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Please quote our reference: PFA/GA/4983/2005/RM

**Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“THE ACT”) – M S MODITILE v WOOLTRU GROUP RETIREMENT FUND & WOOLTRU LIMITED**

Introduction

[1] The complaint concerns the alleged non-payment of a withdrawal benefit by the Wooltru Group Retirement Fund (“the fund”). It was received by this office on 22 August 2005. A letter acknowledging receipt thereof was sent on 15 November 2005. On the same date letters were dispatched to the fund, Alexander Forbes Financial Services (“the administrator”) and Wooltru Limited (“the employer”), giving them until 6 December 2005 to file a response to the complaint. The fund submitted its response on 6 January 2006 and the administrator submitted one on 9 January 2006. Mr. Tabane of the Department of Labour replied on your behalf on 14 March 2006. Having considered the submissions before me, I find it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.

Complaint

[2] You were employed by the employer at its Vereeniging store from 1981 to January 1990 when your employment was terminated. Your complaint is that the fund has failed to pay your withdrawal benefit following the termination of your employment despite Mr. Tabane having made several

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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

enquiries on your behalf since July 1999.

### Responses

- [3] The principal officer of the fund responded to your complaint. He advised that by virtue of your employment you were a member of the fund and upon your withdrawal from the fund in January 1990 you should have received a cash lump sum from it in accordance with the rules. He goes on to advise that despite a thorough search neither the fund, nor the employer, nor the administrator were able to locate any relevant documentation pertaining to your employment history or payment of your benefit from the fund.
- [4] He submits that none of the respondents are able to respond on the merits of your complaint because there are no substantiating documents to either prove or disprove the allegation that you never received payment of your withdrawal benefit. Therefore, he avers that the complaint is time-barred in terms of section 30I of the Act since the act or omission to which it relates occurred more than 3 years before the date on which the written complaint was received. The principal officer goes on to suggest 6 reasons why condonation for the non-compliance with the time limit should not be granted.
- [5] The principal officer avers that the fund is bound to pay benefits in terms of its rules. In the absence of any substantive information in support of your claim that you did not receive payment of your withdrawal benefit it should be assumed that the benefit was paid in terms of the rules of the fund. With regard to the employer's liability, he submits that the benefit was payable by the fund, not the employer. Since the fund and the employer are two separate legal entities the employer cannot be held liable for a benefit that is payable by the fund. Finally, he submits that the complaint ought to be dismissed for the aforesaid reasons.

### Determination and reasons therefor

- [6] This complaint relates to a complaint that, at the latest, arose in January 1990, following the termination of your employment on 31 December 1989. Thus, a period of approximately 14 years and 7 months passed before you lodged your complaint with this office. Section 30I(1) of the Act requires that complaints be lodged within 3 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. 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.”

- [7] However, the enquiry does not end there as I still need to satisfy myself as to whether or not good cause has been shown, or exists, for me 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 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.”

- [8] As alluded to in paragraph 6, more than 14 years passed before you lodged your complaint with this office. This, in my view is an extraordinarily long delay. In attempting to explain the reasons for the delay, it is stated that a co-worker told you in January 1990 that you should “go home and wait for your big cheque” and that you approached the Department of Labour for assistance in 1999 but, despite letters to the employer, you did not receive a satisfactory response. A complaint was also lodged with the Public Protector on 24 May 2005 and then with this office on 22 August 2005.
- [9] Regarding your prospects of success, I take cognisance of the respondents’ submission that no records could be found pertaining to your employment or your fund membership. Apart from the bare allegation that is made in your complaint, you have not furnished any substantive proof that you were not paid your benefit when you exited the fund in January 1990. From the information before me, I am unable to determine with any degree of

certainty whether you were paid your benefit or not. Therefore, it would be remiss of me to find against the fund given the lack of information to substantiate your allegation. In my view, there is little prospect of success in your complaint against the fund. Furthermore, in light of the 14 year delay, it would be unfair to require the fund to submit a full defence to your complaint.

[10] Taking all these factors into consideration, I find that no good cause exists for me to extend the time limit prescribed for lodging a complaint in terms of section 30I(1), nor do I condone the non-compliance with the time limit prescribed in the section.

[11] In the result, your complaint cannot succeed.

DATED AT JOHANNESBURG ON THIS            DAY OF            2006.

Yours faithfully

**VUYANI NGALWANA**  
PENSION FUNDS ADJUDICATOR