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REGISTERED POST

Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 ("the Act"): C COETZEE ("complainant") v WYNBEDRYF VOORSORGFONDS ("first respondent"), SANLAM LIFE INSURANCE LTD ("second respondent") AND BOLAND VINEYARDS INTERNATIONAL ("third respondent")

[1] INTRODUCTION

1.1 This complaint concerns the repudiation of a disability benefit.

1.2 The complaint was received by this Tribunal on 17 September 2008. A letter acknowledging receipt thereof was sent to the complainant on 27 November 2008. On the same date, a copy of the complaint was sent to the first respondent, affording it the opportunity to submit a response by 12 January 2009. On 13 December 2008, a response was received from the second respondent. On 20 March 2009, a copy of the complaint was forwarded to the third respondent, affording it the opportunity to submit a response to the complaint by 20 April 2009. On 3 April 2009, a copy of the

response provided by the second respondent was forwarded to the complainant, affording her the opportunity to submit a reply to the response, in the event she wished to do so. On 15 April 2009, a reply was received from the complainant. On 1 June 2009, a copy of the complainant's reply was forwarded to the second respondent. On 23 August 2010, a follow-up letter requesting a response was sent to the third respondent, affording it an opportunity to submit a response to the complaint by 23 September 2010. On 3 November 2010, a response was received from the third respondent. No further submissions were received.

1.3 Having considered the written submissions before this Tribunal, it is considered unnecessary to hold a hearing. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

2.1 The complainant was an employee of the third respondent until 3 October 2005, when she was placed on unpaid leave. The complainant was also a member of the first respondent by virtue of her employment with the third respondent. The complainant was absent periodically from her workplace on account of her ill-health before October 2005. On 11 November 2005, the complainant received a medical certificate from her doctor, declaring that she was no longer fit for the open labour market.

2.2 Upon her being declared permanently disabled, the complainant became eligible to receive a disability benefit from the first respondent. However, the complainant's disability claim was repudiated by the second respondent, on account of her claim having been lodged more than six months after her last work day with the third respondent.

[3] COMPLAINT

3.1 The complainant submitted that she submitted her medical certificate to the third respondent in November 2005. The complainant submitted that she subsequently received notification that her disability claim had been repudiated. The complainant further submitted that the third respondent had failed to lodge her disability claim with the first respondent timeously.

3.2 The complainant seeks this Tribunal to investigate the matter.

[4] RESPONSES

Second respondent

4.1 The second respondent submitted that it is the insurer of the benefits provided for in the rules of the first respondent, including the disability benefit offered therein. The second respondent submitted that the complaint is not against the first respondent or itself, but against the third respondent for its failure to lodge the complainant's claim within six months from the commencement of her disability, as prescribed in the policy issued to the first respondent.

4.2 The second respondent referred this Tribunal to Part 7 of the first respondent's rules, stipulating that a disability benefit is subject to the same limitations, exclusions and conditions as those which are applicable to the disability insurance which the first respondent has effected with the insurer with regard to the benefit. The second respondent submitted that the disability benefit in question is therefore subject to a maximum time period within which it should be notified of a claim. The second respondent referred to Clause 4.2(3)(c) of the policy document, stipulating that no benefit is payable if the first respondent is not notified of the claim within the waiting period of six months.

4.3 The second respondent submitted that in terms of Clause 4.4 of the policy, it is responsible for determining the commencement date of the member's total and permanent disability, on the grounds of medical and other information submitted. The second respondent submitted that the commencement of the complainant's total and permanent disability was either on her last day at work, having been on 3 October 2005, when she was unable to perform her occupational duties or on the date on which the complainant's doctor issued a medical certificate, being on 11 November 2005. The second respondent submitted that the complainant's claim was lodged on 14 June 2007, whereas in terms of the stipulated waiting period, the complainant's disability claim ought to have been lodged by 11 May 2006.

Third respondent

4.4 The third respondent submitted that it was aware of the complainant's periodical absence from work during 2005, as she was undergoing medical treatment. The third respondent submitted that the complainant was subsequently placed on unpaid leave as she had exhausted both her sick and annual leave for that year.

4.5 The third respondent submitted that in November 2005, the complainant provided it with a medical certificate, indicating that she was unfit for the open labour market for an indefinite period of time. The third respondent submitted that it froze the complainant's employment position with the hope that she would return to it, in due course. The third respondent further submitted that there was no indication that she qualified for permanent disability. The third respondent submitted that subsequent to the complainant's submission of her medical certificate, application was

made for temporary disability, but is unclear whether or not the complainant received any benefits from that claim.

4.6 The third respondent submitted that in December 2006, after a year of absenteeism, the complainant indicated that due to her unimproved medical condition, she was declared unfit for the open labour market. The third respondent further submitted that on 19 January 2007, a final psychiatric report was received the complainant's doctor, after which it immediately made an application for the complainant's permanent disability benefits. The third respondent submitted a copy of the complainant's psychiatric report dated 19 January 2007. The third respondent submitted that it subsequently received notification of the repudiation of the complainant's permanent disability claim from the first respondent. The third respondent submitted that as it had frozen the complainant's employment position, in anticipation of her return to employment and had not officially dismissed the complainant during her period of absence.

