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**RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 (“the Act”): M F LEMAKO (“the complainant”) v ALEXANDER FORBES RETIREMENT FUND (PROVIDENT SECTION) (“the first respondent”) / TOLCON (PTY) LTD (“the second respondent”)**

1. Introduction

[1.1] This complaint concerns the alleged unlawful withholding by the first respondent of the complainant’s withdrawal benefit on the complainant leaving the service of the second respondent and withdrawing from the first respondent on 17 September 2004. Such withholding is done at the instance of the second respondent.

[1.2] The complaint was received by this office on 24 April 2006. A letter acknowledging receipt of the complaint was sent to the complainant on 3 May 2006. On the same date letters were addressed to the first and second respondents giving each until 24 May 2006 to file a response to the complainant’s complaint. A response dated 31 May 2006 on behalf of the first and the second respondents was received from Alexander Forbes Life Limited on 2 June 2006. On 5 June 2006 a letter was dispatched to the complainant asking him to file a reply to the respondents’ response by no later than 15 June 2006. No reply was received from the complainant. After reviewing the written submissions filed of record, it is considered unnecessary to hold a hearing. The determination and reasons therefor

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M Mohlala (Adjudicator), N Jeram (Deputy Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), L Shrobbree (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), S Gcelu (Assistant Adjudicator), T Nekile (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator), S Mthuphi (Assistant Adjudicator)

Office Manager: L Manuel

appear below.

- [1.3] Save for setting out only those essential facts that are pertinent to the issues raised herein, the tribunal shall not burden this determination by repeating the background facts as these are well-known to the parties.

## 2. Facts in brief

- [2.1] The complainant was a member of the first respondent during his tenure of employment with the second respondent until his dismissal by the second respondent and his exit from the fund on 17 September 2004.
- [2.2] Following the complainant's dismissal for fraud allegedly committed against the second respondent, the second respondent laid a criminal charge against the complainant and contemporaneously advised the first respondent to withhold the complainant's withdrawal benefit pending the finalisation of the criminal case.
- [2.3] It is not apparent from the papers what the complainant's withdrawal benefit amounts to. The same holds true when it comes to the loss allegedly suffered by the second respondent.

## 3. Complaint

- [3.1] The complainant is aggrieved by the withholding of his withdrawal benefit by the first respondent.
- [3.2] The complainant submits that he is being prejudiced as a result of maladministration by the first respondent in that he submitted the withdrawal claim form within the prescribed period and yet, 14 months thereafter, the benefit remains unpaid.
- [3.3] The complainant seeks the adjudicator to intervene on his behalf and exert her pressure and influence to assist him in obtaining his withdrawal benefit together with interest from November 2004 to date of payment.

## 4. Responses

- [4.1] The first respondent asserts that the second respondent informed the first respondent that the complainant was found guilty of fraud against the second respondent. Thus, the complainant was dismissed from employment with effect from 28 September 2004.
- [4.2] The first respondent states that on 11 November 2005, the second respondent furnished the first respondent with a list of names from the South African Police Services ("SAPS") under case number 475/08/2005 alleging that such a list

- comprised names (including the complainant's name) of employees who had committed fraud against the second respondent. Further, the first respondent avers that on the basis of this list, the second respondent requested that the first respondent withhold the complainant's withdrawal benefit pending the outcome of criminal charges which the second respondent had brought against the complainant.
- [4.3] Furthermore, the first respondent submits that section 37D of the Act empowers it to deduct any amount which is due by the complainant to the second respondent in respect of compensation for any damages caused to the second respondent by reason of theft, fraud or misconduct by the complainant. Further, the first respondent submits that the purpose of the section is to protect the second respondent's right to recover losses caused due to theft, fraud and misconduct by the complainant. Furthermore, the first respondent submits that section 37D implies that the first respondent has a right to withhold a benefit pending determination of proceedings against the complainant, which if such proceedings are successful would entitle the first respondent to effect the said deduction from the complainant's benefit.
- [4.4] Moreover, the first respondent submits that the section also empowers the first respondent's trustees the right to withhold the complainant's benefit for compensation in respect of any damages caused to the second respondent as a result of theft, fraud or misconduct by the complainant.
- [4.5] Therefore, the first respondent submits that it is of the belief that because the complainant committed fraud and theft against the second respondent and having been notified by the second respondent of the "police case" opened against the complainant, that it is reasonable that the complainant's benefit be withheld. Further, the first respondent submits that with regards to the withholding of the complainant's benefit, in *Appana v Kelvinator Group Services of SA Provident Fund* [2002]2 BPLR 126 PFA, the Adjudicator held that the trustees have an inherent and implicit power to withhold the payment of a benefit for a reasonable period of time. The first respondent also submits that in, *Sayed-Essop v Non Ferrous Metal Works Pension Fund and Another* [2000]9 BPLR 1051 (PFA), it was held that where proceedings had been instituted within days of dismissal of an employee and where delay in the prosecution of the employee was beyond the control of the employer, that a two year delay was not unreasonable.
5. The second respondent's response
- [5.1] The second respondent contends that it commissioned a fraud investigation against the complainant and approximately 24 other employees who allegedly defrauded the second respondent through the manipulation of vehicle classifications between April 2003 to August 2005. Further, it is submitted that the incidents of fraud investigated ranged between 17 to 2300 fraudulent

transactions per individual. In this regard, the second respondent employed the Forensic Consultants (Pty) Ltd (“the investigators”) to assist it with the investigation for disciplinary purposes.

- [5.2] The second respondent states that subsequent to the second respondent collecting the required information pertaining to the fraud charges, the second respondent discussed the matter with the senior state prosecutor of Heidelberg Magistrate’s Court. Thereafter, the second respondent states, it became the senior state prosecutor’s decision to interview the complainant and the other implicated employees and such interviews were indeed conducted at each employee’s place of residence.
- [5.3] The second respondent further points out that a new prosecutor has been assigned to the matter and that he is in the process of gathering further information in order that he can draw charges and issue summonses against the complainants for the purposes of trial.

## 6. Determination and reasons therefor

- [6.1] The question that falls for determination is whether the withholding of the complainant’s withdrawal benefits by the first respondent, pending the outcome of criminal charges which the second respondent alleges to have brought against the complainant is legally justifiable.
- [6.2] Rule 11 of the first respondent’s rules provides:

“The fund shall have the right to make such deductions from the benefit 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 benefit as the Management Committee may from time to time fix for making such claims.

Notwithstanding the provisions of Rule 7.3.1, the Trustees may, where an Employer has instituted legal proceedings in a Court of law and/or laid a criminal charge against the Member concerned for compensation in respect of damage caused to the Employer as contemplated in Section 37D of the Act, withhold payment of the benefit until such time as the matter has been finally determined by a competent court of law or has been settled or formally withdrawn; provided that:

- (a) the Trustees in their reasonable discretion are satisfied that the Employer has made out a prima facie case against the Member concerned and there is reason to believe that the Employer has a reasonable chance of success in the proceedings that have been instituted;
- (b) the Trustees are satisfied that the Employer is not at any stage of the proceedings responsible for any undue delay in the prosecution of the proceedings;
- (c) once the proceedings have been determined, settled or withdrawn, any benefit to which the Member is entitled is paid forthwith; and
- (d) the Trustees, at the express written request of a Member whose benefit is withheld, may, if applicable and practical, permit the value of the Member’s benefit as at the time of such request to be isolated, in whatever manner the Trustees believe appropriate, from the possibility of a decrease therein as a result of poor investment

performance.”

[6.3] The relevant parts of section 37D(1) of the Act provide that:

“A registered fund may-

- (a) ...
- (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-
  - (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 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;”

[6.4] Thus, before a fund (respondents) 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:

- [6.4.1] there must be a benefit payable;
  - [6.4.2] 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;
  - [6.4.3] the damage caused to the employer must be by reason of theft, dishonesty, fraud or misconduct by the member;
  - [6.4.4] the member must either admit liability in writing to the employer or judgment must be obtained in any court; and
  - [6.4.5] 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.
- [6.5] The respondent’s rule’s are in line with the provisions of section 37D(b)(ii)(bb), which entitle a registered fund to deduct from any benefit due to a member/ beneficiary, any amount due by a member to his employer on the date on which she/he ceases to be a member, in respect of compensation for any damages caused to the employer by reason of theft, dishonesty, fraud or misconduct by the member. The member must

either have admitted liability to the employer in writing, or judgement must have been obtained against the member in a court of law.

- [6.6] The object of the section is to assist the employer to recover loss caused to it by the member from the member's pension payout. It is a well-known fact that court proceedings, both civil and criminal take a long time to be finalized. Further, the second respondent's fraud investigations in respect of the complainant's alleged theft and/or fraud of monies might also take a long time to finalize. Thus, by the time a judgement or compensation order has been obtained against the complainant, the respondents may have already paid out his benefit to him and he may have long dissipated it. The purpose of the section would therefore be defeated if the respondent's express authority to deduct from a member's benefit is not regarded as including an implied authority to withhold payment of the benefit pending the determination of the member's liability by a court of law: (*Appana v Kelvinator Group Services of SA Provident Fund* [2000] 2 BPLR 126 at page 129 paragraphs I –J (PFA). It should be borne in mind, however, that the benefit may only be withheld for a reasonable period.
- [6.7] However, in this case the complainant's withdrawal benefit has been withheld by the first respondent because the second respondent requested that the first respondent withhold the complainant's withdrawal benefit pending the outcome of criminal charges which the second respondent alleges to have brought against the complainant. Therefore, the complainant's withdrawal benefit was not withheld by the respondents pending the determination of his liability by a Court of law. The complainant's complaint was lodged at this office on 3 March 2006, and since it was lodged the second respondent has failed to furnish this office with proof that the complainant admitted liability in writing to it or judgment has been obtained in any court. Having regard to the Act and the first respondent's rules there is no merit in the first respondent's submissions that the complainant's benefit cannot be paid to him because the complainant allegedly committed fraud and theft against the second respondent and having the first respondent been notified by the second respondent of the "police case" opened against the complainant, that it is reasonable that the complainant's benefit be withheld.
- [6.8] The first and the second respondents have therefore acted outside the powers vested in them by both the first respondent's rules and the Act in withholding payment of the complainant's benefit. The first respondent's rules are silent regarding the period that his benefit in them can be withheld to assist the employer to recover loss caused to it by his alleged theft and/or fraud of monies by it (the employer) applying to a relevant Court for determination. Furthermore, the period over which the benefit has been withheld is unreasonable and unjustifiable. The complainant's

benefit in the first respondent has been withheld since his dismissal date (28 September 2004) and it is has not been made clear by the first respondent the value of the complainant's withdrawal benefits in the first respondent. Moreover, the second respondent has not made a clear declaration the extent of his liability to it.

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

[6.9.1] The first respondent is hereby ordered to compute the complainant's withdrawal benefit in terms of the first respondent's rules including interest at 15.5% from 28 September 2004 until the date of payment.

[6.9.2] Further, the first respondent is further ordered to pay the complainant's withdrawal benefit as ordered in paragraph [6.9.1] within 7 days of the date of this determination.

DATED AT JOHANNESBURG ON THIS                      DAY OF                      2007

Yours faithfully

**MAMODUPI MOHLALA**  
**PENSION FUNDS ADJUDICATOR**