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Mr D R Ndlovu
144 Feilden Heights
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REGISTERED POST

Dear Mr Ndlovu

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, OF 1956 (“the Act”) – D NDLOVU (“the complainant”) v SOUTH AFRICAN LOCAL AUTHORITIES PENSION FUND (“the respondent”)

1. Introduction

- 1.1 This complaint concerns the calculation of the retirement benefit which the complainant received from the respondent, a registered pension fund.
- 1.2 The complaint was received by this office on 4 December 2006, and a letter acknowledging receipt thereof was sent to the complainant on 2 January 2007. On 5 January 2007 a letter was dispatched to the respondent, giving it until 6 February 2007 to file a response to the complaint. The response dated 9 February 2007 was received on the same day. A supplementary response pursuant to an enquiry from this office was filed on 2 October 2007.
- 1.3 After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter.

Dr. EM de la Rey (Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), S Mothupi (Snr Assistant Adjudicator), T Dooka (Snr Assistant Adjudicator), M Ramabulana (Snr Assistant Adjudicator), C Seabela (Snr Assistant Adjudicator), P Mphephu (Snr Assistant Adjudicator), T Nawane (Snr Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator), S Mokgara (Assistant Adjudicator), A Mnginya (Assistant Adjudicator), B Mahlalela (Assistant Adjudicator), G Mothibe (Assistant Adjudicator), P Mogashoa (Assistant Adjudicator), T Mbhansa (Assistant Adjudicator), T Tlooko (Assistant Adjudicator), R Kikine (Assistant Adjudicator)

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

2. Complaint

- 2.1 According to the complainant, he was employed by the eThekweni Municipality for 37 years. As a consequence of his employment, he became a member of the respondent and had pensionable service of 36 years and 4 months at the time of his retirement on 30 November 2003. He elected to take a cash benefit, and was paid an amount of R2 291 638, which he states was significantly lower than the quotation furnished to him. He does not state by whom the quotation was provided, but an annexure attached to his complaint reflects a quotation provided by the respondent as at 30 November 2003, signed by the "Benefit Administrator" in an amount of R2 547 171. It was based on an annual salary of R252 900.
- 2.2 The complainant states that he was prompted to approach this tribunal because he read of a previous ruling which was publicized in the media at the time of its release. That determination concerned a member of the respondent whose withdrawal benefit was calculated with reference to a rule amendment that had not been registered at the time his benefit accrued. This had the effect of reducing his benefit. The member in question withdrew from the fund approximately seven months after the complainant retired. The complainant therefore suspects that the calculation of his benefit may also have affected by the application of the incorrect rule.

3. Response

- 3.1 The respondent states that the complainant's benefit was calculated with reference to the definitions, Rule 1.42 (the withdrawal formula), 4.2.2 (rate of contribution), and 4.5.3 (there is no such rule), and regard was had to the following definition of "final salary"

"Final salary: The average annual salary earned by and the bonus received by a member during the last two years ending on the date before the member's actual retirement date. Unless the trustees otherwise so decide the final salary shall be subject to a minimum of the average salary earned by a member on 1 April 2000."

- 3.2 The respondent further confirms that the complainant's salary used for the purposes of calculation was R227 529, which represented his average annual salary during the last two years before his retirement date. The calculation is then set out as follows:

"Gratuity	= (6.72% x average salary over 24 months x years of service) = (6.72% x R227 529 x 36.33424658) = R555 548
Cash	= (21% x average salary over 24 months x years of service) = (21% x R227 529.00 x 36.33424658) = R1 736 089.91
Total	= R2 291 638.68"

- 3.3 The fund notes that the rule amendment providing for an average salary over the preceding two years was approved by the Registrar of Pension Funds on 5 July 2006 with retrospective effect from 1 July 2003. It confirms in its supplementary response that this rule amendment was implemented when calculating the complainant's retirement benefit. It also adds that the quotation provided as at 30 November 2003 was based on an average salary over one year (R252 900), yielding the higher benefit.

4. **Determination and reasons therefor**

Time barring

- 4.1 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 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).”

- 4.2 The complainant's cause of action arose in November 2003 following the complainant's retirement. Any retirement benefit from a pension fund would have become payable to the complainant at that time. However, the complaint was only lodged in December 2006 and was therefore out of time.

- 4.3 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

- 4.4 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, extent such period;
- (b) condone non compliance with any time limit prescribed by this Chapter.”

4.5 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.

4.6 The Supreme Court of Appeal (or the 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 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.”

- 4.7 The complainant's right to payment of a benefit accrued on the date of his retirement, 30 November 2003. His benefit therefore fell to be calculated in accordance with the rules as they stood on that date. The respondent has conceded that it calculated the complainant's benefit in terms of a rule that was unregistered at the time of the accrual of his benefit, but relies on the fact that the rule was subsequently registered with retrospective effect to a date prior to the accrual of the complainant's benefit.
- 4.8 Rule amendments with retrospective effect cannot apply to vested rights, in other words benefits which have already accrued. (See *Ntshiliza v ICS Provident Fund* [2000] 10 BPLR 1146 (PFA), at 1153B-H. See also *NDPP v Carolus and Others* 2000(1) SA 1127 (SCA) at para [31] et seq.)
- 4.9 For that reason the complainant is entitled to have his benefit calculated on the basis that prevailed on the date of his retirement, unaffected by the subsequent rule amendment. The previous definition of "final salary" read as follows:
- "The average ANNUAL SALARY earned by and the ANNUAL BONUS received by a MEMBER during the last year ending on the day before the MEMBER'S actual retirement date. Unless the TRUSTEES otherwise so decide the FINAL SALARY shall be subject to a minimum of the ANNUAL SALARY earned by a MEMBER on 1.4.2000."
- 4.10 The complainant's benefit was calculated on an average of the previous two years' instead of the previous year's salary, leading to a reduction in value. He is entitled to be placed in the position he would have occupied had the benefit been calculated in accordance with the rules as they stood at the time that he retired.

5. Relief

- 5.1 In the result, I make the following order:
- 5.1.1 The respondent is ordered to recalculate the complainant's benefit using the definition of "final salary" as set out above;
- 5.1.2 The respondent is further directed to pay to the complainant **within two weeks** of date hereof the difference between the amount calculated in paragraph 5.1.1 above and the benefit already paid to the complainant, less any permissible deductions, together with interest thereon at the prescribed rate of 15,5% from the date of payment of the initial benefit to the date of final payment.

DATED at JOHANNESBURG on this the ____ day of _____ 2010.

Yours faithfully

DR E.M DE LA REY
PENSION FUNDS ADJUDICATOR