[5] DETERMINATION AND REASONS THEREFOR

5.1 The issue for determination is whether or not the third respondent failed to comply with its duties in terms of the first respondent's rules with regard to the timeous lodgement of the disability claim to the first respondent.

5.2 The crux of the matter is that the complainant's disability claim was repudiated by the first respondent, on the basis that her claim was submitted outside of the prescribed waiting period of six months. The payment of any benefit that is due to a member of a fund is regulated by the fund's rules (see *Tek Corporation Provident Fund & Another v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D-E and section 13 of the Act).

5.3 Part 7 of the first respondent's rules deals with disability benefits. Clause 7.5 of the first respondent's rules reads as follows:

> "Die ongeskikheidsvoordeel is onderwerpe aan dieselfde beperkings, uitsluitings en voorwaardes as die wat van toepassing is op die ongeskikheidsversekering wat die Fonds in verband met die voordeel met die Versekeraar aangegaan het. Verder is die ongeskikheidsvoordeel, saamgevoeg met ander inkomste en voordele soos deur die Versekeraar bepaal, beperk tot die mate wat die Versekeraar vereis."

5.4 The rule above states that the disability benefit is subject to the same limitations, exclusions and conditions as those which are applicable to the disability insurance, which the fund has effected with the insurer. Clause 4.1 of the policy document issued to the first respondent by the second respondent, defines a waiting period as a period of six months from the commencement of a member's total and permanent disability. The second respondent submitted that in their view, the commencement date of the complainant's total and permanent disability was on 3 October 2005, being the last day on which she was able to perform her occupational duties or alternatively, on 11 November 2005 being the date on which her psychiatrist issued a medical certificate stating that she was unfit for the open labour market.

5.5 The third respondent submitted that it had decided to freeze the complainant's employment position, in the hope that she would return to her employment, as there was no indication that she qualified for permanent disability. The complainant was therefore granted an indefinite period of unpaid leave by the third respondent, on the basis of the medical certificate that was issued in November 2005. The third respondent further submitted that it lodged the complainant's disability claim with the first respondent, after 19 January 2007, when the complainant's psychiatrist

submitted a final psychiatric report, indicating that the complainant was permanently disabled.

5.6 The medical certificate issued by the complainant's psychiatrist on 11 November 2005, clearly stated that the complainant was no longer fit for the open labour market. The complainant submitted that her last day at work was on 3 October 2005 and that she was permitted to take unpaid leave from her employment. The second respondent submitted that the complainant's disability claim was lodged by the third respondent on 14 June 2007, whereas it should have been lodged by 11 May 2006.

5.7 The third respondent merely submitted that it had frozen the complainant's employment, despite the medical certificate that was issued by her psychiatrist in November 2005, clearly stating that the complainant was medically unfit for the open labour market. As soon as the third respondent became aware of the potential disablement of the complainant, they ought to have lodged a disability claim with the first respondent (see *Gxotiwe v Private Security Sector Fund and Another [2007] 3 BPLR 303 (PFA)*). The third respondent was negligent in its failure to lodge the complainant's disability claim timeously.

5.8 In light of the above, this Tribunal finds that the third respondent did not comply with its duties in terms of the first respondent's rules with regard to the lodgement of the complainant's disability claim with the first respondent.

[6] <u>ORDER</u>

6.1 In the result, the order of this Tribunal is as follows:

6.1.1 The first and second respondents are ordered to exercise their discretion as to whether the complainant would have qualified for a

disability benefit had the disability claim been submitted timeously, within six weeks of this determination;

6.1.2 In the event of the first and second respondents concluding that the complainant is disabled as defined in the rules, then the first respondent is ordered to calculate the amount of the disability benefit that would have been payable to the complainant, had the first respondent been properly notified of the cause of termination of the complainant's employment, together with interest thereto at the rate of 15.5% *per annum* as at the date of termination of service, less any amounts already paid to the complainant, within two weeks of the exercise of discretion in terms of paragraph 6.1.1 above;

6.1.3 The first respondent is ordered to inform the third respondent of the amount computed in paragraph 6.1.2 above, within three days of computation thereof; and

6.1.4 The third respondent is directed to pay the complainant the amount due in terms of paragraph 6.1.2 (if any), within two weeks of receipt of the calculations by the first respondent in paragraph 6.1.2.

6.1.5 In the event of the first and second respondents concluding that the complainant is not disabled as defined in terms of the rules, the first and second respondent must inform this Tribunal and the complainant of such decision including the reasons thereof; within eight weeks of this determination.

DATED AT JOHANNESBURG ON THIS 1st DAY OF NOVEMBER 2012

MA LUKHAIMANE

DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M filing: High Court

Parties unrepresented