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Please quote our reference: PFA/KZN/11426/2007/NS

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”): E H CHARLTON (“the complainant”) v THE TONGAAT-HULLETT PENSION FUND (“the respondent”)

1. Introduction

- 1.1 The complaint concerns the low rate of interest added to the complainant’s benefit, pursuant to the withholding of his benefit by the respondent in terms of section 37D of the Act.
- 1.2 The complaint was received by this office on 30 August 2006. A letter acknowledging receipt thereof was sent to the complainant on 15 December 2006. On the same date a letter was dispatched to the respondent, giving it until 15 January 2007 to file its response to the complaint. The response was received on 11 January 2007. The response was sent to the complainant on 12 February 2007 requesting a reply by 27 February 2007. No reply has been received from the complainant.
- 1.3 After reviewing the written submissions before me, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), F Mtayi (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), E de la Rey (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator), S Mothupi (Assistant Adjudicator), P Mphephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), M Qhali (Assistant Adjudicator),

Office Manager: L Manuel, Financial Manager: F Mantsho

2. Factual background

- 2.1 The complainant was an employee of Tongaat-Hulett Sugar Limited (“the employer”) and a member of the respondent from 1 December 1982. The complainant was dismissed from his employment on 31 December 2002 pursuant to a disciplinary enquiry for misconduct involving fraud and theft. The complainant subsequently appealed against his dismissal to the Commission for Conciliation Mediation and Arbitration (“CCMA”) in January 2003. The appeal was refused by the CCMA. The complainant then brought an application for review in the Labour Court against the decision of the CCMA.
- 2.2 Upon termination of service, the complainant became entitled to his withdrawal benefit of R840 416.00 from the respondent. However, the employer instructed the respondent to withhold the complainant’s benefit pending the outcome of two civil proceedings instituted against him in the High Court under case numbers 3310/2003 and 9159/2003 respectively. Criminal charges were also laid against the complainant with the Durban Commercial Crimes Unit under CR number 824/07/2002. Pursuant to the above, the complainant lodged a complaint to this tribunal alleging that the withholding of his withdrawal benefit by the respondent was unlawful. However, his complaint was dismissed by this tribunal on 17 May 2004, in a determination with case no: PFA/KZN/678/03/CN.
- 2.3 Following the dismissal of his complaint, the complainant lodged an application in the High Court of South Africa (Durban and Coast Local Division) in which he sought an order directing the respondent to pay his benefit. The aforesaid application was dismissed on 1 February 2006.
- 2.4 With regard to the civil proceedings that were instituted against the complainant by the employer, it appears that a settlement agreement was reached by the respective parties on 5 May 2006 in terms of which the complainant agreed to pay an amount of R150 000.00 to the employer. Clause 3 of the settlement agreement reads as follows:
- “This settlement is in full and final settlement of all and any claims which either party may have against the other arising from this matter and the CCMA, Labour Court proceedings, the application for release of Pension Fund monies and all other litigation that has been pursued between the parties or is pending. To this end the First Defendant shall withdraw all appeals he has instituted with each party to pay its own costs.”
- 2.5 Following the release of the complainant’s benefit by the respondent, the complainant received his benefit from the respondent on 3 July 2006 which was calculated as follows:

“Actuarial reserve value as at 31 December 2002 (as advised by the Fund actuary)	R840 416.00
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Interest thereon from 1 January 2003 to 30 June 2006	R190 982.66
Total gross	R1031 398.66
Less tax	R 272 614.80
Less transfer to Liberty Life Retirement Annuity	R 161 398.66
Net payment	R597 385.20"

3. Complaint

3.1 The complainant has levelled a number of allegations against the respondent.

Late payment interest

3.2 The complainant is aggrieved by the low rate of interest added to his benefit by the respondent. In this regard, he states that the respondent failed to ensure that his benefit was properly invested while it was withheld. He contends that the investment return earned by the respondent was 24.3% in 2004 and 34.5% in 2005 but these rates were not applied to his benefit.

3.3 The complainant avers that the respondent has acted contrary to the provisions of rule 37(2) of the its rules which empowers the trustees to invest the pension fund benefits in an interest bearing account or with any financial institution where his right to a maximum return would be protected at all costs. The complainant wants the respondent to pay interest on his benefit at a rate which is market related calculated from 31 December 2002 to 3 July 2006.

Failure to pay the benefit timeously

3.4 The complainant states that the settlement agreement between him and the employer was concluded on 5 May 2006. However, the respondent failed to pay his benefit timeously. He asserts that payment was only made by the respondent upon receiving instructions for it to do so from the employer on 20 June 2006. The complainant feels that the respondent, while unlawfully withholding his pension fund benefit, has failed to have due regard to his interests as a member of the fund.

Coercion by the respondent to admit liability

3.5 The complainant states that the respondent attempted to coerce him into signing a statement of admission of liability (in terms of section

37D(b)(ii)(aa) of the Act). He avers that the statement referred to above was presented to him by the respondent but he refused to complete and sign the document. The complainant states that the relationship between the respondent and the employer is nepotistic and that they protect each other's interests without due regard to members' interests. The complainant alleges that had he signed the aforesaid admission of guilty he would have forfeited his right to claim a share of the actuarial surplus and interest on his benefit.

Failure of the respondent to disclose information

- 3.6 The complainant states that the respondent has continuously failed to provide him with copies of the documents and information that he requested from it. These documents appear to be the financial statements of the respondent. It appears that he eventually received them from the Financial Services Board.

4. Response

Late payment interest

- 4.1 The respondent states that the fund in question is a defined benefit pension fund and its members and pensioners do not benefit or suffer directly from the investment returns (positive or negative) which are earned by the fund, as is normally the case with the defined contribution funds.
- 4.2 It contends that the complainant has received the correct benefit in terms of its rules and disputes that the complainant is entitled to the "maximum returns" as set out in his complaint.
- 4.3 The respondent submits that interest was applied to the complainant's benefit and was calculated in terms of rule 33(4) for the period 1 June 2003 (being the first day immediately after the dismissal of the complainant) to 30 June 2006 (being the date when payment to the complainant was processed by it). It contends that there is no further interest due to the complainant.

Failure to pay the benefit timeously

- 4.4 The respondent denies that it has failed to pay the complainant's benefit timeously. In this regard, the respondent submits that a copy of the settlement agreement dated 5 May 2006 was faxed through to the Principal Officer on 13 June 2006. Upon receipt of the aforesaid settlement agreement, the respondent claims that it immediately prepared

a letter dated 15 June 2006 to the complainant advising him about the options available to him and requesting his election. The respondent states that a copy of the aforesaid letter forms part of the documents annexed to the complaint.

- 4.5 According to the respondent, the complainant's election was received from his financial advisor on 19 June 2006. In support of its contention, the respondent has attached a copy of this election. It submits that it immediately applied for a tax directive and transferred R161 398.66 to the Liberty Life Retirement Annuity and paid the balance to the complainant on 30 June 2006 as is evidenced by its letter dated 3 July 2006 contained in the bundle of documents attached to the complaint.
- 4.6 The respondent submits that there is no basis for this aspect of the complaint.

Coercion by the respondent to admit liability

- 4.7 The respondent denies that it attempted to compel the complainant into signing an admission of liability and states that it was the complainant's financial advisor who requested the complainant to sign such a document as is evidenced by his e-mail dated 7 June 2006. A copy of this e-mail has been annexed by the respondent as proof thereof. The respondent asserts that the above proposal was made because of a concern raised that the payment of R150 000.00 from the complainant's benefit to the employer would be in breach of section 37D of the Act.
- 4.8 The respondent states that the purpose of the admission of liability was not to secure the forfeiture of the complainant's right to claim interest or a share in the actuarial surplus as alleged by the complainant but it was a means of allowing the deduction of the agreed amount to be made from the complainant's benefit and paid over to the employer, thereby giving effect to the terms of the settlement agreement between the complainant and the employer.

Failure of the respondent to disclose information

- 4.9 The respondent submits that the contention raised by the complainant that it denied him access to information is incorrect. In this regard, it states that before it received the two letters attached to the complaint from the complainant's attorneys it had tendered inspection of all information requested by the complainant.
- 4.10 The respondent requests that the complaint should be dismissed.

5. Determination and reasons therefor

Late payment interest

- 5.1 It is common cause that the value of the complainant's benefit that was withheld by the respondent after he was dismissed from his employment was R840 416.00. The evidence suggests that the interest that has accrued on this benefit from 1 January 2003 to 30 June 2006 is R190 982.66. The question which arises is whether the complainant is entitled to any further interest as alleged by him. There is no principle in our law which entitles a party to demand interest simply because he has been deprived of the use of the benefits and fruits of the money. Interest is payable only if the parties have so agreed, or if the debtor is in *mora*. (See *Commissioner for Inland Revenue v First National Industrial Bank Ltd* 1990 (3) SA 641 (A) at 654.) Translated into the pension landscape, the rules must confer a right to receive interest on benefits paid late, or the fund must be in *mora*. (See *Brockbank v Argus Pension Fund* (1) [2000] 11 BPLR 1200 (PFA).)
- 5.2 In this case, rule 33(4) of the rules of the respondent regulates the payment of interest if there has been a delay in the payment of a benefit and states as follows:
- “The benefit, if a lump sum, shall be paid at the end of the month following the month in which the benefit becomes payable, or at such other date as the Trustees, in their absolute discretion determine. The benefit shall accumulate interest at the rate earned by the Fund on its cash management account with Standard Bank of South Africa Limited, for the period specified above or for such other period as the Trustees, in their absolute discretion decide.”
- 5.3 It is evident from the provisions of the above rule that interest at a rate earned by the respondent on its cash management account with Standard Bank of South Africa Limited (“Standard Bank”) is payable if there has been a delay in the payment of a benefit. In the instant case, there is no doubt that the complainant's benefit was paid after a period of 3 years and 6 months due to the circumstances beyond the respondent's control. The evidence suggests that when the complainant's benefit was disinvested it was placed into the respondent's bank account. The interest that accrued on this benefit was R190 982.66 for the period 1 January 2003 to 30 June 2006. This is the amount that was paid by the respondent in accordance with the provisions of its rules.
- 5.4 In the circumstances, the complainant's contention that he is entitled to an additional interest is unfounded. Therefore, this aspect of the complaint cannot succeed.

Failure of the respondent to pay the benefit timeously

- 5.5 There is no merit in this aspect of the complaint. The evidence suggests that the respondent was only notified about the contents of the settlement agreement on 13 June 2006. Upon receiving such notification, the respondent immediately addressed an option letter to the complainant on 15 June 2006 and a response was received on 19 June 2006. The payment of the benefit was processed on 30 June 2006, within a period of 11 days from the date that the respondent received an election from the complainant. It follows therefore that there was no delay in the payment of the complainant's benefit.

Coercion by the respondent to sign an admission of liability

- 5.6 There is no evidence to suggest that the respondent attempted to compel the complainant to sign an admission of liability in this matter. In this regard, I have examined the contents of the e-mail dated 7 June 2006 which has been referred to by the respondent in its response. It is quite clear from this document that it was the complainant's financial advisor who requested the complainant to sign the aforesaid document and not the respondent.
- 5.7 I also agree with the respondent's contention that the purpose of signing the aforesaid document was not to secure the forfeiture of the complainant's right to claim interest or to receive any actuarial surplus that may be due to him. In essence, the purpose was to give effect to the settlement agreement signed by the complainant and the employer. Most importantly, even if there were merit in the complainant's allegations, the point is that he did not sign the admission of liability form, and there is no prejudice to him. Therefore, this aspect of the complaint cannot succeed.

Failure of the respondent to disclose information

- 5.8 The complainant's assertion that he was denied access to information by the respondent is unfounded. It is clear from the letter dated 4 October 2005 addressed to the complainant's attorneys by the respondent that they were advised that the aforesaid documents were available for inspection at the respondent's offices. The complainant's contention is therefore inconsistent with the contents of the aforesaid letter. It follows therefore that this aspect of the complaint cannot succeed either.

6. Relief

- 6.1 In the result, the complaint is dismissed.

