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**Our ref: PFA/FS/3853/2005/TT**

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956 (“the Act”): JJ VAN DER WESTHUIZEN v AFROX PENSION FUND (“the fund”)**

Introduction

1. The complaint was received by this office on 7 June 2005 and a letter acknowledging receipt thereof sent to the complainant on 22 June 2005. On 22 June 2005 a letter was dispatched to the respondent giving it until 13 July 2005 to file a response to the complaint. The response dated 25 January 2006 was received on 25 January 2006. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter. My determination and the reasons therefor appear below.

Factual Background

2. You were married to the late Mr P.J. Smit (“the deceased”) who was a member of the Afrox Pension Fund (“the fund”). On his death on 23 February 1985, a spouse’s pension became payable to you in terms of the rules. You commenced receiving the pension in April 1985. You state that the fund advised you at the time that the spouse’s pension would cease in the event that you remarried.
3. On 25 May 1988 you remarried Adriaan Albertus van der Westhuizen whereupon the spouse’s pension ceased. You state that the marriage however failed and that you currently receive no support from your second husband as he is a pensioner.

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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

### The Complaint

4. You would like to know what happened to the rest of your late husband's pension monies given that you only received the spouse's pension from April 1985 to May 1988. You request that the spouse's pension be reinstated.

### The Response

5. The fund's administrator, Lekana Employee Benefits Solutions (Pty) Ltd ("Lekana"), has responded to your complaint.
6. Lekana raises a technical point that since your complaint was not lodged within 3 years from the date that the claim arose, I am precluded from determining the matter. Given my finding in relation to this preliminary issue, I find it unnecessary to canvass the other aspect of the response.

### Determination and the reasons therefor

7. Section 30I(1) of the Act provides that 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. Your complaint relates to cessation of the spouse's pension in 1988 whereas it was only received by my office on 7 June 2005 which is a delay of some 18 years. Therefore your complaint is time barred.
8. 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 during which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigating 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."

9. 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 in terms of section 30I(3) of the Act to extend the three year time period or to condone

non-compliance with the three year period. In order for me to condone the non-compliance there must be good cause.

10. The Supreme Court of Appeal (or 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 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 is 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.”

11. In light of the above I now proceed to determine whether good cause exists to extend the three year period.
12. The record goes back 18 years as a result of which the fund states it has been unable to find any records in respect of payment of your spouse’s pension. Furthermore the fund does not have a copy of the rules as they applied in 1988. My assistant made various attempts to obtain the rules including several telephone calls to the Financial Services Board which proved unsuccessful.
13. For the above reasons if I were to condone your non-compliance with the time-limits it will cause severe prejudice to the fund because it would not be in a position to submit a substantive response. A delay of 18 years is also significant. On this basis I am satisfied that no good cause exists to exercise my discretion in terms of section 30I(3) of the Act in your favour.

#### Relief

14. In the result, your complaint cannot succeed.

DATED AT CAPE TOWN ON THIS THE

DAY OF

2006

Yours faithfully,

Vuyani Ngalwana  
**Pension Funds Adjudicator**