

# IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

**CASE NO:** PFA/KZN/2512/05/KM

In the complaint between:

**M. PHAHLAMOHLAKA**

**Complainant**

and

**ESKOM PENSION AND PROVIDENT FUND (“the fund”)**

**First Respondent**

**ESKOM (“the employer”)**

**Second Respondent**

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## DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956 (“the Act”)

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### Introduction

[1] This complaint, received on 1 March 2005, concerns the legitimacy of a deduction from the complainant’s withdrawal benefit. The deduction was purportedly made in terms of section 37D of the Act in respect of a housing loan made to the complainant by the employer. I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.

### Complaint

[2] The complainant commenced working for the employer on 20 January 1982. His service was terminated on 30 September 2002 at which time he became entitled to a withdrawal benefit from the fund. He was then informed by the fund that his entire

pension benefit had been paid to an entity described as “Eskom Finance Company” (“EFC”) to repay the loan advanced to him in respect of housing.

- [3] The complainant states that to the best of his knowledge the debt he owed to EFC had been repaid in full. He also challenges the fund’s entitlement to pay his benefit to the account of a third party without his consent. He therefore claims payment of his benefit.

### Response

- [4] In its response, the fund has stated that the deduction from the complainant’s benefit was in respect of an outstanding housing loan made in terms of Rule 41 of the fund and Section 37D(1)(b) of the Act. According to the fund, the amount of the complainant’s benefit after tax amounted to R25 686,18. The balance owing on the housing loan at the time of his exit from the fund was R28 073,21. The entire amount of his post-tax benefit was therefore applied in reduction of this outstanding amount.

- [5] In explanation of the above, it alleges that the complainant was granted a housing loan by Eskom on 1 March 1997. EFC was established in 1990 to administer the housing loans of all Eskom employees. It is further stated that, although EFC is a wholly owned subsidiary of Eskom and legally a separate entity, it operates for all practical purposes as a division of Eskom with the same conditions of service. Therefore, according to the fund, on the complainant’s exit from service with Eskom,

he became indebted to it in terms of the outstanding home loan account.

[6] In the course of investigation of this matter the fund was asked to outline the basis on which a loan made by EFC, a separate legal entity from the employer, could be brought into the scope of the provisions of the above section. This office was then advised that Eskom had stood surety for the loan, and a copy of the suretyship agreement between Eskom and EFC was made available for inspection. The relevant portions of it read as follows:

**“2.2 Personal Housing Loans**

EFC is also willing to grant Personal Housing loans without mortgage to ESKOM employees (hereinafter referred to as “the loanee”) in unproclaimed areas and ESKOM is prepared to bind itself as surety and co-principal debtor for such loans on the terms and conditions as set out hereinafter.

.....

**3.1 Personal Housing Loans**

ESKOM hereby binds itself as surety and co-principal debtor in solidum for the full amount owing to the EFC after the deduction of any pension fund monies due, under any personal housing loan granted to any current or future ESKOM employee.

**3.2 Termination of Liability**

ESKOM liability to the EFC in respect of a personal loan shall terminate when the

loanee's indebtedness to the EFC has been settled in full.

.....

## **5.1 Pension Benefit and Leave Monies**

**5.1.1** In order to reduce the risk of losses when employees terminate service, ESKOM, will endeavor within the bounds of the law, to withhold monies due to the employee, on the basis set out below. Such monies would be paid over to EFC, should the bond not be Transferred within 90 days of such termination of service. (sic)

**5.1.2** .....

### **5.1.3 Standard Termination of Service**

ESKOM undertakes to inform the EFC and the Eskom Pension Fund of every termination of service (except separations – refer paragraph 6.2.5) in advance. On settlement of the mortgage loan by the employee and/or after 90 days of termination of service where settlement has not been finalized, the EFC may inform/claim from Eskom Pension Fund accordingly, subject to paragraphs 6.2.2 and 6.2.3.

**5.1.4** .....

## 6. Personal Housing Loans

### IN THE EVENT OF:

**6.1** The loanee of a Personal Housing Loan leaving the service of Eskom for any reason whatsoever, dies Or becomes insolvent or gets divorced, or vacates the property; or (sic)

**6.2** .....

**6.3** Any shortfall will be the responsibility of Eskom.”

[7] The fund concludes that the deduction was lawfully made in terms of the provisions of section 37D(1)(b) of the Act.

[8] The fund has moreover provided a detailed documentary record of the complainant's indebtedness to EFC, including the amounts advanced, the loan repayments, and the interest charged on the outstanding balance.

### Determination and reasons therefor

[9] Section 37D allows a fund to make certain deductions from the payment of pension benefits. The relevant portions read as follows:

**“37D Fund may make certain deductions from pension benefits**

(1) A registered fund may-

.....

(b) deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of-

(i) (aa) a loan granted by the employer to the member for any purpose referred to in section 19 (5) (a) ; or

(bb) any amount for which the employer is liable under a guarantee furnished in respect of a loan by some other person to the member for any purpose referred to in section 19 (5) (a) ,

to an amount not exceeding the amount which in terms of the Income Tax Act, 1962, may be taken by a member or beneficiary as a lump sum benefit as defined in the Second Schedule to that Act..."

[10] Section 19(5)(a) referred to in subsection (1)(b)(i)(bb) includes loans made in connection with housing.

[11] It is clear that the complainant's debt to EFC sought to be deducted in this case does not fall within the provisions of section 37D(1)(b)(i)(aa), since it was not the employer itself which advanced the loan to the complainant. However, if it can be shown that the employer is liable under a guarantee furnished in respect of a loan (made in connection with the purposes set out in section 19(5)) to EFC, it will be afforded the protection extended to employers in this section to the extent that it is liable under the guarantee.

[12] I therefore turn to the suretyship agreement entered into between the employer and EFC. Now it is clear from clause 3.1 that both parties were labouring under a

misapprehension about the application of section 37D to the present situation. In that clause the employer ironically binds itself as surety for the balance of the loan owing *after* deduction of the loan amount from the employee's pension benefits. This is made even clearer by clause 3.2 which absolves Eskom from liability in the event of the loan being settled from the member's pension fund monies. The problem here is that the benefit cannot be reduced by the amount of the complainant's indebtedness to EFC as EFC was not his employer. Nor, on the face of it, can the full amount of the debt be deducted in respect of the guarantee by the employer of the loan from EFC, since (in terms of this clause) the employer has only stood surety for the balance of the loan amount after deductions have been made from the member's pension benefit.

[13] Fortunately for the employer, this self-referring loop of circular logic is saved by a contextual and purposive approach to the rest of the agreement. It is abundantly clear from the remainder of the document, and clause 6 in particular, that the intention was to indemnify EFC against any shortfall on loan repayments. To this end, it was also intended that the shortfall first be recovered from the member's pension benefit in terms of the provisions of section 37D. Practically speaking, if those pension monies are not legally deductible from the member's benefit, then I am satisfied that under this surety agreement (read as a whole), Eskom would become liable to EFC for the full balance outstanding. Therefore, despite the clumsy wording of clause 3.1, the effect of this agreement is that the employer has guaranteed the housing loan made to the complainant by EFC, and therefore falls squarely within the protection conferred by section 37D(1)(b)i)(bb). The fund was

therefore entitled to deduct any amount proved owing to EFC in respect of the complainant's housing loan from his pension benefit.

[14] As stated, the fund has furnished a detailed schedule of loan repayments and interest charged on the outstanding balance. The complainant was copied with this schedule, and I understand through his attorney that this aspect is no longer being challenged. It must therefore be accepted as proof of the amount of the complainant's indebtedness to EFC, and consequently the amount for which the employer is liable under its guarantee to EFC. There is therefore no basis on which to find that the deduction made by the fund was unlawful.

[15] Finally, the facts of this case and several other complaints directed against this fund on similar grounds require a word of caution from this tribunal. It is imperative for the board of management of the fund to inform all members of the consequences of housing loans and in particular, the manner of recovery and implications of section 37D.

### Relief

[16] The complaint is dismissed.

