

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/KZN/678/03/CN

In the complaint between:

Edgar Howard Charlton

Complainant

and

Tongaat-Hulett Group Pension Fund

First Respondent

Tongaat-Hulett Sugar Limited

Second Respondent

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

[1] This complaint concerns the withholding of the withdrawal benefit of the complainant by the first respondent after his dismissal from employment by the second respondent, and it is alleged that such withholding is unlawful.

[2] As I have considered it unnecessary to hold a hearing, in coming to a decision in this matter I have relied exclusively on the parties' respective written submissions and the documentary evidence that was compiled in the course of this investigation.

Background facts

[3] The complainant was an employee of the second respondent, and a member of the first respondent from 1 December 1982, until 31 December 2002. After investigations into alleged fraudulent activities within one of the business operations of the second respondent, which had resulted in an estimated loss of R1,5m, an internal disciplinary enquiry was held, and the complainant was found guilty on all charges of dishonest misconduct and dismissed with effect from 31 December 2002. Further investigations into alleged irregular transactions that were conducted by the complainant during 1999, resulting in an estimated loss of R500 000, were subsequently undertaken by the second respondent. Meanwhile, the complainant unsuccessfully appealed against his dismissal during January 2003, and subsequently challenged the legality of his dismissal before the CCMA. The CCMA has recently dismissed his referral and upheld his dismissal as being fair.

1. Upon the termination of his employment and withdrawal from the first respondent, the complainant became entitled to a transfer benefit in the amount of R840 416. On 10th February 2003, the second respondent, through its attorneys, instructed the first respondent not to pay out the complainant's pension benefit until civil proceedings that it intended instituting against him had been finalized. At a meeting of the trustees of the first respondent held on 11th February 2003, it was decided to accede to the second respondent's request. During April 2003, the second respondent instituted civil proceedings before the Durban and Coast Local Division of the High Court against the complainant, to recover the monies allegedly misappropriated by him. Summons were issued under against him under Case No.3310/03, and were served on him on the 14h April 2003. At this stage it appears that pleadings have closed, and the legal representatives of the second respondent have applied for a trial date. Criminal charges were also laid against the complainant with the Durban

Commercial Crimes Unit, under CR number 824/07/2002; and a second civil suit was instituted against him before the High Court.

The issues

2. The complainant contends that the withholding of his pension benefit by the first respondent is unlawful, and prays for an order directing the immediate payment out of the same.

Alternatively, he contends that the first respondent should be ordered to pay out the “interest on the money that is accumulating monthly”.

3. In response, the first respondent states that the withholding of the complainant’s pension benefit is lawful, as it is authorized by both rule 45(2) of its rules, and section 37D (1) (b) (ii) of the Pension Funds Act. Accordingly, the first and second respondents argue, the complaint should be dismissed.

Analysis

4. Rule 45(2) provides as follows:

The trustees may, where an employer has instituted legal proceedings in a court of law and/or laid a criminal charge against the member concerned for compensation in respect of damage caused to the employer as contemplated in section 37D of the Act, withhold payment of the benefit until such time as the matter has been finally determined by a competent court of law or has been settled or formally withdrawn; provided that:

- (a) the trustees in their reasonable discretion are satisfied that the employer has made out a *prima facie* case against the member concerned, and there is reason to believe that the employer has a reasonable chance of success in the proceedings that have been instituted;

(b) the trustees are satisfied that the employer is not at any stage of the proceedings responsible for any undue delay in the prosecution of the proceedings;

(c) once the proceedings have been determined, settled or withdrawn, any benefit to which the member is entitled is paid forthwith.

5. Rule 45(2) expressly authorizes the first respondent to withhold the payment of a member's benefit where an employer has instituted legal proceedings against the member concerned in respect of damage caused to the employer as contemplated in section 37D.

The damage contemplated in Section 37D is that caused to the employer by the member through fraud, theft, dishonesty and intentional misconduct.

6. The civil proceedings against the complainant were instituted just over three months from the date of his dismissal, and the second respondent has already applied for a trial date in respect thereto. Accordingly, it cannot be said that the second respondent has unduly delayed the institution and prosecution of the civil action proceedings. The first respondent has thus acted within the express powers granted to it by rule 45(2) in withholding the complainant's benefit. It is only after the civil proceedings have been determined, settled or withdrawn, that the complainant will be entitled to demand payment of his benefit.

7. Even if there had not been a provision in the fund's rules authorizing it to withhold payment of the complainant's benefit, its conduct would have been justified in terms of section 37D(1)(b)(ii)(bb) of the Act, which expressly authorizes the fund to deduct from a member's benefit, after the member has admitted liability to the employer in writing, or has been adjudged by a court of law to be liable to the employer for loss suffered by the latter through his theft, fraud, dishonesty, or misconduct. In previous

determinations of this tribunal, the provision for deduction has been interpreted to impliedly include the power to withhold payment of the benefit pending the determination or acknowledgement of liability: See the decision of the Adjudicator in *Appanna v Kelvinator Group Services of SA Provident Fund* [2000] 2 BPLR 126 (PFA) at 129A.

8. I therefore find that the withholding of the complainant's benefit until such time as the civil proceedings in Case No. 3310/03 have been finalized, withdrawn or settled is not unlawful.

9. The complaint is accordingly dismissed.

DATED AT CAPE TOWN THIS 22nd DAY OF APRIL 2004.

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR