising the value of the proceeds of the free demutualization shares of Sanlam received by the fund prior to 1 April 1998 (date of receipt by the fund does not appear on the papers).
- [2] The complaint was received by this office on 13 June 2005 and a letter acknowledging receipt thereof was sent to the complainant on 27 June 2005. On the same date, letters were sent to the respective respondents giving each until 18 July 2005 to file a response to the complaint. A response dated 28 July 2005 was received from the fund on 2 August 2005. A letter was sent to the complainant on 20 August 2005 asking him to file a reply to the response on or before 5 September 2005. A reply dated 26 August 2005 was received from the complainant on 13 September 2005. After considering the written submissions before me, I consider it unnecessary to hold a hearing.
- [3] I shall set out the facts as far as is essential for understanding this determination.

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), N van Coller (Assistant Adjudicator), L Mbalu (Assistant Adjudicator), R Maharaj (Assistant Adjudicator), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), Solomzi Gcelu (Assistant Adjudicator)

Office Manager: L Manuel

Factual Background

- [4] You were in the employ of the Limpopo Development Corporation (“the employer”) and a member of the fund until your resignation from employment which you tendered on 2 April 1998 and was to take effect on 5 April 1998. The fund was advised of your withdrawal therefrom by way of a “Notice of Withdrawal” dated 10 July 1998 which was completed and signed by the employer. On the said notice, the column reading: “Date on which the last deduction from the member’s salary/wages will be made” is completed as 31 March 1998.
- [5] Demutualisation shares were allocated to the fund from Sanlam and one of the requirements for such allocation was that all funds which held investment and insurance policies with Sanlam as at 1 April 1998 would qualify for a demutualization benefit, being the allocation of free shares. The fund subsequently took a decision to enhance the benefits of existing fund members, also using the cut-off date of 1 April 1998 as the criterion, to the exclusion of former members. The allocation of the free demutualization shares now forms the subject-matter of this complaint.

Complaint

- [6] Your complaint is that on 1 April 1998, which is the cut-off date for both the allocation of the free demutualization shares of Sanlam to the fund and the enhancement of the fund members’ benefits in accordance with the trustees’ decision, you were still a member of the fund and should have shared in the distribution of the value of the proceeds of the free shares and your withdrawal benefit should therefore have been enhanced thereby. In other words, you dispute that your fund membership terminated on 31 March 1998.
- [7] You contend that your resignation from the employer took effect on 5 April 1998 and that the fund was only notified of such some three months later on 10 July 1998. You then contend that your withdrawal from the fund took place on the day of resignation from employment. You further contend that the cut-off date of 1 April 1998 was intended to include persons who made their last fund contribution the previous month (in your case 25 March 1998). You submit that it is illogical to relate the cut-off date to future in contradistinction to previous contributions made by the member.
- [8] You further aver and this is corroborated by documentary evidence that the fund had initially allocated free shares to you to the value of R3 781.64 and

on your questioning the value thereof as being paltry as opposed to the value allocated to your junior colleagues, such was withdrawn by the fund citing your resignation prior to the cut-off date as the reason for such decision.

[9] You request that I “take this matter further so that I am also allotted this benefit ultimately”.

Response

[10] The fund firstly points out as a backdrop to its response that it is an umbrella fund with 19 participating employers controlled by a “Central Board of Trustees” wherein each participating employer is represented by a trustee. Each participating employer in turn has a sub-council of trustees who handle the day-to day operations and administration of the fund at the “local” (participating employer) level and that all claims, including withdrawals, are handled by the respective participating employers at the local level and forwarded to the broker for the fund who, in turn, will advise the fund administrator.

[11] As regards the specifics of your complaint, the fund states that its board of trustees decided to extend the enhancement of fund members’ benefits on a pro rata basis to those members who were members on the cut-off date of 1 April 1998. The fund, in making reference to your resignation letter addressed to the employer wherein you tender your resignation on 2 April 1998 to be effective on 5 April 1998, further states neither the administrator nor the intermediary to the fund would receive those types of communications as it relates to an internal participating employer matter.

[12] The fund avers that your withdrawal form completed by the employer constitutes an official communication and a claim form for the expeditious payment of the benefit, and that such communication clearly stated that your service with the employer terminated on 31 March 1998. The fund submits that this is consistent with the rules and the “general administration process” and refers me to clause 4.1 (2) which, according to the fund, “determines that contributions are made for a specific month which must be seen in reverse in so far as that the member resigned before the 15th of the month [1 April 1998] and which implies that the member’s service effectively terminated at the end of the previous month on which date the last contributions were made”. The fund further avers that you were informed, by way of a letter from Sanlam dated 25 August 2002 that you did not qualify for the free shares because you fell outside the cut-off date of 1 April 1998

and that nothing further was heard from you until the lodgement of your complaint with this tribunal in 2005.

- [13] The fund then submits that your contributions to the fund ceased on 31 March 1998 and you were not a fund member on 1 April 1998 and that by virtue of such fact you did not qualify for the demutualization benefit.

Determination and reasons therefor

- [14] The essence of the complaint is that a dispute of fact or law has arisen in relation to the fund between you and the fund and/or the fund administrator. Although I consider the provisions of Chapter 3 of the Prescription Act, 68 of 1969, not to be of application in proceedings before this tribunal (see *Nyanyeni v Illovo Sugar Pension Fund and Another* [2004] 11 BPLR 6249 (PFA) at paragraphs [16] to [19], there is nevertheless the issue of time-barring in terms of section 30I of the Pension Funds Act which provides for certain time-limits with regard to the lodging of complaints. The section reads:

“(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.”

- [15] It is clear from the complaint that the event to which it relates occurred more than three years before this complaint was received by or lodged at this office. Your benefit accrued in 1998 and it is not clear from the papers when it was paid to you. Your complaint should have been lodged at the latest in 2001. Your complaint was received by this office on 13 June 2005, more than three years out of time. Thus, it is time-barred for the purposes of section 30I(1) of the Act. 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 *Mahlomi 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.”

[16] However, that the complaint has become time-barred in terms of section 30I is not the end of the matter as I still have a discretion to extend the three-year period or to condone non compliance therewith. But you need to show good cause to enable me to do that.

[17] 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:

“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.”

[18] The appropriate time for you to lodge a complaint was in 1998 when you became aware that the fund was not willing to enhance your withdrawal benefit by allocating to you the value of the free shares arising from demutualization. In terms of the provisions of section 30I, the latest by which your complaint should have been lodged was in 2001. You state that the delay in lodging the complaint was occasioned by the fact that you were unaware of the existence of this tribunal at the time and that you attempted to engage the print media (City Press), and this is borne out by documentary evidence, in an attempt to have them investigate the matter without success. It also appears from the documentary evidence that by

[20] The fund submits that from this rule must be implied that if a member resigns from employment before the fifteenth day of a particular month, his membership of the fund effectively terminated at the end of the previous month on which date the fund contributions were last made. Based on this reasoning, the fund then seems to argue that because you resigned from service on 5 April 1998, that is, before the fifteenth day of that month, then, in terms of rule 4.1(2) you are deemed to have left the fund in March 1998 which is the month when your last fund contributions were made. Because the fund trustees had decided on 1 April 1998 as the cut-off date for the allocation of the value of the free shares to the members of the fund, so goes the argument, you are disqualified from such allocation by virtue of having been deemed to have left service on 31 March 1998, which is the month you last made contributions to the fund. I disagree.

[21] This rule specifically deals with the payment of fund contributions and the manner and times when such payment must be made and the fund's interpretation thereof is, in my view, not in any way a necessary implication of the wording of the rule. What is at issue in this complaint is the termination of fund membership in contradistinction to the manner of payment of contributions by fund members. Hence, the principal enquiry should, in my view, be when does membership of the fund terminate and this question needs to be decided with reference to the rules.

[22] Rule 3.2 governs the termination of fund membership and provides:

“3.2 Termination

3.2(1) A Member's Membership may not be terminated as long as he/she remains an Employee.

3.2(2) A Member's Membership terminates –

- (a) ...
- (b) as soon as the Member, after he/she has ceased to be an Employee, ceases to be entitled to a benefit in terms of the Rules; or
- (c) ...”

[23] It appears from rule 3.2(2)(b) that a withdrawing member's membership of the fund terminates on payment of his/her withdrawal benefit as that is the time when his entitlement to a benefit in terms of the rules ceases. Your resignation from service took effect on 5 April 1998 and it is immaterial

whether your fund contributions were last made in March 1998 or not. The fund was notified by the employer of your withdrawal on 10 July 1998. It is not apparent from the papers when your withdrawal benefit was paid. The trustees made a decision (also does not appear on the papers but surely must have been prior to 1 April 1998) to benefit existing members as at 1 April 1998 by allocating them the free demutualization shares. It also does not appear from the papers when the actual allocation of the shares took place. Be that as it may, it is common cause that the fund was only notified of your withdrawal therefrom on 10 July 1998; the trustees must have taken the relevant decision prior to 1 April 1998 and that your benefit must have been paid after 10 July 1998, it follows therefrom that you were still a member of the fund when the trustees took the relevant decision and also that by the cut-off date you were still a member as at that stage the fund had not even been notified of your withdrawal and could not have effected payment of your benefit. Hence, you had not ceased being entitled to a benefit from the fund.

[24] In light of the foregoing, the fund cannot now claim that you withdrew on 31 March 1998 prior to the cut-off date for the simple reason that by the cut-off date and some time thereafter, you were still a member of the fund because your withdrawal benefit had not yet been paid. It follows therefrom that the failure of the fund to enhance your withdrawal benefit by the value of the free shares has resulted in your sustaining prejudice thereby.

[25] In the result, I make the following order:

[25.1] It is declared that you were a member of the fund at the time the fund trustees decided to enhance fund members' benefits by allocating the value of the free shares. It is further declared that you were still a member of the fund by 1 April 1998 which was the cut-off date for the allocation of the said shares.

[25.2] The fund administrator is ordered to compute the value of the enhancement of your withdrawal benefit in terms of the trustees' decision within fourteen days of the date of this determination.

[25.3] The fund is ordered to pay you within four weeks of the date of this determination the value of your enhanced benefit computed in terms of paragraph [25.1] less any deductions permitted by the Act together with interest thereon calculated at the rate of 15,5% per annum reckoned from 1 April 1998 until date of payment.

