

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFAWE/7/98

In the complaint between:

I J van der Westhuizen

Complainant

and

Sanlam Pension Fund (Field Staff)

Respondent

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT OF 1956

Introduction

This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act of 1956.

The complainant is Isak Johannes van der Westhuizen, an adult male of Cape Town.

The respondent is the Sanlam Pension Fund (Field Staff), a pension fund duly registered in terms of the Pension Funds Act of 1956.

After some correspondence between the parties, the complainant lodged a written complaint with the Pension Funds Adjudicator under cover of a letter dated 8 October 1997. It is common cause between the parties that the complainant has complied with the provisions of section 30A(1) of the Pension Funds Act of 1956, requiring him to first lodge a complaint with the pension fund before lodging the complaint with the Pension Funds Adjudicator.

After an exchange of correspondence, consisting of a number of letters and interrogatories, I met with the complainant and Mr Serffontein of the respondent at my offices on 14 April 1998. The meeting was of an informal nature and neither party adduced additional evidence under oath. In determining this matter, therefore, I have relied exclusively on the documentary evidence and argument put to me in writing and orally.

Having completed my investigation I have determined the complaint as follows. These are my reasons.

The issue

The complainant alleges that he has not received the pension benefits to which he is entitled in terms of the rules of respondent and seeks an order compelling the respondent make payment to him of all amounts owing to him in terms of the rules of the respondent.

Background to the complaint

The complainant was employed by Sanlam as a permanent full time sales consultant for the period September 1961 until his resignation in August 1966. He was initially employed at the Pretoria branch office until December 1962 when he transferred to the Cape Town branch. For the duration of his employment, he was a contributing member to the respondent. He alleges that when he resigned the respondent failed to pay him his pension benefit.

He maintains that because at the time his resignation he was under the impression that he would not receive any pension benefit or payout until he reached the age of 66, he did not query the fact that the respondent failed to pay him a pension benefit at the time of his resignation.

In 1995, when he attained the age of 66, he enquired about payment of the benefit, and

was advised by Mr W Theron, the Senior Manager: Administration that he was not entitled to any payment.

The respondent claims that it has no records of the complainant or his contribution history. Nevertheless, on the basis of the information submitted by the complainant, the respondent concedes that he must have been a member during the period of his employment. However, the respondent submits that rule 5.4 of the rules of the fund (which prevailed at August 1966 - the date of the complainant's resignation) stipulated that a member's withdrawal benefit will be payable within 15 months after the date of termination of service. Rule 6.8 allowed the fund to set off any amount which might have been due to the employer against the benefit. At that stage, this was legitimate and lawful practice. In accordance with this practice, the respondent usually set off any debt on the employees commission account against his pension benefit and would then pay him the balance. The respondent suggests that this may have happened in the complainant's case, although it cannot confirm this with any certainty.

The respondent contends that there is no evidence indicating that the respondent would have dealt the complainant's pension benefit in any manner other than in accordance with the rules which were in force at the time of his resignation.

In addition, the respondent argues that the complainant's complaint has in any event prescribed and he is not entitled to any relief on that basis. In response to this latter point, the complainant counters that he first became aware of the respondent's intention to renounce liability in 1995, when he attained the age of 66 and sought to obtain his pension benefit.

Analysis of evidence and argument

The determination of this matter depends on a proper interpretation of section 30I of the Pension Funds Act of 1956. Section 30I 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 sub-section (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;
 - (b) condone non-compliance with any time limit prescribed by this Chapter.

The act or omission to which this complaint relates (the accrual of the complainant's right to receive a benefit) occurred 15 months after the complainant's resignation in August 1966; i.e sometime in November 1967. This is by virtue of the provisions of rule 5.4 read with rule 6.8 of the applicable rules of respondent at that time. The two rules read as follows:

5.4 **Afdanking en Bedanking**

Indien die Werkgewer 'n lid of versekerde volgens sy kontrak of wetlik met kennisgewing afdank, of as hy vrywillig die diens van die Werkgewer verlaat, en sodanige lid of versekerde nie op enige ander voordele ingevolge hierdie reëls behalwe moontlik dié in artikel 5.6 vervat, geregtig is nie, sal hy op die teruggawe van sy opgelope bydrae geregtig wees. Sodanige terruggawe sal geskiet vyftien maande nà die datum van uittrede uit die diens, maar die Komitee mag dit na goeëddunke vroeër uitbetaal.

6.8 **Skulde**

Ondanks die bepalings van hierdie reëls sal die Werkgewer en die Fonds 'n absolute verhaalreg hê op 'n derde van die pension soos vóór kommutasie ingevolge article 6.2 en op enige sterfte-, ongeskiktheids-, ontbindings- en uittredingsvoordeel ingevolge hierdie reëls betaalbaar in soverre as wat enige gelde aan die Werkgewer of the Fonds verskuldig is. Enige bedrae aan die

Werkgewer verskuldig, wat aldus weerhou word, sal deur die Komitee aan die Werkgewer oorbetaal word ter vereffening van die skuld.

Vir die doeleindes hiervan sal enige bedrae wat deur die Werkgewer tot die lid of versekerde se kommissierekening gekrediteer of andersins aan hom betaal is en wat ingevolge die bepalings van die lid of versekerde se diens kontrak geag word 'n voorskot te wees wat deur die Werkgewer verhaalbaar is, beskou word as bedrae wat aan die Werkgewer verskuldig is en sal dit teen die voordele betaalbaar in verrekening gebring word.

The accumulative effect of these rules is that in terms of their provisions the complainant became entitled to payment of the balance of his pension benefit, after any applicable set off against his employee's commissions account, in November 1967. Thus, the three year prescription period in section 30I commenced at this date, unless I accept that the complainant was unaware of his entitlement.

The complainant claims to have been unaware until 1995 of the fact of his entitlement, and thus the alleged omission by the respondent to pay his benefit. Consequently, the issues for determination are whether the complainant was unaware of his accrued entitlement and whether in terms of section 30I(2) the prescription period of three years should commence on the date on which the complainant became aware or ought reasonably to have become aware of the fact of non-payment, whichever occurred first.

Section 30I(2) contemplates two kinds of knowledge which operate to interrupt the prescription period provided for in section 30I(1): actual knowledge and imputed knowledge. Hence, I am obliged to determine the date upon which the complainant actually acquired knowledge of the occurrence as well as the date on which the complainant ought reasonably to have become aware of the occurrence. The prescription period shall then commence from the earlier of these two dates.

For the purposes of argument, I am prepared to accept that the complainant became aware of the non-payment in late 1995. However, given the complainant's position, I find that he ought reasonably to have become aware of the occurrence much earlier. It

is neither possible nor necessary to fix an exact date of such imputed knowledge. Nevertheless, the complainant was an insurance broker, accustomed to dealing in financial service products on behalf of Sanlam. Given his experience and level of knowledge, one would expect that when he resigned his employment he would have taken steps to ascertain the date upon which he would have become entitled to receive his pension benefits in terms of the rules. In other words, one can reasonably expect a man in the complainant's position to have consulted the rules to ascertain the nature and extent of his withdrawal benefit. Had he done so he would have discovered that rule 5.4 was quite explicit as to when his entitlement arose.

Accordingly, I am satisfied that the three year period referred to in section 30I has long since expired, in that the complainant ought reasonably to have known of his entitlement before 1995.

It remains for me to determine whether I should extend the period or condone non-compliance with the time limit in terms of the discretion granted to me in section 30I(3).

Section 30I aims at finality and certainty in the affairs of pension funds and aims at promoting efficiency by providing an incentive for the expeditious enforcement of complaints. All legal systems accept that the operation of obligations should be limited by requiring enforcement within a reasonable period of time. From a policy perspective, it is undesirable to allow complainants to reactivate complaints about occurrences which occurred a long time ago. This is especially the case, as in this matter, where a period of more than 30 years has elapsed.

The fact of the matter is that the respondent simply does not have any records recording the complainant's contribution history. The respondent's failure to retain 30 year old records of withdrawals from membership is understandable and is probably based on the common business practice of keeping records for no more than 5 years retrospectively. Even were I to condone the complainant's non-compliance with the time limits, it is highly improbable that he would succeed in his claim because he is unlikely to discharge the onus upon him to prove his contribution history and the fact of

non-payment. The probabilities favour the respondent in that it can fairly be presumed that they were accustomed to making payments in accordance with their rules. There is no evidence to suggest otherwise.

To sum up, the complainant ought reasonably to have become aware of the fact of his entitlement and the respondent's alleged non-payment much sooner than he did. Hence, I am not permitted to investigate the complaint by virtue of the fact that the occurrence to which the complaint relates is deemed to have occurred more than 3 years before the date on which I received the complainant's complaint. Moreover, by virtue of the complainant's limited prospects of success, I am not persuaded that good cause exists either to extend the period or to condone non-compliance with the time limits contained in this section.

For the foregoing reasons, the complainant's complaint is dismissed.

DATED AT CAPE TOWN THIS 14TH DAY OF JULY 1998.

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Prof John Murphy
PENSION FUNDS ADJUDICATOR