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Mr. J.P. du Preez

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PETIT

1512

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 (“the Act): J P DU PREEZ (“complainant”) v STRANDFOAM PENSION FUND (“first respondent”), SANLAM LIFE INSURANCE LIMITED (“second respondent”), ABSA CONSULTANTS AND ACTUARIES (PTY) LTD (“third respondent”) AND M CUBED EMPLOYEE BENEFITS (PTY) LTD (“fourth respondent”)

[1] INTRODUCTION

1.1 The complaint concerns the payment of the complainant’s benefit in the first respondent.

1.2 The complaint dated 22 October 2008 was received by this tribunal on 27 October 2008. On 9 January 2009 a letter was sent to the first and second

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act No. 24 of 1956

-The service offered by the Pension Funds Adjudicator is free to members of the public-

respondents requesting a response to the complaint by no later than 9 February 2009. On 5 March 2009 a letter was sent to the third respondent requesting a response to the complaint by no later than 6 April 2009. A response dated 9 February 2009 was received from the second respondent. Further submissions were received from the second respondent on 9 March 2010. A response was received from the fourth respondent on 9 June 2010. A response was received from the third respondent on 10 June 2010. A response was received from the first respondent on 29 June 2010. Further submissions were received from the second respondent on 28 June 2010, 30 June 2010 and 7 December 2010. Further submissions were received from the first respondent on 6 October 2010 and 25 October 2010.

- 1.3 This complaint was referred to conciliation on 6 August 2009, 8 April 2010 and 7 June 2010 in order to afford the parties an opportunity to settle the matter. However, the parties could not reach settlement so the complaint was referred to adjudication.
- 1.4 After reviewing the written submissions before this tribunal, it is considered unnecessary to hold a hearing in this matter. This tribunal's determination and its reasons therefor appear below.

[2] BACKGROUND FACTS

- 2.1 The complainant was an employee of Strandfoam Group (Pty) Ltd and by virtue of his employment became a member of the first respondent from 15 June 1978 until 31 March 2001. Upon his resignation the complainant did not request payment of his benefit, but instead left it in the first respondent.
- 2.2 The first respondent was administered by the second respondent until 1 September 2003 when the administration was taken over by the third respondent. The third respondent administered the first respondent until

1 March 2007 whereafter the administration was taken over by the fourth respondent. The fourth respondent administered the first respondent until 1 November 2009. On 8 November 2010 all but ten members were transferred to another fund in terms of section 14 of the Act and the first respondent is in the process of deregistering as a pension fund with the Financial Services Board (“FSB”).

[3] COMPLAINT

3.1 The complainant is aggrieved by the non-payment of his benefit in the first respondent. He states that he was informed that he will receive his benefit within 3 to 6 months after his resignation. However, he decided to leave his benefit in the first respondent to earn interest because he was 54 years old at the time. Over the years he enquired about his benefit using three different insurance brokers, but without success. During October 2008 he was informed by an employee of the second respondent that his “policy” was cancelled and he must have been paid. He was also informed that the administration of the first respondent was taken over by the third respondent. Upon contacting the third respondent he was advised that his name is indicated as “inactive” on the list of members transferred to the third respondent. Therefore, he requests this tribunal to assist him in obtaining payment of his benefit in the first respondent.

[4] RESPONSES

First respondent’s response

Points in limine

Time-barring

- 4.1 The first respondent noted that the complaint relates to the complainant's cessation of membership in March 2001 and the payment of his withdrawal benefit. Therefore, the complaint relates to a matter which occurred more than three years before 7 June 2010, being the date on which it received the complaint from this tribunal. Almost nine and a half years have elapsed since the resignation of the complainant. It seems from the complaint that the second respondent was informed in early 2009 of the complaint. Even if the latter date is to be taken as the date on which the complaint was launched, it is still some 8 years after the complainant left it. It is important to note that a referral to the second respondent cannot be said to be a notification of the complaint to it as the second respondent ceased to be its administrator in 2003.
- 4.2 If the complainant had been dissatisfied with his benefit or the payment thereof, he could have approached it earlier. The complainant's version is that he utilised the services of various insurance brokers to ascertain the whereabouts of his pension, but without success. The complainant had the benefit of professional advisors, but failed to claim the benefit referred to in the complaint. The first respondent is of the opinion that the reason is that the complainant's claim is not against it, but against the second respondent from whom it seems he purchased a "policy" with his resignation benefit. In addition to the provisions contained in section 30I of the Act, its rules are also explicit that should a member fail to claim his benefit from it, the provisions of the Prescription Act No. 68 of 1968 ("the Prescription Act") will be applied to any outstanding benefit, this is assuming that the complainant was not paid by it in 2001, which is denied. Rule 12.14 reads as follows:

"Except for the benefits payable on the death of a MEMBER, the provisions of the Prescription Act, 1969, are applicable in respect of benefits that remained unclaimed"

- 4.3 The board of management is bound by the rules. Therefore, even if the first respondent still held the complainant's benefit, which is denied, his claim has in any event prescribed if the rules are applied to any benefit which he may still have had. Furthermore, in a letter received by the complainant from the employer, dated 27 March 2001, he was advised that future enquiries must be lodged in writing to the second respondent, which administers the employer's pensions. The complainant signed the letter and is still in possession of it. The complainant makes no allegation, nor attaches any correspondence, that indicates that he attempted to contact it or the second respondent, notwithstanding the fact that he was explicitly made aware of his right to do so. He neglected and/or failed to exercise it.
- 4.4 Since the complainant's resignation the first respondent's administration was managed by the second respondent, the third respondent and the fourth respondent prior to the majority of its members being transferred out of it. During this process the records of those members who left, as the complainant did, have been destroyed as they were no longer required to be kept. It has been in the process of winding down over a number of years and currently there are only 10 members left, who are in the process of being transferred to the Allan Grey Retirement Annuity Fund and it will thereafter deregister. Even if the complainant wished that this tribunal condone his late submission of the complaint, which it is submitted he cannot, he in any event failed to submit any reasons for the late submission, which could even have been considered by this tribunal. The complaint must be dismissed because the time limit within which to lodge the complaint has elapsed.

Complaint in terms of the Act

- 4.5 For the complaint to be successful the complainant must establish a cause of action that is within the confines of a "complaint" in terms of the definition in the Act. The relief sought by the complainant is unclear as the complaint

relates to a policy purchased from the second respondent. The complainant explicitly states that he was informed that the payment of his resignation benefit would occur within 3 to 6 months after he exited, but he decided to leave his benefit with the second respondent to earn interest. He could not have left the money with the first respondent as the rules did not allow for an option to defer a benefit. Notwithstanding this, the complainant does not aver that he left the benefit with it, but explicitly that he left it with the second respondent. The only manner that he could have left it with the second respondent was if he elected to use his resignation benefit to purchase a policy of some form from the second respondent. That his claim is against the second respondent is clear from the following:

- the complainant states that he instructed various insurance brokers to determine the status of his pension. Therefore, he received a resignation benefit from it and this benefit could only have become a pension if he utilised his resignation benefit to purchase an annuity to provide a pension for him;
- the purchase of a policy is further confirmed by the complainant where he states that he was advised by the second respondent that his policy had been cancelled, which he refuted and which forms the subject of his complaint, seemingly only against the second respondent;
- had the complainant remained its member his records would not have been removed and he would have been included in the various section 14 transfers. The reason why he was not on the transfer list is because his benefit was used to purchase a policy, as indicated by him in the complaint.

4.6 The complainant cannot utilise this tribunal to establish whether or not he has any claim against it by simply making mention of it. The complainant must

make at least one of the four allegations set out in the definition of a complaint in the Act, which he failed to do (see *Armaments Development and Production Corporation of South Africa Ltd v Murphy NO and Others* [1999] 11 BPLR 227 (CPD)). Therefore, the complainant has failed to establish a cause of action against it and consequently this tribunal does not have jurisdiction to adjudicate any claim against it. The only case being made out is against the second respondent and it is not clear what policy he purchased, but it may be that this tribunal could also not have jurisdiction in this regard as it may fall within the jurisdiction of the Office of the Ombudsman for Long-Term Insurance, but this is an aspect that falls within the knowledge of the second respondent and the complainant.

