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Please quote our reference: PFA/MP/6172/2005/SM

**Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”) – P M MATLOLE (“the complainant”) v PALABORA MINING PENSION FUND (“the first respondent”) AND PALABORA MINING COMPANY LIMITED (“the second respondent”)**

1. Introduction

- [1.1] The complaint concerns the alleged unlawful withholding by the first respondent of an amount of R167 091.64 from the complainant’s withdrawal benefit on the grounds that he committed fraud against the second respondent.
- [1.2] The complaint was received by this office on 23 October 2005. A letter acknowledging receipt thereof was sent to the complainant on 8 November 2005. On the same date a letter was dispatched to the first respondent giving it until 28 November 2005 to file its response to the complaint. Another letter was dispatched to Brink Cohen Le Roux Inc on 30 November 2005 giving them until 9 December 2005 to file a response on behalf of the second respondent.
- [1.3] A response was received from Brink Cohen Le Roux Inc on behalf of the respondents on 9 December 2005. This response was forwarded to the

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M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), F Mtayi (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), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator), S Mothupi (Assistant Adjudicator), P Mphephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator)

Office Manager: L Manuel, Financial Manager: F Mantsho, Accountant: R Soldaat

complainant on 17 July 2006. On 6 June 2007 this office received the complainant's further submissions.

- [1.4] Having considered the written submissions before this tribunal, it is considered unnecessary to hold a hearing in this matter. As the background facts are well known to the parties, only those facts that are pertinent to the issues raised herein shall be repeated. The determination and reasons therefor appear below.

## 2.Factual Background

- [2.1] The complainant was employed by the second respondent until his employment was terminated on 22 April 1999. The complainant was a member of the first respondent by virtue of his employment until 30 July 1999.
- [2.2] Upon the termination of his employment, the complainant became entitled to receive a withdrawal benefit from the first respondent. The first respondent sent a letter to the complainant in which it indicated that the amount of his withdrawal benefit was R257 360.55. It further indicated that an amount of R29 139.58 was deducted from his lump sum withdrawal benefit in respect of his home loan from Standard Bank. Further, it indicated that an amount of R61 399.33 was paid to the South African Revenue Services and a further amount of R167 091.64 was paid to the second respondent.

## 3.Complaint

- [3.1] The complainant's complaint is that the first respondent was not entitled to deduct the amount of R167 091.64 that was paid to the second respondent. The complainant contends that he did not admit any liability to the second respondent in writing. The complainant submitted that the first respondent relied upon statements which do not state that he is liable to pay the second respondent any money. Further, the complainant states that he indicated that he disagree with the first respondent's suggestion to refund any money to the second respondent during an internal disciplinary hearing that was held against him. Therefore, the complainant submitted that the withholding of his withdrawal benefit is contrary to the Act.
- [3.2] Moreover, the complainant's attorneys argued that they could not file the complaint timeously because the complainant was sentenced to a period of 10 years in prison for fraud. It was indicated that the complainant was released on parole in August 2005 after serving six years of his term of imprisonment. Further, it was pointed out that a complaint was lodged with the first respondent before the complainant was sentenced to imprisonment. However, it was stated that the complaint could not be

pursued with ease as the complainant was moved from one prison to another.

#### 4. Response

##### Points in limine

- [4.1] It was stated at the outset that the complainant failed to serve a copy of the complaint to the second respondent before he lodged his complaint with this tribunal. Further, it was argued that the complaint is time-barred in terms of section 30I of the Act. It was averred that the three-year period within which the complainant should have lodged his complaint expired on or about 1 August 2002.
- [4.2] Further, it was submitted that the fact that the complainant was in prison from 13 October 1999 to August 2005 is not a sufficient reason for this tribunal to condone the non-compliance with the time limit prescribed in section 30I of the Act. It was argued that the complainant should have lodged his complaint with this tribunal on 13 October 1999 when he was sentenced to imprisonment. Alternatively, it was stated that the complainant should have lodged his complaint within 30 days after receiving a reply from the first respondent on 9 October 1999. Further, it was pointed out that the complainant had access to legal representation and that nothing prevented him from instructing his attorney to lodge a complaint on his behalf if he was not satisfied with the reply from the first respondent. Therefore, it was argued that the complainant failed to take the necessary steps to instruct his attorney even though he was aware or ought to have been aware that his complaint is subject to the time limit set out in section 30I of the Act. Moreover, it was contended that the prospects of success in this matter are very slim having regard to the statements the complainant made to the second respondent, a court order which was made against him and the provisions of section 37D of the Act.

##### The merits

- [4.3] It was submitted that the complainant made written statements to the second respondent in which he admitted that he defrauded the second respondent in an amount in excess of the amount which the first respondent deducted from his benefit. Further, it was submitted that the complainant pleaded guilty to charges of fraud against the second respondent to the value of R370 000.00 in a criminal court at the Phalaborwa Regional Court. It was argued that the complainant was subsequently sentenced to 10 years imprisonment for such fraud.
- [4.4] The attorneys for the respondents referred to section 37D(1)(b)(ii) of the Act which read as follows:

“A registered fund may deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of-

compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb)) in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which-

- (aa) the member has in writing admitted liability to the employer; or
- (bb) judgment has been obtained against the member in any court, including a magistrate’s court,

from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned.”

- [4.5] It was contended that the complainant admitted in writing that he committed some fraudulent activities while he was employed by the second respondent and that a judgment was made in terms of which he was found guilty of defrauding the second respondent. Further, it was argued that the first respondent was entitled in terms of the section 37D of the Act and Rule 43 of the first respondent’s rules to deduct the amount of R167 091.64 from the complainant’s withdrawal benefit. Rule 43 of the first respondent’s rules reads as follows:

“The Committee has the right on behalf of the Fund or the Employer to deduct from any benefit which becomes payable an amount which the Member may owe to the Fund or Employer in accordance with Section 37D of the Act and to pay the amount thus deducted to the Fund or Employer in full or in part settlement of the debt; provided that the amount so deducted shall not exceed the lump sum benefit which may be paid on the date the Member leaves the Fund.”

- [4.6] Moreover, it was argued that the amount that was deducted from the complainant’s benefit (R167 091.64) does not exceed the amount of his lump sum withdrawal benefit in the sum of R257 360.55.

## 5. Determination and reasons therefor

### Time barring

- [5.1] Section 30I of the Act imposes certain time limits with regards to lodgment 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 of 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).”

- [5.2] This complaint relates to a complaint that arose on 30 July 1999, following the withdrawal of the complainant from the first respondent. Any complaint that the complainant had regarding his benefit should have been lodged at that stage. However, the complaint was only lodged in October 2005 and was therefore received almost three years out of time.
- [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 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 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.”

### Condonation

- [5.4] 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-

- (a) Either before or after expiry of any period prescribed by this Chapter, extend such period;
- (b) Condone non-compliance with any time limit prescribed by this Chapter.”

- [5.5] 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 or 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). The Amendment Act referred to above contains a specific section 40B indicating which definitions and sections will have retrospective effect. The deletion of section 30I(3) is not one of them. 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.

- [5.6] 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.”

- [5.7] As stated in paragraph 5.2, approximately three years passed before the complainant lodged his complaint with this office. There has been an inordinate delay in lodging this complaint and on this basis alone this complaint falls to be dismissed. The complainant did not provide sufficient reasons for the delay in submitting his complaint to this office. The complainant’s attorneys submitted that they could not pursue the complaint with ease as the complainant was sentenced to a period of 10 years in prison and that he was moved from one prison to another. Further, they indicated that a complaint was lodged with the first respondent before the complainant was sent to prison. However, it is clear that the complainant should have lodged his complaint with this tribunal after receiving a reply from the first respondent in September 1999.
- [5.8] Further, the complainant received a letter from the first respondent on 7 July 1999 which indicated clearly that an amount of R167 091.64 from his benefit would be paid to the second respondent. It is also clear that the complainant had access to his attorneys while he was in prison and he could have instructed them to lodge a complaint on his behalf. Thus, the complainant failed to submit any cogent explanation as to why no complaint, or even enquiry, was made with the first respondent or this

- tribunal after receiving a reply from the first respondent in 1999. Moreover, the complainant failed to advance reasons for the grant of condonation for the late lodgment of this claim. Therefore, I cannot find any reason to condone the non-compliance with the time limit as set out in section 30I of the Act.
- [5.9] Regarding the complainant's prospects of success, I take cognisance of the submission by the attorneys for the respondents that the complainant made written statements to the second respondent in which he admitted that he defrauded it in an amount in excess of the amount which the first respondent deducted from his benefit. It is also evident that an internal disciplinary hearing was held where the complainant admitted that he was guilty of defrauding the second respondent. It is further clear that the statements the complainant made to the second respondent constitute an admission of liability in terms of section 37D(1)(b)(ii)(aa) of the Act.
- [5.10] Further, the attorneys for the respondents indicated that the complainant pleaded guilty to charges of fraud against the second respondent and he was sentenced to a period of 10 years in prison. Although the respondents are not in possession of the judgment from the Magistrate's Court in this regard, the complainant's attorneys confirmed that he was found guilty of defrauding the second respondent. In any event, section 37D(1)(b)(ii) requires that the damage caused to the employer should be by reason of any theft, dishonesty, fraud or misconduct in respect of which the member has admitted liability in writing or a judgment should have been obtained against the member in any Court, including a Magistrate's Court. *In casu*, the attorneys for the respondents have established that the complainant admitted liability in writing to the second respondent. It follows that the first respondent was entitled to deduct the amount of R167 091.64 in respect of the fraud he committed against the second respondent in terms of section 37D(1)(b)(ii) of the Act read together with Rule 43.0 of the first respondent's rules. Thus, there is no prospect of success in the complainant's complaint against the respondents.
- [5.11] The attorneys for the respondents also argued that the complainant failed to serve a copy of his complaint to the second respondent before he lodged his complaint with this tribunal. It has been held that a complainant is not obliged to first lodge a complaint with the fund or the employer in terms of section 30A before approaching this tribunal for relief. It has also been held that the provisions of section 30A of the Act have been enacted for the benefit of a complainant and as a result he may renounce the statutory right conferred on him in this regard (see *Insurance and Banking Staff Association v Old Mutual Staff Retirement Fund* [2005] 3 BPLR 272 (PFA) at paragraphs 11 and 12). It was further held in the above determination that a technical point arising from the provisions of section 30A of the Act has no place in a forum such as this and has the effect of

delaying the resolution of the complaint and creating uncertainty where there is none. Such a result could not have been intended by the legislature in creating this tribunal with a clear mandate to dispose of complaints in an “economical and expeditious manner”. Therefore, for the reasons stated in the above determination and the authorities cited therein this technical point cannot succeed.

[5.12] 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).

[5.13] In the result, the complaint cannot succeed.

DATED AT JOHANNESBURG ON THIS            DAY OF            2008.

Yours faithfully

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**MAMODUPI MOHLALA**  
PENSION FUNDS ADJUDICATOR