



**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR  
(HELD IN JOHANNESBURG)**

**CASE NO: PFA/WE/24355/2008/SM**

In the complaint between:

**CONSOL LTD t/a CONSOL GLASS**

**Complainant**

**and**

**MOMENTUM FUNDSATWORK UMBRELLA  
PROVIDENT FUND**

**First Respondent**

**HANNELIE GRAVETT**

**Second Respondent**

---

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

---

## INTRODUCTION

- [1] The complaint concerns the failure of the first respondent to deduct an amount of R3 615 104.83 from Mr GC Gravett's death benefit and pay it over to the complainant in respect of fraud he allegedly committed prior to his death.
  
- [2] The complaint was received by this office on 29 April 2008. A letter acknowledging receipt thereof was sent to the complainant on 23 May 2008. On the same date a letter was dispatched to the first respondent giving it until 23 June 2008 to file its response to the complaint.
  
- [3] Responses were received from the first respondent on 23 June 2008 and from the second respondent on 4 June 2008 and 25 June 2008. However, the second respondent indicated in her response that she agrees with the first respondent's response and does not wish to add anything. The first respondent's response was forwarded to the complainant on 30 July 2008, in the event that it wished to make any further submissions. The complainant omitted to file any further submissions.
  
- [4] Having considered the written submissions before this tribunal, it is considered unnecessary to hold a hearing in this matter. As the background facts are well known to all the parties, only those facts that are pertinent to the issues raised herein shall be repeated. The determination and reasons therefor appear below.

## FACTUAL BACKGROUND

[5] Mr GC Gravett (“the deceased”) was employed by the complainant and was a member of the first respondent by virtue of his employment. The deceased remained a member of the first respondent until he was suspended by the complainant for allegedly committing fraud in the amount of R3 615 104.83. The deceased subsequently passed away on 11 September 2007 prior to his disciplinary hearing.

[6] Upon the deceased’s death, a death benefit became available for distribution to his beneficiaries. The board of the first respondent made a decision to distribute the death benefit to all identified beneficiaries of the deceased in view of the fact there was no admission of liability for fraud by the deceased and there was no court judgment in favour of the complainant. However, the board subsequently decided to withhold payment of the death benefit pending a determination by this tribunal. The refusal of the first respondent to deduct the amount of fraud from the deceased’s death and pay it over to the complainant now form the subject matter of this complaint.

## COMPLAINT

[7] The complainant is a company with limited liability properly registered in South Africa and is a participating employer in the first respondent. The complainant

stated that the deceased misconducted himself by wrongfully and unlawfully profiting from a fraudulent scheme in which he was instrumental in misappropriating monies from the company. The complainant contends that the deceased made use of fictitious business trading as Express Engineering, wrongfully prepared and submitted false invoices for work purportedly rendered by Express Engineering to the complainant over the period from 2001 until June 2007.

[8] The complainant submitted that the deceased's conduct was fraudulent and amounts to wrongful misappropriation of monies from the company. It argued that KPMG conducted a forensic audit and concluded that the extent of the fraud amounted to R 3 615 104.83 (three million six hundred and fifteen thousand one hundred and four Rand and eighty three cents). Further, it averred that the forensic audit indicates that the deceased's fictitious company, Express Engineering, received payment of the above amount during the period from 2001 until June 2007.

[9] It further submitted that the deceased admitted liability for the fraud on 10 September 2007 during the course of the investigations. The complainant argued that the deceased undertook to provide it with a written acknowledgement of liability in respect of the monies he had unlawfully misappropriated prior to his death. Furthermore, the complainant stated that the second respondent, (the deceased's wife), confirmed in a statement and a written affidavit that the deceased had confessed to her during 2007 that he had been involved in a fraudulent scheme in which he defrauded the company. It indicated that the following extract appear from the written acknowledgement of debt by the deceased:

“Skuld Erkenning

Ek George Charles Gravett 61070205043083 het besluit skuld te erken. Ek was verkeerd maar is verskriklik jammer oor wat ek gedoen het, ek hoop dat as ek meer inligting vorendag gekom het of julle sys al versagting gee want ek was nie alleen betrokke nie.

Die ergste ek kan nie eers ‘n sent wys nie, ons besit nie n huis nie ons huur ons huis. Die voertule is op huurkoop en behoort aan die bank. Die geld is net eenvouding gemors op dobbel en onnodige luukshede dit het n siekte geword.”

- [10] The complainant averred that the confession made by the deceased to its managers and his wife together with the affidavit wherein he admitted liability constitutes an admission of liability as contemplated in section 37D(b)(ii) of the Act.
- [11] Therefore, the complainant submitted that the refusal of the first respondent to deduct the amount of fraud from the deceased’s death benefit is irrational and amount to an improper exercise of power. The complainant request that the first respondent should be directed to deduct and pay it the proceeds of the deceased’s provident benefit in the amount of R479 690.11 or such other amount as may have accrued to date plus interest from 28 March 2008 to date of payment.

## RESPONSE

- [12] Mrs/Ms T Bakker, the principal officer of the first respondent, filed a response on behalf of the first respondent. She submitted that the board of trustees of the first respondent had a meeting on 17 June 2008 in which it decided that the admission of liability by the deceased is not enforceable against the fund as it does not comply with the requirements of section 37D(b)(ii)(aa) of the Act. Further, she indicated that there is no court judgment in favour of the complainant against the deceased's benefits.
- [13] She submitted, therefore, that the board decided to distribute the deceased's death benefit to all identified dependants in terms of section 37C of the Act. However, she averred that the board decided to withhold the distribution of the benefit pending a ruling by this tribunal. Further, she stated that the board will distribute the deceased's death benefit if this tribunal decides that the complainant is not entitled to receive payment of the benefit.
- [14] Mrs/Ms Bakker also submitted a copy of the first respondent's response that she sent to the complainant's attorneys on 27 March 2008. She indicated in the response that a lump sum amount of R498 680.65 became available for distribution to the deceased's beneficiaries following his death. She argued that in terms of section 37D(b)(ii) of the Act, a registered fund may deduct from a member's benefit any amount due by the member to his employer, provided the member has in

writing admitted liability to the employer or a court judgment has been obtained against the member. She averred that the complainant did not seek a court judgment against the deceased prior to his death. Further, she argued that the admission of liability does not comply with section 37D(b)(ii)(aa) of the Act.

[15] Firstly, she pointed out that an admission of liability as contemplated in section 37D(b)(ii) of the Act must be a clear admittance of guilt to the employer. *In casu*, she stated that the admission by the deceased does not mention the employer's name or at least state that his admission of liability is for fraud committed against the complainant. She indicates that without clarity in this regard one can assume that the admission can be for any wrongful act committed against any party. Secondly, she averred that the admission of liability does not state that the deceased caused damage to the complainant by reason of theft, dishonesty, fraud or misconduct. Further, she stated that the forensic report was done after the deceased's death and the report did not draw any conclusion as to whether the deceased defrauded the complainant.

[16] Thirdly, she submitted that the deceased did not state the amount of his alleged fraud, theft, dishonesty, or misconduct against the other party. Lastly, she pointed out that the alleged admission of liability was obtained from a disk provided to the complainant and the admission of liability is not signed or dated, which does not prove that the deceased in fact admitted any guilt to the complainant. She further indicated that the complainant failed to provide it with an extract in which the deceased's wife confirm that he confessed his involvement in the fraudulent

scheme prior to this death. In light of the above, she submitted that the first respondent object to the complainant's claim against the deceased's death benefit.

### DETERMINATION AND REASONS THEREFOR

[17] The issue that falls to be determined is whether the refusal by the first respondent to deduct the amount of R3 615 104.83 from the deceased's death benefit and pay it over to the complainant was reasonable in light of the evidence and the provisions of section 37D(b)(ii) of the Act.

[18] It is important to consider the provisions of the Act which regulates permissible deductions from benefits. The apposite portion of Section 37A of the Act reads as follows:

**"37A Pension benefits not reducible, transferable or executable**

- (1) Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act No. 58 of 1962), and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment debtor's financial position in terms of section

65 of the Magistrate's Court Act, 1944 (Act No. 32 of 1944), and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the fund concerned may withhold or suspend payment thereof... .”

[19] Thus, section 37A of the Act as a general rule provides that pension benefits shall not be reducible, transferable or executable. The policy behind section 37A is to protect members' pension benefits. However, it allows for exceptions to this principle in certain circumstances.

[20] Section 37D(b)(ii) is one of the exceptions to the general rule. It reads as follows:

“37D(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-

(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 employer 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 employer; 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 employer concerned.”

[21] In the matter of *Rowan v Standard Bank Staff Retirement Fund and Another* (2) [2001] 2 BPLR 1643 (PFA) at 1648B-D), this tribunal held that the provisions of section 37D(b)(ii) reveals that a number of requirements must be met before a deduction is permissible. These requirements are as follows:

- an amount must be due by a member of a fund to his or her employer;
- the amount must be due at the date of retirement or on which the member ceases to be a member of the fund;
- the amount must be in respect of compensation payable;
- the compensation must be in respect of any damage caused to the employer;
- the damage caused to the employer must be by reason of theft, dishonesty, fraud or misconduct by the member;
- the member must have furnished a written admission of liability to the employer in respect of the compensation in respect of the delictual damages caused to the employer; or
- alternatively, the employer ought to have obtained a judgment in a court in respect of the compensation.

[22] If these conditions are met, the fund may deduct the amount due by the member to the employer from the member’s benefit payable in terms of the rules and pay it to the employer.

[23] It is common cause that the complainant (the employer) has not obtained a judgment in a court in respect of any compensation owing. The first respondent has

placed the requirements of section 37D(b)(ii)(aa) in issue. The first respondent denies that the deceased has provided the complainant with a written admission of liability in respect of the alleged fraud as contemplated by section 37D(b)(ii)(aa) of the Act.

[24] In support of its submission that the deceased has made an admission of liability in writing to the complainant, the complainant provided affidavits from its employees and from the deceased's wife wherein the deceased allegedly admitted liability for defrauding the complainant. It further submitted an extract wherein the deceased allegedly admitted guilt to the complainant. However, the deceased's wife indicated that she agrees with the first respondent's submission that the deceased never provided the complainant with any written acknowledgement of liability prior to his death.

[25] Further, the complainant's reliance on an extract wherein the deceased admitted liability is problematic insofar as the deceased never actually furnished it with a written acknowledgement or admission of liability prior to his death as contemplated in section 37D(b)(ii)(aa) of the Act. The complainant indicated in its complaint that the deceased undertook to provide it with a written acknowledgement of liability prior to his death. However, it is clear from the evidence that this never happened. There is further no evidence which indicates that the extract was done by the deceased as it was not signed or dated. Furthermore, it is not clear from the extract whether the deceased admitted liability to the complainant in respect of any damage caused to it by reason of any theft, dishonesty, fraud or misconduct. The alleged admission of

liability does not mention the complainant or the amount of the fraud as indicated by the complainant.

[26] It is very imperative that a written acknowledgement of liability should be clear and must amount to an unequivocal admission of guilt to the employer in order to avoid future problems. The written admission of liability must be signed by the member concerned (see *Rampone v Blue Ribbon Bakery and Another* [2002] 12 BPLR 4198 (PFA) at 4200H-I). This tribunal has held that an admission of liability in terms of section 37D(b)(ii)(aa) must not be vague as to its nature and must constitute a clear acknowledgement of guilt to the employer (see *DH Mvinjelwa v Allied Publishing Ltd and Others* PFA/GA/18011/2007/FM-unreported).

[27] In light of the fact that the requirements of section 37D(b)(ii) are placed in issue by the first respondent, in particular the admission of guilt and /or the acknowledgement of liability, the onus lies on the complainant to prove on a balance of probabilities that it has suffered loss as a result of the complainant's misconduct (see *DH Mvinjelwa-supra* at paragraph 5.16). It has been held that the incidence of the burden of proof in this case can be resolved by reference to Roman Law, which requires that if one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it (see *Pillay v Krishna and Another* 1946 AD 946 at 951-2).

[28] The complainant failed to discharge its evidentiary burden by producing proof that the deceased admitted liability in writing to it prior to his death. The complainant has

fallen short in adducing sufficient, cogent evidence in support of its claim in this regard and hence it failed to discharge its overall burden. Moreover, section 37D(b)(ii) of the Act applies to members and employers. *In casu*, there was no employer and employee relationship as the member has passed away and the matter involve a benefit that is payable to the beneficiaries.

[29] The manner in which section 37D(b)(ii)(aa) is framed, with section 37A creating a general prohibition for any reduction of benefit means that it is incumbent upon the party who seeks to bring his/her claim within the ambit of the exception to prove that he/she complies with the requirements set out in the proviso. *In casu*, the complainant failed to proof that a deduction in terms of section 37D(b)(ii) will be lawful. It follows that the refusal of the first respondent to pay the deceased's death benefit to the complainant is lawful and reasonable in terms of the Act. The board of the first respondent should, therefore, distribute the amount of the death benefit to all identified beneficiaries in terms of section 37C of the Act.

[30] In the result, the complaint cannot succeed.

DATED AT JOHANNESBURG ON THIS            DAY OF            2008.

Yours faithfully

---

**MAMODUPI MOHLALA**  
PENSION FUNDS ADJUDICATOR