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DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act"): R. CAMPBELL v LIFESTYLE RETIREMENT ANNUITY FUND ("the fund") and LIBERTY GROUP LTD ("Liberty")

Introduction

[1] Having examined and investigated the complaint received by this office on 19 April 2005, I consider it unnecessary to hold a hearing in this matter. My determination, together with reasons therefor, is set out below. In December 2005 an announcement was made of a Statement of Intent between the Minister of Finance, on the one hand, and the Life Offices Association and five large life assurers on the other, in terms of which the life assurers would commit themselves to certain minimum standards in respect of retirement annuity funds and endowment policies. Although the statement is not binding on this office, we nevertheless referred all retirement annuity fund complaints (including this one) back to the management boards and life assurers administering these funds with a view to facilitating an amicable resolution of the complaint between the parties without the intervention of this office. This matter was referred for settlement to the fund on 19 January 2006. The parties were given 30 days to settle the matter failing which this office would determine the complaint in the ordinary course. Many complaints were settled on this basis but the settlement terms were not divulged to this office. However, on 19 April 2006 we were informed that the parties in this complaint had failed to reach a settlement in this case. The details of disagreement were not communicated to us. It is with that brief background that we now determine this complaint in the ordinary course.

Complaint

[2] Your complaint concerns the maturity value of your retirement annuity benefit from the fund, a retirement annuity fund administered and underwritten by Liberty. In particular your complaint seems to arise out of a comparison between the amount you received from the fund and the amount you obtained from the South African Retirement Annuity Fund ("SARAF"), also a retirement annuity fund, administered and underwritten by Old Mutual Life Assurance Company (SA) Ltd. You state that you paid exactly the same value in contributions to each fund for the same period, 1 February 1978 to 1 February 1996, in production of a mere R82 121 from the fund, compared with R148 635 from the SARAF fund. It is unclear precisely what relief you are seeking, but I assume you require some "leveling up" of the benefit to that obtained from the SARAF fund.

Response

[3] The fund has responded and taken the *in limine* point that your claim has prescribed in terms of the Prescription Act 68 of 1969. As regards the merits of your complaint, the fund has been unable to reconstruct the factors which influenced the maturity value of your benefit, since the details have been purged off the system, given the lapse of time since maturity. It does, however, state that it is unable to comment on the maturity value of a different benefit arising from a different fund.

Determination and reasons therefor

Prescription

[4] I cannot uphold the fund's argument that your complaint has prescribed for the reasons more fully set out in *Nyayeni v Illovo Sugar Pension Fund and Another* [2004] 11 BPLR 6249 (PFA). The parties are referred to that determination for a full exposition of why, in my opinion, the Prescription Act does not apply to complaints as defined in the (Pension Funds) Act.

Time-barring

[5] I turn now to the question of the time limits imposed on the lodging of complaints by section 30I of the Act.

[6] Your complaint was lodged on 19 April 2005. Section 30I provides for certain time-limits with regard to the lodging of complaints and reads 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 on which the complaint is received by him or her in writing.
>
> (2) If the complainant was unaware of the occurrence 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 expiry of any period prescribed by this Chapter, extend such period; [or]
> (b) condone non compliance with any time limit prescribed by this Chapter."

[7] The date at which you must have become aware of your possible claim was at the time you received your benefit in February 1996. At the very latest, you were aware of your claim in 1997, since you lodged a complaint with the Ombud for Long Term Insurance in that year. The complaint ought therefore to have been lodged by 2000 on your best version. Your complaint has thus been lodged five years outside of the statutory limit.

[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 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 uncertainly 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 to extend the three year time period or to condone non-compliance therewith. But your client needs to show good cause to enable me to do that.

[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 532C:

> "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 strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."

[11] It is apparent from the response that the fund has been severely prejudiced in answering your complaint by such a lengthy passage of time. It no longer has any records pertaining to the computation of your benefit. In addition, I am not satisfied that the merits of your complaint are, in themselves, compelling. Your complaint centres around a comparison of the performance of two different funds. While it might be commercially questionable for there to be such a large difference in performance, it does not follow that there is necessarily legal relief. The two funds are governed by their separate sets of rules and underlying policy documents, investments, and so forth. Each benefit must be judged in relation to the entitlements under the rules of the particular fund concerned. Moreover, there is no information as to the comparability of the underlying investments, for instance high equity exposure, or an off-shore component could drastically affect fund performance. Finally, you have given no compelling reason for the delay in lodging your complaint, other than that you have recently become aware through all the media coverage of the activities of this office. Taking into account all the circumstances, I cannot find good cause to condone non-compliance with the time limits set out in section 30I. The complaint therefore remains time-barred and I may not investigate it.

Relief

[12] For the reasons set out above, the complaint is dismissed.

DATED AT CAPE TOWN ON THIS THE DAY OF 2006.

Yours faithfully

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR