

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/608/04/Z/VIA

In the complaint between:

Orbet Sibanyoni

Complainant

and

Concor Holdings (Pty) Ltd

First Respondent

Concor Defined Contribution Pension Fund

Second Respondent

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24
OF 1956**

Background

[1] This is a complaint lodged with the Pension Funds Adjudicator relating to the fund's deduction of monies from the complainant's withdrawal benefit in terms of section 37D of the Pension Funds Act 24 of 1956 ("the Act") and thereafter paying it to the employer.

[2] The complainant commenced his employment with Concor Holdings (Pty) Ltd ("the employer") in 1974 until he was dismissed for misconduct during March 2000. He became a contributing member of the Concor Defined Contribution Pension Fund ("the fund") by virtue of his employment on 1 September 1994. Upon termination of his membership of the fund, the complainant became

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entitled to a withdrawal benefit in the amount of R126 919.61. However, when the complainant applied for his benefit he was informed that his withdrawal benefit had been paid to the employer as compensation for the loss that he had caused to the company, through an alleged theft.

- [3] The employer initially instructed the fund to withhold the complainant's benefit as there was a pending criminal case against the complainant for theft committed whilst in its employ. It would appear that the case was withdrawn due to lack of evidence. The employer thereafter instructed the fund to make deduction from the complainant's withdrawal benefit in terms of 37D(1)(b)(ii) of the Act, since the complainant had allegedly acknowledged liability in writing that he had caused damage to it in the amount of R157 158.93. The fund did so and paid R85 677.13 to the employer on the strength of the admission of liability.
- [4] The complainant alleges that the affidavit which he signed does not constitute a full and complete acknowledgement of liability, with the result that the deduction by the fund was unlawful. He further disputes that the document he signed constitutes an unequivocal admission of liability, because according to him, he was not informed at the time that he was signing an affidavit.
- [5] The issue for determination is whether the document signed by the complainant constitutes an unequivocal acknowledgement of liability, on the basis of which the fund could effect a deduction from the complainant's benefit in terms of section 37D(1)(b)(ii) of the Act.
- [6] In response, the respondents have raised two points *in limine*. The first is that

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the complaint has become extinguished as a result of prescription as is envisaged in section 11(d) of the Prescription Act of 1969. The second is that it has become time-barred in terms of section 30I(1) of the Act and that no good cause has been shown for condoning its late lodging. Accordingly, it is argued, I should dismiss it.

The arguments *in limine*

(a) Prescription

[7] Placing reliance on the *obiter dictum* of NC Erasmus J in *Metro Group Retirement Fund & Another v Murphy NO & Another* [2002] 9 BPLR 3821 (C) at page 3823C, the respondents argue that because this complaint was lodged long after the expiry of a period of three years from the date on which the cause of action giving rise thereto occurred, the adjudicator has no jurisdiction to deal with it.

[8] In that decision NC Erasmus J stated as follows:

“In his first preliminary determination, the Adjudicator rejected the first two contentions raised by the fund and Metcash. In doing so, he failed to distinguish between time-barring under section 30I of the Act, in relation to which he has a power of condonation, and prescription under the Prescription Act 68 of 1969, in relation to which he has no such power.”

[9] Thus, the issue is, notwithstanding the provisions of section 30I of the Pension Funds Act of 1956, whether the provisions of Chapter III of the Prescription Act of 1969 are applicable in proceedings before the Pension Funds Adjudicator.

[10] Chapter III of the Prescription Act applies to claims or legal proceedings instituted for the recovery of a debt. Where the claim or legal process is intended

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to achieve relief other than a recovery of a debt then chapter III of the Prescription Act can surely not apply.

[11] The concept of “debt” in the context of the Prescription Act has been given a wide and general meaning. It embraces not only debts sounding in money but also rights of action for enforcement of obligations flowing from a particular right (*Evins v Shield Insurance Company Ltd 1979 (3) SA 1136 (W) at 1141F-G; HMBMP Properties (Pty) Ltd v King 1981 (1) SA 906 (N) at 909A-C; ESCOM v Stewarts and Lloyds of South Africa (Pty) Ltd 1981 (3) SA 340 (A) at 344E-F; CGU Insurance Ltd v Rumdel Construction (Pty) Ltd 2004 (2) SA 622 (SCA)*).

[12] However, notwithstanding its wide ambit as judicially interpreted, the concept of a debt is not synonymous with that of a complaint as defined in the Act. A complaint as defined covers a wider spectrum than a debt. It may well be that in some circumstances a complaint may involve the recovery of a debt. But that does not alter the character of a complaint as defined. From its very definition, it is clear that the jurisdiction of the adjudicator is not limited to claims designed for the recovery of a debt. It extends to the determination of matters relating to the administration of pension funds, including decisions on the investment of pension fund monies, or the application of pension fund rules, or disputes of fact or law relating to pension funds. The appropriate orders which the adjudicator is entitled to make would inevitably include declaratory orders, prohibitory interdicts or determinations of law or fact which may not necessarily entail the recovery of a debt or payment of money or the performance of an obligation. It is

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conceivable that in making a determination the adjudicator may make an order which entails payment of money or fulfillment of an obligation, thus relating to the recovery of a debt. But that in itself does not mean that the provisions of chapter III of the Prescription Act apply.

[13] I say so because section 1 of the Act defines a complaint without making a distinction between complaints that involve the recovery of a debt, on the one hand, and those that do not, on the other. It would be anomalous if such a distinction were imputed and the adjudicator entitled only to extend the three year period in regard to complaints that do not involve the recovery of a debt but not entitled to do so in regard to complaints that do. Such a result could never have been intended by the legislature. Moreover, section 30I creates a just power. It provides for statutory machinery deliberately designed by the legislature for the resolution of a wide variety of issues relating to pension funds in a just and expeditious manner. When the legislature devised the scheme described in chapter VA of the Act it was mindful of the Prescription Act, including chapter III thereof. It nonetheless elected to include in chapter VA the provisions of section 30I which, although regulating similar issues, are materially different from the provisions of chapter III of the Prescription Act. It would, in my view, make nonsense of section 30I(3) of the Act if the legislature had intended at the same time that chapter III of the Prescription Act should apply to chapter VA proceedings. In any event, section 16(1) of Chapter III of the Prescription Act sets out the scope of application of the Act as follows:

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“Subject to the provisions of subsection (2) (b), the provisions of this chapter shall, save insofar as they are inconsistent with the provisions of any Act of Parliament which prescribes a specified period within which a claim is to be made or an action is to be instituted in respect of the recovery of a debt or imposes a condition on the institution of an action for the recovery of a debt, apply to any debt arising after the commencement of this Act.”

[14] In *Manzini v Metro Group Retirement Fund (2)* [2003] 11 BPLR 528 (PFA) at 5295C the then Adjudicator seems to suggest that the provisions of section 30I(3) were intended to apply in circumstances where a complaint is time barred but has not prescribed. In other words, the suggestion seems to be this: if the act (or omission) giving rise to the complaint occurred more than three years before the date on which the complaint is received by the adjudicator, but the complaint has not prescribed for purposes of the Prescription Act, then (and only then) the adjudicator has the power to extend the three year period or condone non-compliance therewith. This argument cannot, with respect, be correct for a number of reasons. First, the need for condonation does not arise where a claim has not prescribed. The only instances where that could conceivably happen are those where prescription has been delayed (section 13 of the Prescription Act) or interrupted (sections 14 and 15) or where the debtor has no knowledge of the debt (section 12(2)) or the creditor has no knowledge of the debtor's identity (section 12(3)). Secondly, and in any event, complainants are not necessarily creditors, and pension funds or employers are not necessarily debtors. Where a complainant argues for the interruption or delay of the running of prescription or

