



HEAD OFFICE

Johannesburg

2nd Floor, Sandown House
Sandton Close 2, 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 ref: PFA/WE/6367/05/VIA

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956 (“the Act”) – EDNA STRACHAN (“the complainant”) v ALEXANDER FORBES GROUP (PTY) LTD (“the first respondent”) and J D GROUP DEFINED BENEFIT PENSION FUND (“the second respondent”) and OLD MUTUAL LIFE ASSURANCE COMPANY (S.A) LIMITED (“the third respondent”)

1.0 The introduction

1.1 This complaint concerns the pensioner increase granted to pensioners in 2005.

1.2 The complaint was received by this office on 15 November 2005. A letter acknowledging the receipt thereof was sent to the complainant on 19 November 2005. On 16 December 2005 letters were dispatched to the respondents giving them until 6 January 2006 to file a response to the complaint. This office received a response from the first respondent on 4 January 2006.

1.3 Having examined the written submissions from the parties, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below. As the background facts are known to the parties, these shall be repeated only to the extent that they are pertinent to the issues raised herein.

2.0 The background facts

2.1 The complainant’s membership to the second respondent arose as a

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 Mothupi (Senior Assistant Adjudicator), T Dooka (Snr Assistant Adjudicator), L Mbalo (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), A Mqinyana (Assistant Adjudicator), T Nawane (Assistant Adjudicator), B Mahlalela (Assistant Adjudicator)

Financial Manager: F Mantsho, Accountant: R Soldaat, HR Manager: P Mhlambi

result of her late husband's ("the deceased") membership to the second respondent. When the deceased passed away in 1997 the complainant commenced receiving a pension from the second respondent. With effect from 1999 the third respondent commenced paying a pension to the complainant.

3.0 The complaint

3.1 The complainant's complaint is that the pensioner increases granted by the third respondent is not in line with the Act which prescribes that every fund should adopt a pensioner increase policy which should aim to award as a pension increase a percentage of the consumer price index. The complainant prays that this tribunal order the third respondent to adopt a pension increase policy as prescribed by the Act.

3.2 The complainant is also dissatisfied with the second respondent's decision, in 1999, to purchase a pension in her name from the third respondent. The complainant submitted that she was not consulted and neither did she consent to purchase an annuity from the third respondent. The complainant requested this tribunal to investigate the legality of the transfer and the annuity policy that were issued to her.

4.0 The response

4.1 The first respondent submitted that the second respondent outsourced its pensioner liabilities in terms of section 14 of the Act to the third respondent in 1990. Furthermore, that the transfer was approved by the Registrar of Pension Funds ("the Registrar") on 23 November 1999. In this regard the first respondent submitted that the complainant's complaint is not a complaint as defined by the Act because it is in relation to an annuity purchased by the second respondent, in the complainant's name, from the third respondent.

4.2 The first respondent further submitted that all the members, including the complainant, were consulted prior to the outsourcing exercise. Furthermore that the complainant was given an option, in accordance with GN 18, issued by the South African Revenue Services ("SARS"), to either purchase an annuity, in her name, from the third respondent or Sanlam Life Assurance Company ("Sanlam") or to continue receiving a pension directly from the second respondent. However, the complainant elected to purchase an annuity, in her name, from the third respondent. For this reason the complainant commenced receiving her pension from the third respondent.

4.3 Lastly, the first respondent further submitted that the provisions of the Act which deals with pension increase only applies to those pensions that are

being paid to a pensioner directly by the second respondent and does not apply to a “GN 18 annuity” such as what the complainant is receiving.

5.0 Determination and reasons therefor

5.1 In terms of section 30I(1) of the Act this tribunal may 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 this tribunal.

5.2 The complainant’s complaint relates to the outsourcing of the second respondent’s pensioner liabilities which took place in 1999 and the subsequent purchase of an annuity, in her name, from the third respondent. This complaint was only received by this office on 15 November 2005, 5 years later after the transfer. Therefore in terms of section 30I(1), this tribunal may not investigate this complaint.

5.3 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.”

5.4 However, that the complaint has become time-barred in terms of section 30I of the Act is not the end of the matter as this tribunal has 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. However in order for this tribunal to condone the non-compliance there must be ‘good cause’ (section 30I(3)).

5.5 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 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 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.”

- 5.6 In light of the above factors, this tribunal proceeds to determine whether good cause exists to condone your non-compliance with the time-limits.
- 5.7 A delay of five years, for which no explanation is given, is unreasonably long. It certainly cannot be expected of the respondents to be in a position to provide substantive responses, with reference to the relevant documentation, to the complainant’s complaint after such a lengthy period.
- 5.8 From the submission from the complainant it is clear that the complainant has not raised this issue with the second respondent, prior to lodging her complaint with this office in 2005. The complainant only raised this issue to the first respondent in 2005, five years after receiving her pension from the third respondent.
- 5.9 It appears further that the complainant does not have good prospects of being successful on the merits. This is so, because the transfer of the second respondent’s pensioner members, including the complainant, to the third respondent’s “Platinum Pension Portfolio” was approved by the Registrar, in terms of section 14 of the Act, on 23 November 1999. By approving, the Registrar confirmed that he was satisfied that the transfer scheme was reasonable and equitable and accorded full recognition to the rights and reasonable benefit expectations of the persons concerned, as well as to any additional benefits which had become established practice. This tribunal does not have jurisdiction to investigate and

