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Please quote our reference: PFA/GA/3120/05/LCM

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT  
NO. 24 OF 1956 (“the Act”) – R MICHAEL v AIR LIQUIDE (PTY) LTD/ FUSSELL  
UMBRELLA PENSION FUND(“the fund”)**

Introduction

- [1] This matter concerns the failure of the fund to pay your withdrawal benefit after the employer instructed it to withhold your benefit. The complaint was received by this office on 8 April 2005 and a letter acknowledging receipt thereof sent to you on 22 April 2005. On the same date a letter was dispatched to the respondents giving them until 13 May 2005 to file a response to the complaint. Air Liquide (Pty) Ltd (“the employer”) submitted a response via its legal representative, Gael Barrable Attorneys on 17 May 2005. The fund’s administrator, Fussell and Associates, submitted a response on 13 May 2005. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter.

The facts

- [2] You were employed by the employer from June 1996 until you were dismissed in November 2003. By virtue of your employment you were a member of the fund. Upon your dismissal, you became entitled to a withdrawal benefit from the fund. However, in December 2003 following a disciplinary hearing, the employer laid criminal charges against you for the misappropriation of approximately R2 900 000.00 (two million nine hundred thousand rand). On 27 November 2003 the employer instituted an application in the High Court for the sequestration of you and your husband’s estates. This order was granted on 2 March 2004. Furthermore, on 8 November 2005 the employer instituted a civil claim against you for the recovery of R2 980 678.00 which it sought to recover directly from your withdrawal benefit.

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V Ngalwana (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrosbree (Snr Assistant Adjudicator), Z Camroodien (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), Solomzi Gcelu (Assistant Adjudicator), T Thabethe (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator)

Office Manager: L Manuel

### The complaint

- [3] Your complaint is that the employer and/or the fund has unlawfully withheld your withdrawal benefit despite your acquittal on the criminal charges. You state:

“On approximately 7/3/05 I again phoned Fussell Umbrella Pension Fund to speak to Brad Button and was informed that he had left the company. I then spoke to Chris Holford also from Fussell Umbrella Pension Fund and told him the outcome of my case and asked him when my pension fund would be paid out. He then said he would come back to me. He then got back to me later that day and told me that Mr Teke Mothebi (The I.R Manger *[sic]* for Air Liquide) has told him that they are trying to obtain another court order to keep my pension fund benefits.”

### The administrator’s response

- [4] Fussell and Associates submits that members who exit the fund complete withdrawal forms and submit them to the fund. However, because you failed to complete a withdrawal form, it has not been notified of your pending withdrawal. Furthermore, after the conclusion of the criminal case, it was notified by the employer’s attorney to withhold your withdrawal benefit pending the outcome of a civil case to be instituted against you. The letter dated 24 March 2005 from Gael Barrable Attorneys, acting for the employer, reads as follows:

“Please be advised that I am in the process of preparing an application to the High Court to have Ms Michael’s benefits released to my client as compensation for the losses suffered by my client due to the dishonest and fraudulent of *[sic]* Ms Michael during her employ.”

- [5] In the same letter the employer’s attorney requested confirmation from the administrators that they will not release your benefit.
- [6] Attached to the administrator’s response was a trustee resolution signed by the Principal Officer (Avril Bussio) and two trustees of the fund, as well as a letter signed by the Principal Officer that your benefit has been withheld in terms of a statement you signed in November 2004 pursuant to a plea of not guilty in terms of section 115 of the Criminal Procedure Act, No 51 of 1977. It says, in light of the admission you made in this statement and an admission you made in an e-mail dated 12 August 2003 regarding the misappropriation of the R2 900 000.00, the fund is entitled in accordance with section 37D of the Act to withhold payment of your withdrawal benefit and make payment to the employer.

### The Employer’s response

- [7] The employer says following your disciplinary hearing and dismissal, it successfully applied to the High Court for your sequestration, which was granted on 2 March 2004. Furthermore, in December 2003 criminal charges of fraud and theft were laid

against you. At the criminal proceedings you submitted a statement in terms of section 115 of the Criminal Procedure Act.

[8] The employer contends:

“In that statement Michael, *inter alia*, admitted that due to her false pretences the Company had effected payment of various amounts to fictitious employees. Michael also confirmed that due to her false pretences the Company had suffered a real loss totaling R2 700 000.00 (two million seven hundred thousand Rand).”

[9] It says that although you made these admissions in your statement, you pleaded not guilty to the charges on the grounds that you had lacked criminal capacity to commit the offences. In support of this plea you produced medical and psychological reports alleging that at the time of the incidents you had suffered from “impulse control disorder and more specifically pathological gambling”. Therefore, you were found not guilty on all counts on the ground that the state had failed to discharge its onus to prove *mens rea*.