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alleges that he was not aware of the identity of the employer or fund, he could well conceivably be met with the argument that he is not a debtor and so that argument does not assist him. Thirdly, if section 30I were intended for such limited and narrow application, it would simply be superfluous because then the Prescription Act already takes care of the difficulty (assuming for the moment that a complainant is a creditor, the respondent a debtor and the relief sought the recovery of a debt). The legislature is presumed not to legislate superfluously. Fourthly, in practice it is complaints that are older than three years and that fall outside sections 12 to 15 of the Prescription Act that make up a considerable majority of cases requiring the invocation of section 30I(3). A typical refrain by complainants usually goes something like “I did not know I was entitled to a benefit until my neighbour who worked with me at the same mine (or factory etc) those 5 years ago told me he received a benefit”. The section would simply be a woefully inadequate remedy if the difficulty it was intended to address was so circumscribed.

[15] In addition, one must not lose sight of the public policy underpinning chapter VA of the Act by which the complaints adjudication process was introduced as recently as 1996 in the same year as the final constitution. Prof Murphy, with respect, captured the essence of the process accurately when he said in *Sligo v Shell Southern African Pension Fund & Another* [1999] 11 BPLR 299 (PFA):

“The complaints adjudication process established by chapter VA of the Act constitutes a unique and special process granting complainants extensive statutory rights in relation to their pension benefits. It is an interventionist instrument of policy enacted in the

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interests of greater social security. Pension rights build up over a period of years and represent the most significant property entitlements of a vulnerable sector of society. The aim of the complaints adjudication process is to provide a mechanism of enhanced protection of those benefits. To accomplish this end the Adjudicator is given extensive investigative powers which can be exercised in an inquisitorial manner. The grant of a power to go beyond the three year prescriptive period, considered normal in commercial transactions, should be construed in this context.”

[16] In the result, considering the public policy underpinning the complaints adjudication mechanism, the provisions of section 16 of the Prescription Act, the provisions of section 30I of the Act as a whole and the clear definition of “complaint” in section 1 of the Act, I am of the view that the provisions of chapter III of the Prescription Act were never intended to apply to proceedings before the Adjudicator under chapter VA of the Pension Funds Act. The first *point in limine* is therefore dismissed

(b) Section 30I(1)

[17] The present complaint was lodged on 6 May 2004, almost four years after the complainant became aware that the actions of the fund might be unlawful. The latest by which the complainant should have lodged his complaint with this office was in May 2003. The complaint is thus one (1) year out of time and is therefore time barred for the purposes of section 30I of the Act.

[18] The enquiry does not end there, however, as I still need to satisfy myself as to whether or not good cause has been shown, or exists, for me to extend the three-year limit or to condone the non-compliance therewith. Whether good cause exists is determined by an examination of the following factors: the length

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of the delay, the explanation therefor, the importance of the case, the existence or otherwise of *bona fide* measures to resolve the dispute, the prospects of success on the merits, and the possibility of prejudice to either party that will be occasioned by the condonation (see: *Metal and Allied Workers Union v Filpro (Pty) Ltd* (1984) 5 ILJ 171 (IC); *Venter v Renown Food Products* 1989 (10) ILJ 320 (IC)).

[19] The complainant became aware that the conduct of the fund might be unlawful when it informed him during July 2000, that his benefit was paid to his previous employer. The complainant's attorney addressed a letter of demand on 2 August 2000 to the employer, demanding payment of his benefit. After receiving the employer's response, wherein it informed the complainant why the fund paid his withdrawal benefit to it, the complainant did not institute any further legal proceedings. Thereafter the matter remained dormant until 14 February 2004, when the complainant instructed Timfanelo Community Legal Service Centre ("the Centre") to follow up on it.

[20] According to the complainant the reason for the delay to lodge a complaint in terms of the Act or to consult earlier with the Centre, was the employer's lack of response to his letters. The explanation given by the complainant cannot be accepted as reasonable, because he received the employer's reasons why his withdrawal benefit was paid over to it in August 2000, when his attorney addressed a letter to the employer. Between the time of lodging his complaint and instructing his last representative, more than three-and-a-half years had

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passed, during which period the complainant did nothing to proceed against the fund and the employer. The reason given for the lack of proceeding against the employer is not very convincing.

[21] However, the period of only one (1) year with which this complaint is out of time is not unduly long. Neither of the parties concerned will be prejudiced in the circumstances. Insofar as the prospects of success on the merits are concerned, I am of the view that the complainant enjoys excellent prospects of success, by reason of the factors set out hereunder. The complainant's case is balanced on the question as to whether the affidavit signed by him constitutes a complete and full acknowledgement of liability, thereby entitling the fund to make a deduction in terms of section 37D(1)(b)(ii) of the Act. The section authorizes a registered fund to deduct from a benefit due to a member any amount owing by the member to his employer as compensation for damages caused to the employer by reason of theft, fraud or dishonesty where a judgment has been obtained, or the member has admitted liability in writing.

[22] The decision in *Ehlers v Nedcor Defined Benefit Contribution Provident Fund [2001] 4 BPLR 1825 (PFA)*, sets out the requirements to be met in order for a document to constitute an unequivocal admission of liability:

- The amount must be due by the member to the employer,
- The amount must be due on the date that the member ceased to be a member of the fund,
- The amount must be in respect of compensation payable,
- The compensation must be in respect of any damage caused to the employer, which must have been caused by reason of theft, fraud, dishonesty or misconduct by the member, and

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- The member must have furnished a written admission of liability to the employer in respect of the delictual damages caused to the employer

[23] Evaluating the affidavit against the above requirements, it is clear, for the reasons that follow, that the affidavit made by the complainant does not constitute an unequivocal acknowledgement of liability. Firstly, although the complainant admitted liability to stealing a cheque, he, however did not admit liability in respect of a specific cheque in a specific amount. The employer alleges that the complainant caused damages to it in the amount of R157 158.93. That amount is made up of two cheques in the amounts of R100 398.93 and R56 759.00, bearing cheque numbers 1436 and 248729 respectively, which the complainant has not admitted to stealing. Nowhere in the affidavit does the complainant admit to stealing those specific cheques. Secondly, even though the complainant has admitted to stealing a cheque, he has not admitted liability insofar as the amount owing to the employer is concerned.

[24] In the circumstances the affidavit that the employer is relying on does not constitute an unequivocal admission of liability for the purposes of section 37D(1)(b)(ii) of the Act. Thus, the payment by the fund of the complainant's withdrawal benefit to the employer was contrary to the provisions of the section and is therefore unlawful.

[25] After weighing all the factors alluded to above, I find that good cause exists for me to condone the complainant's non compliance with the provisions of section 30I of the Act. Condonation is therefore granted.

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[26] The complainant is entitled to his withdrawal benefit in the amount of R126 919.61 for the reasons aforementioned.

[27] In the result, the ruling of this Tribunal is:

27.1 The Concor Defined Contribution Pension Fund is directed to pay to the complainant within six (6) weeks of the date of this ruling the amount of R85 677.13, together with interest thereon at the rate prescribed in the Prescribed Rate of Interest Act, reckoned from 31 March 2000 to date of payment.

DATED AT CAPE TOWN ON THIS 4th DAY OF MARCH 2005

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR

Appearances:

1. Complainant – not represented
2. Concor Holdings (Pty) Ltd – not represented
3. Concor Defined Contribution Pension Fund – not represented

Registered Address of the Fund

Concor House
13 Church Street Extension
Crown Industria
Johannesburg,
2000

Section 30M filling in terms of the Pension Funds Act 24 of 1956 –

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Magistrate Court