IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

(HELD IN CAPE TOWN)

CASE NO: PFA/KZN/1839/2004/SG

In the complaint between:

K ODAYAN **Complainant**

and

ORION MONEY PURCHASE PENSION FUND **First Respondent**

LAND LINK CUSTOMS CLEARING & FORWARDING **Second Respondent**

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT OF 1956 ("the Act")

Introduction

[1] This complaint concerns the refusal by Land Link Customs Clearing & Forwarding ("the employer") to sign and submit to Orion Money Purchase Pension Fund ("the fund") the complainant's notification form for withdrawal from the fund, by reason of the complainant's outstanding balance on the loan advanced to him by the employer.

Factual background

[2] The complainant was employed by the employer until 5 March 2004. He was a member of the fund as a result of such employment. During the period of his employment, he took a personal loan of R10 080,00 from the employer. The loan was to cover the attorney's transfer costs of the property that the complainant had purchased. It appears that when he left service, the loan or part thereof was still outstanding. On 26 May 2004, he submitted a notification form for withdrawal from the fund to the employer. The employer did not sign and submit the notification form to the fund. To date, the complainant has not received his withdrawal benefit.

Complaint

[3] The complainant is unhappy that since he left service on 5 March 2004 he has not received his withdrawal benefit.

Employer's response

[4] The employer states that it withheld the complainant's notification form as a result of the balance which is still outstanding on the loan. It seeks to deduct the outstanding amount on the loan from the benefit.

The fund's response

[5] The fund contends that it was not aware that the complainant has left service. No notification form was received from the employer to that effect, and therefore it was not in a position to process the payment of the benefit.

Determination and reasons therefor

[6] The participating employer in a pension fund owes various duties to the members of the fund. In this regard, Marais J in *Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 235B-D, said the following:

> "The trustees of the fund owe a fiduciary duty to the fund and to its members and other beneficiaries (section 2(a) and (b) of the Financial Institutions (Investment Fund) Act 39 of 1984 and rule 18.1.4). The employer is not similarly burdened but owes a duty of good faith to the fund and its members and beneficiaries (cf *Imperial Group Pension Trust Ltd v Imperial Tobacco* Ltd [1991] 2 All ER 597 (Ch) at 604*g* -606*j*)."

[7] Section 37D makes provision for exceptional instances when deductions can be effected from pension benefits. The section allows for nine kinds of deductions from a pension benefit, which can be summarized as follows:

(i) amounts due on the benefit in question by a member in accordance with the Income Tax Act (section 37D(1)(a));

(ii) amounts due to the fund in respect of housing loan granted to the member by the fund (section 37D(1)(a)(i));

(iii) amounts due to the fund in respect of amounts for which the fund is liable under a guarantee furnished in respect of a housing loan to the member made usually by bank or a building society (section 37D(1)(a)(ii));

(iv) amounts due by the member to his employer owing on the date of his retirement or termination of employment in respect of a housing loan granted by the employer to the member (section 37D(1)(b)(i)(aa));

(v) amounts due by the member to his employer on the date of his retirement or termination of employment in respect of amounts for which the employer is liable under a guarantee in respect of a housing loan made by some other person , usually a bank or building society (section 37D(1)(b)(i)(bb));

(vi) amounts due by a member to his employer on the date of

termination of his employment in respect of compensation for any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member (section 37D(1)(b)(ii));

(vii) amounts which the fund has paid or will pay by arrangement and on behalf of, a member or a beneficiary in respect of subscriptions to a medical aid scheme (section 37D(1)(c)(i));

(viii) amounts which the fund had paid or will pay by arrangement, or on behalf of, a member or a beneficiary in respect of insurance premiums (section 37D(1)(c)(ii)); and

(ix) amounts which the fund has paid or will pay by arrangement, or on behalf of, a member or beneficiary in respect of any purpose approved by the Registrar, on the conditions determined by the Registrar upon a request in writing from a fund (section 37D(1)(c)(iii)).

[8] The loan taken by the complainant from the employer was to cover the attorney's transfer costs of the property he had purchased. The loan does not fall within the exceptions provided for in section 37D. The employer does not have the authority to withhold the notification form.

The conduct of the employer in this regard is to be deprecated. The employer abused its powers and refused to complete the notification form without any good reason in law. Had the complainant been represented in this matter, contrary to the normal position of this tribunal, I would have no hesitation in making a cost order in favour of the complainant.

Relief

[9] In the result, the order of this tribunal is as follows:

[9.1] The Second respondent is ordered to complete the withdrawal form and to forward it to the first respondent within 7 days of the date of this determination.

[9.2] Should the second respondent fail to complete the withdrawal form within the time period prescribed in paragraph [9.1], the first respondent is ordered to accept a withdrawal form completed and signed by the complainant only and to calculate the complainant's withdrawal benefit in terms of the rules, within 14 days of the date of this ruling.

[9.3] The first respondent is further ordered to pay the benefit calculated in terms of paragraph [9.2], less any deductions in terms of sections 37A and 37D, within 21 days of the date of this determination.

[9.4] The second respondent is ordered to pay interest on the cash benefit

calculated in terms of paragraph [9.2] to the complainant at the rate of 15,5% per annum reckoned from 5 April 2004 to date of payment, within 21 days from the date of this determination.

DATED AT CAPE TOWN ON THIS THE DAY OF JULY 2005.

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Vuyani Ngalwana

Pension Funds Adjudicator

cc Mr Jonathan Van Oordt

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Fund's registered address

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Section 30M filing: High Court