[10] Lastly, the employer says should I disagree with its submissions which is based on your e-mail dated 12 December 2003 and the statement you entered in terms of section 115 of the Criminal Procedure Act, and find that these do not constitute a written admission of liability as envisaged in section 37D(b)(ii)(aa), it requests that I suspend my decision pending the outcome of a civil action which it will institute against you. It has subsequently instituted a civil claim against you, which I discuss below.

#### Determination and reasons therefor

[11] The fund’s defence in withholding your withdrawal benefit is that, because the employer had laid a criminal charge of fraud/theft and as you during the proceedings submitted a statement in terms of section 115 of the Criminal Procedure Act, your statement constitutes a written admission of liability as envisaged in section 37D(b)(ii)(aa). It is common cause that you admitted to causing the employer loss of R2 788 271.70. You entered into such admission in terms of section 220 of the Criminal Procedure Act, thereby absolving the state of the onus to prove same. You entered a plea of not guilty on the basis that during the period of committing the fraud/theft you had no criminal capacity because you were suffering from impulse control disorder. On 17 February 2005 the Court, in terms of section 174 of the Criminal Procedure Act, discharged the case against you.

[12] What falls to be determined here is whether the fund’s withholding of your withdrawal benefit (after being instructed by the employer) is lawful. Rule 10.1 deals with deductions from benefits and provides as follows:

#### “DEDUCTION FROM BENEFITS

The TRUSTEES shall have the right to make such deductions from the benefits to which a MEMBER or other beneficiary is entitled in terms of the RULES as are

permitted in terms of Section 37D of the ACT and in respect of which a claim has been lodged in writing within such reasonable time of the event giving rise to the benefits as the TRUSTEES may determine from time to time for making such claims.”

[13] Before a fund may make any deductions from a member’s benefit in terms of section 37D(1)(b) of the Act the following requirements must be met:

- [13.1] there must be a benefit payable;
- [13.2] there must be an amount due by the member to his employer on the date of his retirement or on which he ceases to be a member of the fund;
- [13.3] the damage caused to the employer must be by reason of theft, dishonesty, fraud or misconduct by the member;
- [13.4] the member must either admit liability in writing to the employer or judgment must be obtained in any court; and
- [13.5] the judgment or the written admission of liability must relate to compensation due in respect of the damage caused to the employer by the member.

[14] On 17 February 2005 the Court, in terms of section 174 of Act 51 of 1977, discharged the state’s case in the criminal proceedings where you were found not guilty. Subsequent to that, the employer instituted a civil claim against you in the High Court, Witwatersrand Local Division, for the recovery of R1 936 360.00. In its civil claim against you it averred that during your employment with it as payroll manager you had misappropriated the company’s funds to the value of R2 900 000.00. It alleged that its investigation revealed that your *modus operandi* was to create fictitious employees on the company’s payroll system and pay overtime claims as well as salaries to these employees. You then paid these false salary claims into bank accounts which were opened in your name, your husband’s and your daughter’s. You did not defend this case. On 7 February 2006 the High Court granted an order against you in the following terms:

**“IT IS ORDERED:-**

1. Declaring that the first Defendant is liable to the plaintiff in the amount of R1 936 360.00.
2. Directing the second defendant to pay over to the plaintiff the amounts standing to the credit of the first defendant’s member’s account, up to a maximum of the amount referred to in paragraph 1 above, and after deducting therefrom such amount as may be required to be deducted in terms of the Income Tax Act, 58 of 1962.
3. That the first defendant pay the cost of this action on the attorney and own client

scale.”

- [15] It is common cause that you are the “first Defendant” referred to in the court order. In terms of section 37D(1)(b) the fund sought to deduct R2 788 271.70 from your withdrawal benefit in respect of compensation for damages you caused to the employer. On 7 February 2006, while our investigation was still in progress, the Witwatersrand Local Division of the High Court found you liable to the employer in the amount of R1 936 360.00. It also ordered the fund to pay your withdrawal benefit to the employer. Therefore, the court order is the judgment that is envisaged in terms of section 37D(1)(b)(ii)(bb) of the Act and which has been granted against you in respect of damages you caused to it by reason of theft, dishonesty, fraud or misconduct.
- [16] A judgment has been granted in respect of the damages you caused to the employer and it complies with the requirements of the Act. The fund has to act in terms of the binding court order and I cannot interfere with the order granted by the High Court.
- [17] In the result, your complaint cannot succeed.

DATED AT JOHANNESBURG ON THIS                      DAY OF                      2006

Yours faithfully

**VUYANI NGALWANA**  
PENSION FUNDS ADJUDICATOR