Merits

- 4.7 The first respondent admits that the complainant became entitled to a resignation benefit in March 2001, but bears no knowledge about the reason for his resignation. The employer confirmed his resignation and advised him that his benefit will be paid to him within 3 to 6 months. The first respondent did not write this letter or give the estimate. The complainant does not deny that his resignation benefit was paid within this period, but simply states that because it seemed a long period and because he was only 54 years old he decided to leave it with the second respondent so as to earn interest. This, as stated, he could not do because the rules don't provide for it. Only the second respondent could accommodate this because it is an insurer. It is denied that an insurance broker acting on behalf of the complainant contacted it about his benefit. It further bears no knowledge of whether or not the brokers contacted the second respondent at any time, or that the second respondent cancelled his policy. However, the letter suggests that his resignation benefit was utilised to purchase a policy from the second respondent.

4.8 Had the complainant not received his benefit from it, his fund credit and fund records would have been with it at the time of the transfer in 2003 and all subsequent transfers. Had the complainant's benefit not been utilised to purchase a policy, this excess fund credit would have been reflected during the section 14 transfer to the third respondent in 2003. The third respondent denied having received any amount for the benefit of the complainant from the second respondent or any record of his existence. It is submitted that the reason why the third respondent had received no record is because the complainant had already resigned in 2001 and he received his resignation benefit at that time. The first respondent has no excess funds that could be utilised for the benefit of the complainant, which indicates that none was ever transferred. The current members' fund credits are run on an individual member pricing basis, which filters into individually utilised portfolios and no additional amounts can be generated for the complainant. The complainant contacted the employer in 2009 and the complainant was referred to the second respondent, who was responsible for the payment of his resignation benefit in 2001. It was not until 2010 that it became aware of a complaint having been lodged with this tribunal.

Second respondent's response

4.9 The second respondent states that the assets of the first respondent, in the amount of R15 041 332.08, were transferred to the third respondent during the change of administration. Due to tax problems it was unable to pay out the complainant's withdrawal benefit prior to the transfer of the assets to the third respondent. For this reason the complainant's withdrawal benefit, in the amount of R81 476.01 (annual interest included) was transferred to the third respondent as part of the total fund assets. It advised the third respondent that the complainant's benefit had not been paid out as at 10 February 2004 and that the benefit would be transferred as part of the fund assets to the third respondent, making the third respondent liable for payment thereof.

Third respondent's response

4.10 The third respondent states that the transfer data from the second respondent did not make mention of the complainant and the first respondent was administered on the basis that the available money was only for the active members. The complainant's benefit was queried by the second respondent. Over time it was discovered that the fund assets that were transferred included the complainant's benefit. When transferring the administration to the fourth respondent, it did not refer the matter as the incident was never officially registered as unclaimed by it for the reasons aforementioned. If it was still the administrator of the first respondent it would recommend that each member's fund value be minimally reduced to determine the assets to be paid to the complainant since his money was included with other members' fund values over time. The data and processing reserve that it suggested for this type of situation, and which the trustees were unhappy with, would have served that purpose. The negative impact on members' values would have been minimal.

4.11 The unclaimed benefit of the complainant "fell through the cracks" because of inadequate information between it and the second respondent. It administered the total assets of the first respondent on the basis that they belonged to active members as they appeared on the transfer spreadsheet provided to the fourth respondent. It can be argued that the current members have been unfairly enriched because of the fact that the complainant's benefit was not earmarked separately. His benefit was distributed to other active members as part of the distribution of reserves. His benefit as at 1 March 2007, when the administration was transferred to the fourth respondent, was R97 771.21.

Fourth respondent's response

4.12 The fourth respondent advised that when it took over the administration of the first respondent it did not receive any transfer of assets for the complainant. Further, during its period of administration the complainant was not a member of the first respondent. Therefore, if there are any benefits owing to the complainant they would still be with the third respondent.

[5] STATEMENT OF DETERMINATION AND REASONS THEREFOR

Introduction

5.1 The issue for determination is whether or not the complainant is entitled to be paid a benefit by the first respondent. However, it is necessary to address the preliminary points raised by the first respondent before addressing the merits of the complaint.

Time-barring

5.2 The complainant withdrew from the first respondent on 31 March 2001 after he resigned from employment. The complainant was informed by letter on 27 March 2001 that his pension fund benefit would be paid to him within three to six months of 31 March 2001. However, the complainant did not request payment of his benefit, but instead left it in the first respondent. The first respondent's rules do not provide for paid-up or deferred membership. This tribunal first needs to determine if the complaint is time-barred. Section 30I of the Act imposes certain time limits with regards to lodging 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 on 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).”

5.3 The first respondent also contended that the complainant’s claim has prescribed in terms of rule 12.14 dealing with unclaimed benefits by failing to claim his benefit timeously. Rule 12.14 reads as follows:

“UNCLAIMED BENEFITS

Except for the benefits payable on the death of a MEMBER, the provisions of the Prescription Act, 1969, is applicable in respect of benefits that remain unclaimed.”

5.4 The provisions of the Prescription Act need to be analysed to determine whether or not the complaint is time-barred. Section 11 of the Prescription Act, dealing with the period of prescription of debts, reads as follows:

“The periods of prescription of debts shall be the following:

- (a) ...
- (d) save where an Act of Parliament provides otherwise, three years in respect of any other debt.”

5.5 Section 12 of the Prescription Act, dealing with the period when prescription commences, reads as follows:

“(1) Subject to the provisions of subsections (2), (3), and (4), prescription shall commence to run as soon as the debt is due.

- (2) If the debtor willfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.

(3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.”

- 5.6 The complainant exited the first respondent on 1 April 2001 and became entitled to a withdrawal benefit from the first respondent on this date. This is the date when his benefit became due and payable and prescription commenced running from this date in terms of section 12(1) of the Prescription Act.
- 5.7 The complainant knew that he was entitled to a withdrawal benefit from the first respondent as this was confirmed in the letter to him from the employer dated 27 March 2001. The letter also confirmed he will be paid his benefit within three to six months of his resignation and he could make enquiries with the second respondent in this regard. He also knew the identity of the fund at all times as this is evident from the benefit statements attached to his complaint. Despite this, he decided to leave his benefit in the first respondent even though the rules did not provide for paid-up or deferred membership and he never received any benefit statements after 31 March 2001. By his own admission he subsequently used three different insurance brokers to establish the whereabouts of his benefit, without any success.
- 5.8 Therefore, the complainant knew the identity of the first and second respondents at all material times, he knew that the benefit was payable by 1 April 2001 or within six months of this date, he ought reasonably to have known that the rules did not provide for paid-up or deferred membership and he knew there were problems with paying his benefit because his brokers were unsuccessful in tracing it. Despite these facts he decided to only lodge his complaint with this tribunal on 22 October 2008. This is more than three years after the cause of action arose on 1 April 2001. Therefore, the first

respondent is correct in submitting that the complaint is time-barred in terms of section 30I of the Act.

5.9 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 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.”

5.10 In light of the peremptory nature of the provisions of section 30I, this Tribunal has no authority to investigate and adjudicate any complaint which is time-barred. It must be borne in mind that the adjudicator’s erstwhile authority to, on good cause shown, condone the late lodging of complaints or extend the three-year time limit, has with effect from 13 September 2007 been removed by the deletion of sub-section 30I(3) of the Act.

5.11 In the result, this complaint is time-barred in terms of section 30I of the Act.

[6] ORDER

1. The complaint cannot succeed and is dismissed.

DATED AT JOHANNESBURG ON THIS THE 4th DAY OF MARCH 2011

DR. E. M. DE LA REY
ACTING PENSION FUNDS ADJUDICATOR

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