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Please quote our reference: PFA/GA/4535/2005/SM

**Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“THE ACT”) – A VAN DER WESTHUIZEN (“the complainant”) v ABSA GROUP PENSION FUND (“the respondent”)**

1. Introduction

- [1.1] The complaint concerns the alleged improper deduction of the amount of a disability pension that was paid to the complainant from his retirement benefit by the respondent.
- [1.2] The complaint was received by this office on 19 July 2005. A letter acknowledging receipt thereof was sent to the complainant on 30 August 2005. On the same date a letter was dispatched to the respondent giving it until 20 September 2005 to file its response to the complaint. A response was received from the respondent on 20 September 2005. On 24 October 2005 this office received the complainant’s reply.
- [1.3] 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.

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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 is a pensioner of the respondent. The complainant was employed by Trust Bank (“the employer”) from 25 April 1960 until he received a disability pension from the Bankorp Pension Fund which commenced on 1 July 1987. The Bankorp Pension Fund was later taken over by the respondent. The complainant applied to the respondent to be re-admitted as an active employee in 1994 after resuming his employment with the employer in September 1988.
- [2.2] The respondent advised the complainant that he was not entitled to receive a disability pension after resuming his employment in 1988. An amount of R184 565.00 was deducted from the complainant’s lump sum early retirement benefit pursuant to an agreement concluded between the complainant and the respondent.

## 3.Complaint

- [3.1] The complaint is that the respondent was not entitled to deduct the amount of the disability pension that was paid to the complainant from his retirement benefit. The complainant submits that he was entitled to a lump sum retirement benefit of R259 096.06. He stated that he received a letter from the respondent which indicate that an amount of R140 366.33 is the amount that he owed the respondent for the repayment of the disability pension he received from 1 August 1992 to 1 April 1995 together with interest at the rate of 18% per annum from 1 August 1992 to 1 April 1995.
- [3.2] Further, the complainant submitted that the agreement that he entered into with the respondent in which he agreed to repay the disability pension he received from the respondent was concluded under duress. The complainant is also dissatisfied with the fact that an amount of R31 071.00 was deducted from his retirement benefit for tax. He stated that the amount of tax that was deducted from his benefit was due to the fault of the respondent because it should have asked for a tax directive on his net benefit rather than on his gross lump sum benefit of R259 096.06.

## 4.Response

- [4.1] Mr M Swart, manager (administration), filed a response on behalf of the respondent. He confirmed that the complainant’s disability pension commenced on 1 July 1987 in terms of the rules of the Bankorp Pension Fund that were applicable at that time. He stated that in terms of rule 3.3.1 (ii) of the Bankorp Pension Fund rules, a disability benefit that is payable to a disability pensioner will terminate if the continued payment of the benefit cannot be substantiated. It was submitted that in the 14 month period following the approval of the complainant’s disability benefit, he

recovered to an extent that he was able to resume his employment on 12 September 1988. It is submitted that the complainant joined the employer on a temporary basis and he was receiving a monthly salary from the employer. However, it was submitted that the complainant failed to inform the respondent about this fact. The respondent stated that the complainant was requested to submit a declaration regarding his continued disability on three occasions and he indicated that he was not employed and thus not earning an income.

- [4.2] It was also stated that the respondent only became aware of this issue in July 1994 when the complainant applied for re-admission to the respondent as an active employee. It is submitted that the complainant indicated that he had a bypass in 1987 but that his health at the date he completed the form was good. The respondent terminated the complainant's disability income and advised him that he has an option of either taking an early retirement or taking his money in the form of a withdrawal benefit. It submitted that the complainant chose to take an early retirement.
- [4.3] Further, it was submitted that the total amount that was overpaid to the complainant in respect of the disability pension amounted to R399 105.13. The respondent submitted that the complainant signed an agreement in which he admitted that he received a disability income from the respondent to which he was not entitled. It submits, further, that an agreement was also reached in terms of the amount due to the respondent, which was reduced to an amount of R184 565.00. It further submitted that the complainant agreed that he would be deemed to have retired on 1 October 1994. It submitted further that the complainant also agreed that the amount of R184 565.00 will be recovered from his lump sum benefit of R259 096.06. A net amount of R47 433.77 was then paid to the complainant after the deduction of income tax and the amount he owed the respondent.

#### 5. Determination and reasons therefor

- [5.1] The complaint in essence is that the respondent was not entitled to deduct the amount of the disability pension that was paid to the complainant from his retirement benefit. The issue that falls for determination is whether the respondent was entitled to recover the amount of the disability pension that was paid to the complainant.
- [5.2] It is evident that the complainant continued to receive a disability pension from the respondent after he resumed his employment in September 1988. However, the complainant failed to inform the respondent about the fact that he was employed and that he was earning an income from 1988

until he applied for re-admission to the respondent in July 1994. It is also clear that the respondent requested the complainant to complete a form in which he was required to state his continued disability on three occasions. The complainant stated in the form that he was not employed and thus not earning an income. As a result of the complainant's misrepresentation, the respondent continued to pay the complainant a disability pension. From the evidence before this tribunal it is quite clear that the respondent has proved that the complainant made the misrepresentation as a result of which it suffered a loss.

- [5.3] Further, the complainant admitted in his reply that he stated in the form that he was not employed when he submitted a declaration indicating his continued disability to the respondent. It is further clear that the complainant concluded an agreement with the respondent in which he admitted that he received a disability income from the respondent to which he was not entitled. In terms of the said agreement the complainant agreed that the amount of the disability benefit would be deducted from his retirement benefit. The complainant did not submit evidence which indicated that he concluded the agreement under duress or that it was against his free will. It appears to me to be a case of having regret with hindsight after having concluded the agreement. Therefore, having regard to the above factors and the evidence before this tribunal, it is clear that the respondent is entitled to deduct the amount of the disability pension from his retirement benefit pursuant to the conclusion of the agreement.
- [5.4] With regards to the complainant's complaint that the respondent was only entitled to seek a tax directive on the net amount of his early retirement benefit it is clear that the respondent is authorised to deduct a certain amount from the complainant's retirement benefit for tax in terms of the Income Tax Act of 1962 as set out in section 37A of the Act. The respondent was entitled to ask for a tax directive on the complainant's lump sum benefit of R259 096.06 in terms of the Income Tax Act before a net amount is paid to him.
- [5.5] The complainant also not satisfied with the fact that interest at the rate of 18% per annum from 1 August 1992 to 30 April 1995 was added to the amount of the disability pension he owed the respondent. However, it is clear that the amount of interest of 18% per annum that was added to the amount of R140 366.33 formed part of the agreement the complainant concluded with the respondent. Therefore, the complainant's complaint in this regard cannot be sustained.

[5.6] The complainant further stated in his reply that he was not paid the same salary when he resumed his employment with the employer. This is an employment related issue for the employer to answer and since this tribunal is only able to adjudicate on pension-related complaints as defined in section 1 of the Act, this aspect of the complainant's complaint cannot be adjudicated in this forum.

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

DATED AT JOHANNESBURG ON THIS                      DAY OF                      2008.

Yours faithfully

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**MAMODUPI MOHLALA**  
PENSION FUNDS ADJUDICATOR