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Please quote our reference: PFA/GA/5308/2005/RM

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 1956 (“THE ACT”) – P TOM (ON BEHALF OF ESTATE LATE M V TOM) (“the complainant”) v PERSONAL PROVIDENT FUND - PARTICIPATING EMPLOYER: KEMIX (PTY) LTD (“the first respondent”); AND KEMIX (PTY) LTD (“the second respondent”)

1. Introduction

- 1.1 The complaint concerns the withholding of a withdrawal benefit due to a former employee (“the complainant”) by the first respondent following a request to do so by the employer, the second respondent. The complaint was received on 12 September 2005.
- 1.2 A letter acknowledging receipt of the complaint was sent on 10 October 2005. On the same date letters were sent to the second respondent and the fund’s administrator, Momentum Funds at Work (“the administrator”), giving them until 1 November 2005 to respond to the complaint. Responses, which were also copied to you, were received on 17 October 2005, 27 October 2005 and 23 June 2006. A reply was received on 2 March 2006.
- 1.3 After considering the submissions it is considered unnecessary to hold a hearing in this matter. The facts are known to the parties so they will not be repeated here, save for that which has a bearing on the outcome of my determination. The determination and reasons therefor appear below.

2. Factual background

- 2.1 The complainant was employed by the second respondent and by virtue

M Mohlala (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), V Abrahams (Assistant Adjudicator), Solomzi Gcelu (Assistant Adjudicator), T Thabethe (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator)

Office Manager: L Manuel

of his employment became a member of the first respondent. The complainant was suspended from employment on 26 May 2005 pending the outcome of an investigation into his conduct and alleged breach of trust between himself and the second respondent. The complainant resigned from employment on 13 June 2005, before a disciplinary hearing could be convened. The complainant's resignation was subject to three conditions, namely that he receive his leave pay, and he receive his provident fund benefit, and get his certificate of service. On leaving employment the complainant became entitled to a withdrawal benefit from the first respondent, but it withheld payment following receipt of instructions to do so from the second respondent on 26 July 2005.

- 2.2 Following a demand from the complainant's attorney, the second respondent's attorney informed him on 24 August 2005 that the complainant was allegedly involved in an unlawful scheme which deprived the second respondent of its lawful profits. As a result of the complainant's unauthorised association with a competitor trading as KTM Mining Supplies C.C. (now trading as LTC Process Engineering) the second respondent suffered damages of approximately R500 000. Therefore, the second respondent's attorney informed the complainant's attorney that the second respondent had requested the first respondent to withhold his provident fund benefit, was setting off his leave pay against second respondent's claim for damages of R500 000 and that they would provide the complainant with his certificate of service.
- 2.3 On 3 August 2005 the second respondent's attorney sent a letter of demand for R500 000 to the company that the complainant allegedly unlawfully assisted and now worked for and/or is a director in, namely KTM Mining Supplies C.C. No legal proceedings were instituted against the complainant.
- 2.4 The complainant passed away on 16 December 2006. His wife, Mrs. P. Tom, was appointed executrix of his estate and confirmed that the complaint that was instituted by the complainant should be continued. The second respondent advised that no court proceedings were instituted and that the withdrawal benefit was still held by the second respondent.

3. Complaint

- 3.1 The complaint is that the first respondent is unjustifiably withholding the complainant's withdrawal benefit pursuant to an instruction to do so from the second respondent. It is prayed that the first respondent pay the withdrawal benefit.

4. Responses

- 4.1 The first respondent's principal officer, namely Mrs. Hettie Joubert, responded to the complaint. Mrs. Joubert confirmed that the complainant was a member of the first respondent. No contributions were received from June 2005 onwards. The first respondent further advised that no withdrawal notification form was received from the second respondent. Instead the first respondent received a letter from the second respondent dated 26 July 2005 requesting that payment of the complainant's withdrawal benefit be withheld until notification not to do so. The second respondent advised the first respondent that there was a "gross breach of trust" between the complainant and itself and that a charge of fraudulently assisting a competitor was going to be brought against the complainant. However, the complainant resigned from employment with immediate effect on 13 June 2005, before a disciplinary hearing could be held. The second respondent was in consultation with its attorneys to establish the merits of its case against the complainant. In light of this request the first respondent did not effect payment of the withdrawal benefit.
- 4.2 The second respondent's financial director, namely Mrs. Vanessa Veale, responded on its behalf on 27 October 2005. She advised that the second respondent had already informed the complainant that it is withholding his withdrawal benefit in terms of section 37D (1) (b) of the Act and that it is entitled to do so. She further advised that the second respondent had evidence suggesting that the complainant was involved with "fraudulent/dishonest activities" whilst in its employ, as a result of which the second respondent suffered losses of R500 000. The second respondent informed this tribunal that it was in the process of formulating its legal case against the complainant and the other parties involved. It requests this office to "urge Mr. Tom (the complainant) to sign a letter of admission of liability" to the second respondent, failing which it will continue to pursue the legal case against the complainant.
- 4.3 A further response was received from the second respondent dated 23 June 2006. It advised that its investigations continue. To date the second respondent found that the complainant was a listed member of the close corporation trading as KTM Mining Supplies, now known as LTC Process Engineering C.C. ("LTC"), so he could no longer deny involvement with that company. Further, Anglo American Commercial Services were apparently investigating irregularities in equipment supplied by LTC, which they allegedly passed off as the second respondent's authorised equipment. This equipment subsequently failed, which led to an enquiry into how LTC came to be on the suppliers list for the second respondent's proprietary equipment. The complainant and LTC failed to respond to the second respondent's letter of demand. The second respondent avers that it has substantial proof of the

complainant's involvement with LTC and awaits this tribunal's ruling.

5. Determination and reasons therefor

5.1 The complaint concerns the allegedly unlawful withholding of the complainant's withdrawal benefit by the first respondent following his resignation from employment on 13 June 2005. The first and second respondents submit that the benefit can be withheld in terms of the provisions of section 37D (1) (b) (ii) of the Act. The complaint was initially lodged by the complainant but when he passed away on 16 December 2006 the duly appointed executor of his estate, his wife Mrs. P. Tom, confirmed that the case should be finalised as she, in her capacity as executor of the estate, wished to proceed with it.

5.2 Generally pension benefits are not reducible, transferable or executable save for the specific instances mentioned in sections 37A and 37D of the Act. The relevant section of the Act in this complaint is section 37D (1) (b), specifically sub-section (ii) thereof. It reads as follows:

"37D (1) A registered fund may

- (a) ...
- (b) deduct any amount due by a member to his second respondent on the date of his retirement or on which he ceases to be a member of the fund, in respect of-
 - (i) ...
 - (ii) compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb)) in respect of any damage caused to the second respondent by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which-
 - (aa) the member has in writing admitted liability to the second respondent; or
 - (bb) judgment has been obtained against the member in any court, including a magistrate's court,

from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the second respondent concerned"

5.3 The rules also provide for the deduction of benefits in certain instances. The relevant rule is rule 4.1 and it reads thus:

"4.1 Deduction from benefits

4.1.1 The FUND may make any deduction from a benefit that is permitted by the ACT. The FUND may also withhold a benefit in contemplation of giving effect to such a deduction. However, before making a deduction

from a benefit or withholding it, the FUND must:

- (a) satisfy itself that there are reasonable grounds for doing so; and
- (b) act in a justifiable manner.”

5.4 On the facts of this case it is clear that the second respondent instructed the first respondent to withhold payment of the complainant’s withdrawal benefit pending the outcome of investigations to establish the complainant’s liability for the R500 000 in damages it allegedly suffered as a result of his misconduct. Now what has to be decided is whether the first respondent is entitled to withhold payment of the benefit. Section 37D (1) (b) of the Act makes no specific provision for a fund to withhold the payment of a benefit, but rather provides or empowers the fund to deduct an amount due to an employer on retirement or cessation of membership of the fund by the member and specifies the basis for the deduction.

5.5 However, as this tribunal has previously held (see *Appanna v Kelvinator Group Services of SA Provident Fund* [2000] 2 BPLR 126 (PFA)), a pure literal approach is inappropriate. The High Court has subsequently confirmed this approach in *Msunduzi Municipality v Natal Joint Municipal Pension/Provident Fund and Others* [2006] 3 BPLR 210 (N) at paragraph 14, where Pillay J states as follows:

“The Applicant does not seek to attach the benefits due to him (*sic*) but merely seeks to preserve the *status quo* until it has had the opportunity to obtain judgment against the Respondent. If successful, it will naturally proceed to attach, which it will in all likelihood seek to do by virtue of the exception created in the Act. Currently its fears are that it will end up with a hollow judgment.”

5.6 It is clear that the purpose of section 37D (1) (b) is to protect the second respondent’s patrimony from diminution by the member’s misconduct and to allow an appropriate set-off against the pension benefit. In order to give effect to this purpose the textual meaning of the words contained in section 37D (1) (b) must include not only a power to deduct, but also a power to withhold a benefit pending the determination of liability. This is an application of the maxim *ex accessorio eius, de quo verba loquuntur*.

5.7 It is important that the second respondent’s entitlement to request the fund to withhold a benefit must be balanced against the member’s right to use and enjoyment of it within a reasonable period of time. The first respondent, and by implication the second respondent, should not withhold your benefit indefinitely (see *Harker v Simba Provident Fund and Another* [2002] 8 BPLR 3737 (PFA) at paragraph 16). Further, in terms of rule 4.1.1 the first respondent is compelled to satisfy itself that there are reasonable grounds for withholding the benefit and it must act in a justifiable manner. Pursuant thereto the fund should consider, *inter*

alia, the following factors when exercising its discretion to withhold a member's benefit:

- 5.7.1 Whether the damage allegedly caused to the second respondent is by reason of theft, dishonesty, fraud or misconduct; and
 - 5.7.2 The damage must have been caused by the member; and
 - 5.7.3 The damages caused by the member must be quantifiable and be due to the second respondent as compensation; and
 - 5.7.4 The member has in writing admitted liability to the second respondent or judgment has been obtained against the member
 - 5.7.5 The second respondent has instituted legal proceedings against the member in a court within a reasonable period of time; and
 - 5.7.6 The legal proceedings are finalised within a reasonable period of time; and
 - 5.7.7 The benefit amount that is withheld is only that which is claimed by the second respondent from the member, together with a reasonable estimate of the legal costs that will be incurred.
- 5.8 In the present complaint no civil or criminal case was instituted against the complainant while the complainant was alive. The complainant resigned on 13 June 2005, but before that the second respondent suspended him from employment on 26 May 2005. It would not be unreasonable to assume that the second respondent would have commenced its investigations regarding the complainant's conduct at the latest by 26 May 2005. So, a period of at least 18 months passed from the time the complainant resigned until his death, but no criminal charges or civil case was instituted against him by the second respondent. Bearing in mind that the second respondent would have to institute court proceedings against the complainant in order to justify withholding a benefit, it is most unlikely that this will now eventuate. The second respondent's financial director confirmed that there were no court proceedings against the complainant and she alluded to this difficulty when my assistant telephoned her to ascertain the progress of investigations regarding the complainant's alleged misconduct.
- 5.9 The complainant, during his lifetime, did not admit liability in writing to the second respondent, as contemplated and required in terms of sub-section 37D(1)(b)(ii)(aa), which provides that any payment to the second respondent must be pursuant to a written admission of liability. Alternatively, in terms of sub-section 37D (1) (b)(ii)(bb), judgment must have been obtained against a member in any court, including a magistrate's court, before a valid deduction from a member's benefit can be effected. There is no judgment against the complainant, nor is there any pending case in any court and 24 months have now elapsed since the complainant left employment with the second respondent. Bearing in

mind the long delay in finalising the investigations against the complainant, the fact that no legal proceedings have commenced as yet and the limited prospects of success if any court case is in fact instituted against the complainant, the continued withholding of the withdrawal benefit by the first respondent is unreasonable and unjustifiable.

5.10 It is noted that the complainant would have been entitled to receive a withdrawal benefit from the first respondent on 1 July 2005, the month following his resignation from the second respondent. Thus, he exited the first respondent in July 2005 and his membership also terminated. Therefore, the first respondent is liable to pay a withdrawal benefit rather than a death benefit, even though the first respondent withheld his benefit until after his death. Since the complainant passed away on 16 December 2006 his withdrawal benefit must be paid to his estate.

6. In the result, I make the following order:

The first respondent is ordered to pay the complainant's withdrawal benefit to the estate of the late Mr. M.V. Tom, less any deductions in terms of sections 37A and 37D of the Pension Funds Act, 1956, together with interest thereon at the rate of 15.5% *per annum* computed from 1 July 2005 to date of payment, within 4 weeks of the date of this determination.

DATED AT JOHANNESBURG ON THIS DAY OF 2007

Yours faithfully

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR