



HEAD OFFICE

Johannesburg

1st Floor, Norfolk House
Cnr 5th Street & Norwich Close
Sandton, 2196
PO Box 651826, Benmore, 2010
Tel (011) 884-8454 □ Fax (011) 884-1144
E-Mail: enquiries-jhb@pfa.org.za

Cape Town

2nd Floor, Oakdale House, The Oval
Oakdale Road, Newlands, 7700
P O Box 23005, Claremont, 7735
Tel (021) 674-0209 □ Fax (021) 674-0185
E-mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Please quote our reference: PFA/GA/4878/2005/FM

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24, OF 1956 (“the Act”)- C FREDERICK v NMG CONSULTANTS AND ACTUARIES (PTY) LTD / THE SCIENTIFIC GROUP (PTY) LTD

Introduction

- [1] This complaint concerns the alleged unlawful withholding by the Scientific Group (Pty) Ltd (“the employer”) of your withdrawal benefit on leaving the service of the employer and the Scientific Group Pension Fund (“the fund”) on 31 March 2005
- [2] The complaint was received by this office on 15 August 2005 and a letter acknowledging receipt thereof was sent to the complainant on 25 August 2005. A letter was, also on 25 August 2005, dispatched to the respondents giving them until 16 September 2005 to file responses to the complaint. A response dated 14 September 2005 filed by People Administration Services, the administrator of the Scientific Group Pension Fund (“the fund”) on behalf of the fund and the employer was received on the same date. On 21 September 2005 a letter was addressed to the complainant inviting her to make further submissions, if any, by 30 September 2005. A letter was received from the complainant on 21 November 2005 advising that she did not wish to make further submissions.
- [3] As the background facts are well known to all parties, I shall not burden this determination by restating the same here.

The complaint

- [4] Your client’s complaint is that the employer is not entitled to withhold your client’s benefits as there are no civil or criminal proceedings instituted by

V Ngalwana (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), J Mabuza (Assistant Adjudicator), V Abrahams (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), T Thabethe (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator)

Office Manager: L Manuel

the employer currently pending against her nor has she conceded liability of any nature. The employer is intentionally and without sound reason, so argues your client, delaying the payment of her pension benefits to which she is, by law, entitled and furthermore, that she is being unduly prejudiced by the employer's conduct and that it has been five months since her resignation and no attempt expediently to finalise or resolve the matter has been made by the employer. It is your client's submission that the power to withhold the benefit is being made to endure indefinitely and that the benefit is being withheld by the employer for an unreasonably long period of time.

- [5] Your client accordingly seeks an order directing the employer to pay her withdrawal benefit together with interest thereon at the prescribed rate from the date of her resignation from employment to date of payment.

The responses

- [6] The employer has filed a response to your client's complaint. It contends that it intends to institute civil and/or criminal proceedings against your client and will seek an order that her pension fund monies be paid to it in part compensation for the money that your client allegedly misappropriated from the employer. In amplification of its allegation, the employer states that your client was involved in extensive fraudulent activities during her term of employment with the employer which were only discovered after she left the employer's employ. The employer further contends that although the precise amount of the damages allegedly occasioned by your client's fraudulent activities is still unknown, it has established to date that the amount owing is R 783 776.70 and that additional amounts might still be discovered between now and the finalization of its investigations.
- [7] As indicated earlier, the employer avers that the amount of the misappropriated monies which it has been able to trace and confirm with documentary evidence to date, is R 783 776.70. The employer argues that this is substantially in excess of the amount due to your client from the pension fund. In the circumstances, the employer argues that your client's pension fund is entitled to withhold payment of her pension monies in terms of section 37D of the Pension Funds Act, 1956, in order that this money can be paid to the employer in due course in part compensation of the damages it suffered.
- [8] The employer further argues that the investigation into the fraudulent activities has been extremely time-consuming to the extent that it had to hire an employee on a temporary basis solely for the purpose of investigating the various transactions and general entries at considerable expense to itself. It explains that the employee concerned has worked on

- a full time basis exclusively on the investigation since May 2005 and that the investigations are still continuing. The employer further points out that the bulk of its investigations have now been completed and it submits that it could have been neither practical nor proper to institute civil or criminal proceedings previously in view of the number of the fraudulent transactions and the substantial money involved coupled with the gravity of the allegations against your client.
- [9] Finally, the employer argues that it has done everything reasonably possible in its power to investigate the misappropriations as quickly as possible, including carrying the cost of a temporary employee to undertake the necessary investigations. The employer further submits that if your client is permitted to receive the proceeds of the pension fund, the employer could suffer prejudice to that extent because it has no knowledge as to whether your client has the resources to meet any judgment debt or compensation order in terms of the Criminal Procedure Act, 51 of 1977 that may be given against your client.
- [10] I should also mention that the employer has raised certain preliminary points relating to the non-joinder of the pension fund, and the fact that People Administration Services (Pty) Ltd which is not cited as a respondent is the administrator of the fund and not NMG Consultants and Actuaries and that neither of the respondents are the repositories of pension fund monies and hence no order could be made against them. Because of the view I take on the merits of this matter, I consider it unnecessary to fully canvass the preliminary reports.
- [11] People Administration Services (“PAS”), in their capacity as the administrators of the fund, have also filed a response to your client’s complaint. PAS advises that a cheque in the amount of R 30 130.64 was issued in favour of your client and delivered to the employer to be forwarded to your client but was subsequently returned by the employer to PAS on 8 June 2005. PAS further advises that on 8 June 2005 a meeting was held between the representatives of the employer and PAS wherein it was advised that certain irregularities have been discovered pertaining to the alleged misappropriation of funds by your client from the employer. It was at this stage that the cheque which was made in favour of your client and delivered to the employer was returned to the administrators. PAS further states it was further advised by the representatives of the employer during the meeting that the employer was in the process of investigating the matter with the objective of instituting criminal and civil proceedings against your client and consequently PAS was instructed to withhold the payment of your client’s benefit in terms of section 37D of the Act.

Determination and reasons therefor

- [12] The question for determination is whether or not the fund is permitted to withhold your client's benefit pending the institution of civil and/or criminal proceedings by the employer.
- [13] The purpose of section 37D1(b) is to protect the employer's right to recover housing loans and to compensation for certain losses caused to the employer by the wrongful conduct of the member. In terms of section 37D1(b), before a fund may deduct or withhold a member's benefit it has to comply with the following conditions:
- There must be an amount due by a member to his / her employer on the date of his / her retirement or when he / she ceases to be a member of a fund;
 - the amount must be in respect of compensation in respect of any damage caused to the employer;
 - the damaged caused to the employer must be by reason of theft, dishonesty, fraud or misconduct by the member;
 - the member must either admit liability in writing to the employer or judgment must be obtained in any court
 - the judgment or the written admission of liability must be in respect of the compensation due in respect of the damaged caused.

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

- [14] It is common cause that in the instant matter there has been no admission of liability in writing on the part of your client nor has judgment been obtained against her in any court. The question whether the fund's power to deduct in terms of the Act includes a power to withhold a member's benefit pending the institution of civil or criminal proceedings by the employer was answered in the affirmative in the case of *Allison v IMATU Retirement Fund & Another 2004 (7) BPLR 5831 (PFA)*. In that case the Adjudicator held that in order to protect the employer's right to pursue recovery of misappropriated monies, the provision for deduction should be interpreted to impliedly include the power to withhold payment of the benefit pending the determination or acknowledgment of liability. To this general rule the Adjudicator added a rider to the effect that the power to withhold must be exercised reasonably and the benefit should not be withheld for an unreasonably long period of time.
- [15] Your client resigned from employment on 31 March 2005. Subsequent to her departure, it was discovered by the employer that she had allegedly misappropriated substantial amounts of money from the employer during her period of employment. Your client was employed as a credit controller. According to the employer, it employed three credit controllers each of

which dealt with a specific portfolio of customers on an exclusive basis. The employer explains that none of the credit controllers had access to the accounts of customers falling within the portfolio of any of the other credit controllers. Therefore any transaction performed in relation with your particular customer could only be performed by the credit controller with the responsibility of that customer. The employer further explains that subsequent to your client's departure, a number of fraudulent transactions allegedly performed by your client on her customer's accounts were unearthed. The employer has explained your client's alleged *modus operandi* in detail and for present purposes I do not see it necessary to fully canvass that. Suffice it to say that the employer states that the money was misappropriated from its customer's accounts solely controlled by your client and that the false early settlement accounts created to balance the books of account were on the accounts of customers solely controlled by your client. The withdrawal benefit payable to your client is in the amount of R 30 130.64 whereas the employer states that it has sustained damages to date in the amount of R 783 776.70 and that additional amounts may still be discovered between now and the finalization of its investigations. The employer has further stated that some of these fraudulent activities go back as far as three years prior to your client's resignation and that is stated as one of the reasons for the investigations being time-consuming. Furthermore, it is stated by the employer that the fraudulent transactions involved misappropriation from the payments of forty nine different export customers, thousands of false early settlement discounts and tens of thousands of general entries over a period of around three years and that the substantial amount of time taken to complete the investigations was the direct result of a very large number of transactions involved. The employer states that each of those transactions had to be traced, reconciled and verified through documentation which is an extraordinarily time-consuming process.

- [16] It appears that the bulk of the investigations are now complete although there are still transactions requiring investigation and suspected fraud requiring verification through documents.
- [17] In view of the alleged fraudulent transactions, the substantial amount of money involved and the seriousness of the allegations against your client, I accept that it would not have been practical for the employer to institute civil or criminal proceedings previously against your client. I find on the probabilities that the employer has done everything reasonably possible in its power to investigate the misappropriations as quickly as possible including carrying the cost of a temporary employee to undertake the necessary investigations. Furthermore, I am satisfied that the period of approximately 16 months for which the benefit has been withheld is not unreasonable in the circumstances of this case.

[18] In the result, your client's complaint cannot succeed.

DATED AT JOHANNESBURG ON THIS DAY OF 2006.

Yours faithfully

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR