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Please quote our ref: PFA/GA/7469/06/LCM

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, 1956 (“the Act”): A Z YINGWANE (“the complainant”) v FUNDS AT WORK UMBRELLA PENSION FUND (“the first respondent”) AND HLANO FINANCIAL SERVICES (“the second respondent”)

1. Introduction

- [1.1] The complaint concerns the alleged unlawful withholding of the complainant’s withdrawal benefit by the first respondent.
- [1.2] The complaint was received by this office on 28 February 2006. A letter acknowledging receipt of the complaint was sent to the complainant on 3 March 2006. On 6 March 2006, letters were dispatched to the respondents giving each until 4 April 2006 to file responses to the complaint. On 4 April 2006, this office received responses dated 4 March 2006, furnished by Momentum Life who is the first respondent’s administrator on behalf of the first respondent and from Hlano Financial Services on behalf of the second respondent. On 20 April 2007, this office forwarded the responses received to the complainant for the complainant’s further submissions, if any. On 20 October 2006, this office received the complainant’s further submissions in the matter.
- [1.3] After reviewing the written submissions before this tribunal, it is considered unnecessary to hold a hearing. The determination and reasons therefor appear below.

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), S Gcelu (Assistant Adjudicator), T Nekile (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), N Sihlali (Assistant Adjudicator), S Mothupi (Assistant Adjudicator)

Office Manager: L Manuel

2. Factual background

- [2.1] The complainant was employed by the second respondent until he was dismissed in 2005. By virtue of the complainant's employment he became a member of the first respondent which is administered by Momentum ("the administrator"). Upon his dismissal from employment, the first respondent became liable to pay the complainant a withdrawal benefit.
- [2.2] It is common cause that before the first respondent could pay the complainant a withdrawal benefit, the second respondent objected to such payment on the grounds that certain customers of the employer had alleged financial irregularities against the complainant. Therefore, the second respondent commissioned a forensic investigation which led to disciplinary proceedings being held against the complainant and the complainant was dismissed.

3. The complaint

- [3.1] The complaint is that the first and/or second respondents are unlawfully withholding the complainant's withdrawal benefit.
- [3.2] The complainant submits that subsequent to his dismissal, the complainant contacted the first respondent's administrator for the payment of his withdrawal benefit but the administrator informed him that since the second respondent had not furnished the administrator with the required withdrawal notification form the administrator will not be able to pay the complainant his withdrawal benefit.

4. Responses

- [4.1] This office received a response from the Momentum Funds At Work Umbrella Pension Fund and Hlano Financial Services.
- [4.2] The first respondent's response
- [4.3] The first respondent's administrator, furnished a response on behalf of the first respondent.
- [4.4] The first respondent says that in terms of rule A6.2 of its general rules the complainant will be entitled to his retirement savings account in it when the first respondent receives a withdrawal notification from the second respondent. Further, the first respondent submits it would be contrary to its rules if it were to pay the complainant's benefit without receiving a withdrawal notification form.

5. The second respondent's response

- [5.1] The second respondent submitted a response on behalf of the second respondent.
- [5.2] The second respondent states that prior to the complainant's dismissal, a disciplinary hearing was held against the complainant as a result of certain of the second respondent's customers who alleged that they gave money to the complainant where such money the complainant had to credit into those respective customer's account in the second respondent but the complainant failed to credit such money into the customer's account.
- [5.3] Further, the second respondent states that at the disciplinary hearings the complainant pleaded not guilty to the six charges that were laid against him which were, fraud or attempting to be fraudulent, theft, misappropriation of funds belonging to the company, shortages and failure to account for monies received on behalf of the company, dishonesty or abusing a position of trust and gross negligence, failure to follow established procedures or standing instructions. The second respondent further states that as a result of the disciplinary enquiry the complainant was found guilty on the six charges.
- [5.4] Furthermore, the second respondent submits that it had proven on a balance of probabilities that the complainant defrauded, stolen and/or misappropriated an amount in the sum of R12 500.00 from the second respondent's customers. Further, the second respondent states that subsequent to the disciplinary hearing it received further complaints from other customers which implicate the complainant to further misappropriation of money which the second respondent says the total misappropriated money is now R44 950.00.
- [5.5] Moreover, the second respondent asserts that as consequence of the complainant's dismissal, other allegations received and the second respondent's internal investigation, it decided to commission a forensic audit to establish the exact nature and extent of the complainant's fraudulent activities. Therefore, it says its initial audit investigation was conducted by a firm whose services were terminated as it was not performing satisfactorily because there were delays in the process. However, the second respondent says it commissioned Price Waterhouse Coopers to complete the audit investigation which the second respondent hopes will be completed by the end of April 2006.
- [5.6] The second respondent further states that since the complainant was dismissed he failed to make contact with the second respondent where, in terms of section 37D(1)(b)(ii)(aa) of the Act, the complainant would consent to the deduction of the amount referred to in paragraph 6 of the second respondent's response to the complaint from his pension benefit.
- [5.7] The second respondent further submits that the prejudice suffered by the complainant which is that of withholding his pension benefit must be weighted

against the potential losses that the second respondent's customers might suffer if the money is dissipated.

6. Determination and reasons therefor

[6.1] According to the second respondent's submissions the complainant was dismissed from the second respondent in 2005 following a disciplinary hearing wherein the complainant was convicted of misappropriating R12 500.00.

[6.2] Upon the complainant's dismissal from employment the first respondent became liable to pay the complainant a withdrawal benefit. However, the first respondent avers that in terms of rule A6.2 of its general rules the complainant can only be entitled to his retirement savings account when the second submits to the first respondent a withdrawal notification form.

[6.3] It is clear that the second respondent indeed objected to the first respondent paying the complainant's withdrawal benefit in the first respondent on the pretext that the complainant had misappropriated the second respondent's funds thus allegedly being indebted to the second respondent. Further, it is clear that the second respondent wishes invoke section 37D(1)(b)(ii)(aa) of the Act in recovery the alleged debt.

[6.4] Rule A 6.2.2 of the first respondent provides that upon the administrator receiving a withdrawal notification, the complainant's retirement savings account will be disinvested and placed into the insurer's bank account. This rule does not expressly state that the complainant's retirement savings account will be disinvested and placed into the insurer's bank account (in preparation to be paid to the complainant) upon the first respondent's receipt of a withdrawal notification "form". The rule only provides that upon the administrator receiving a "withdrawal notification" in which case it is clear that the complainant had informed the first respondent of his pending exit from the first respondent.

[6.5] Further, rule 4.1.1 of the first respondent's rules provide:

"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 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."

[6.6] 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;”

[6.7] 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:

- [6.7.1] there must be a benefit payable;
- [6.7.2] 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;
- [6.7.3] the damage caused to the employer must be by reason of theft, dishonesty, fraud or misconduct by the member;
- [6.7.4] the member must either admit liability in writing to the employer or judgment must be obtained in any court; and
- [6.7.5] 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.

[6.8] The first respondent's rule 4.1.1 is in congruent 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.

- [6.9] 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 misappropriation of the second respondent's 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.
- [6.10] However, in this case the complainant's withdrawal benefit has been withheld by the first respondent because the second respondent has not submitted to the first respondent a withdrawal notification form upon the complainant's exit from the first respondent. Further, it is because the second respondent objected to the first respondent paying the complainant's withdrawal benefit in the first respondent on the basis that the complainant had allegedly misappropriated the second respondent's funds, therefore, alleging that the complainant is indebted to the second respondent. Further, it appears that the second respondent wishes invoke section 37D(1)(b)(ii)(aa) of the Act in the recovery of the alleged debt. Therefore, the complainant's withdrawal benefit was not withheld by the first respondent pending the determination of his liability by a court of law.
- [6.11] The complainant's complaint was lodged at this office on 28 February 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 of a lack of a withdrawal notification form to be furnished to the first respondent by the second respondent and the complainant's alleged misappropriation of the second respondent's monies, that it is reasonable that the complainant's benefit be withheld.
- [6.12] The first and the second respondent 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 the second respondent to recover loss caused to it by the complainant's alleged misappropriation of the second respondent's monies by it (the second respondent) 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 (2005) and it is has not been made clear by the first respondent the value of the complainant's withdrawal benefits in the first respondent.

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

[6.13.1] 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 the complainant's date of exiting the first respondent until the date of payment.

[6.13.2] Further, the first respondent is further ordered to pay the complainant's withdrawal benefit as ordered in paragraph [6.13.1] within 7 days of the date of this determination.

DATED AT JOHANNESBURG ON THIS DAY OF 2007

Yours faithfully

**MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR**