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Please quote our reference: PFA/WE/3443/2005/NVC

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”): L Strauss v SAVF Pension Fund (“the fund”) and the Suid Afrikaanse Vroue Federasie (“SAVF” or “the employer”)

Introduction

[1] Your complaint concerns the fund’s withholding of your withdrawal benefit in terms of section 37D of the Act. The complaint was received on 29 July 2005 and a letter acknowledging receipt thereof was sent to you on 12 August 2005. On the same date letters were dispatched to the respondents requesting them to submit responses to your complaint by 2 September 2005. The fund’s response was received on 30 August 2005. On 8 September 2005 the response was sent to you for a reply by 23 September 2005. No reply has been received from you. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below. As the facts are well known to the parties I shall not burden this determination by repeating them here.

Complaint

[2] You are unhappy that the fund is withholding your withdrawal benefit after you left the service of the SAVF on 7 December 2004. When you claimed your withdrawal benefit SAVF advised you that it would not process the application as it had a claim against your withdrawal benefit. You state that you are unaware of any claims against your benefit and you want this tribunal to investigate the fund’s withholding of the benefit.

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 fund's response

[3] The fund has submitted a compilation of numerous documents relating to the employer's disciplinary action against you on a number of occasions in 2004, as well as details of the criminal charge laid against you with the South African Police Service on 3 February 2005. The documents suggest that the monies allegedly due to the employer are R2 137.64 (loan to SAVF), R4 900 (expropriation of telephone cards), R390.10 (pocket money due to the residents of a retirement home) and R345.16 (personal phone calls). The total is R7 772.90.

[4] The fund advised that your withdrawal benefit is made up as follows:

“Gross Amount	R13 162.12
Less Tax	R 2 369.18
Less Debt	<u>R 7 772.90</u>
Amount paid to member	R 3 020.04”

[5] The fund states that it paid you R3 020.04 on 17 August 2005, and has been requested to hold the amount of R7 772.90 until further notice.

Determination and reasons therefor

[6] From the evidence the fund has withheld R7 772.90 for approximately two years since the termination of your service.

[7] Section 37A states that no deductions shall be made from pension benefits save to the extent permitted by the Act. Section 37D makes provision for exceptional instances when deductions can be effected. The section allows for nine kinds of deductions from a pension benefit, which can be summarized as follows:

- (i) amounts due on the benefit in question by a member in accordance with the Income Tax Act (section 37D(1)(a));
- (ii) amounts due to the fund in respect of housing loan granted to the member by the fund (section 37D(1)(a)(i));
- (iii) amounts due to the fund in respect of amounts for which the fund is liable under a guarantee furnished in respect of a housing loan to the member made usually by bank or a building society (section 37D(1)(a)(ii));
- (iv) amounts due by the member to his employer owing on the date of his retirement or termination of employment in respect of a housing loan granted by the employer to the member (section 37D(1)(b)(i)(aa));

- (v) amounts due by the member to his employer on the date of his retirement or termination of employment in respect of amounts for which the employer is liable under a guarantee in respect of a housing loan made by some other person , usually a bank or building society (section 37D(1)(b)(i)(bb));
- (vi) amounts due by a member to his employer on the date of termination of his employment in respect of compensation for any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member (section 37D(1)(b)(ii));
- (vii) amounts which the fund has paid or will pay by arrangement and on behalf of, a member or a beneficiary in respect of subscriptions to a medical aid scheme (section 37D(1)(c)(i));
- (viii) amounts which the fund had paid or will pay by arrangement, or on behalf of, a member or a beneficiary in respect of insurance premiums (section 37D(1)(c)(ii)); and
- (ix) amounts which the fund has paid or will pay by arrangement, or on behalf of, a member or beneficiary in respect of any purpose approved by the Registrar, on the conditions determined by the Registrar upon a request in writing from a fund (section 37D(1)(c)(iii)).

[8] There is no evidence that the loan to SAVF was in respect of a housing loan or guarantee, as set out in paragraph [7] (ii), (iii) and (iv). Debts due to the employer for a personal loan and telephone calls do not fall within the exceptions provided for in section 37D. The alleged theft of pocket money due to the residents of the retirement home, operated by SAVF, does not (on the face of it) constitute damage suffered by the employer, but by the particular proposed recipient(s). Should you have caused the employer damage in respect of the expropriation of the telephone cards, section 37D(1)(b)(ii) may have application. This section provides that the employer may be compensated through the retention and payment of the employee's pension benefit, or a portion thereof, provided certain requirements are met.

[9] The requirements are that the damage must have been caused by reason of the member's theft, dishonesty, fraud, or misconduct, and that he/she has in writing admitted liability to the employer, or judgment has been obtained against the member in any court, including a magistrate's court.

[10] It is apparent that you have not admitted liability in writing for the specific amount(s) withheld, nor has judgment been obtained. The employer has not responded to your complaint, and there is nothing in the documents before me to suggest that there has been any attempt, beyond the laying of a criminal charge, to obtain judgment for purposes of this section. The participating employer in a pension fund owes various duties to the members of the fund. In this regard, Marais J in *Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 235B-D, said the following:

“The trustees of the fund owe a fiduciary duty to the fund and to its members and other beneficiaries (section 2(a) and (b) of the Financial Institutions (Investment Fund) Act 39 of 1984 and rule 18.1.4). The employer is not similarly burdened but owes a duty of good faith to the fund and its members and beneficiaries (cf *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 2 All ER 597 (Ch) at 604g -606j).”

[11] While it is understandable for a benefit to be withheld while an investigation is in progress, it is unreasonable to withhold it for a period of two years, and the employer fails in its duty of good faith by not completing the investigation timeously. Moreover, it is clear from the evidence before me that a substantial amount of the “debt” of R7 772.70 does not fall within the protection conferred by this section.

[12] If the trustees do not have the power to make any deductions from your benefit, then the power to withhold the benefit, being ancillary to the main power to deduct, must necessarily also fall away. The fund is therefore not entitled to withhold your pension benefits in terms of section 37D other than the amount already deducted in respect of taxation.

Relief

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

[13.1] the fund is directed to make payment to you in an amount of R7 772.70 within seven days of the date of this determination;

[13.2] the fund is further directed to pay interest on the above amount in paragraph [13.1] at the rate of 15, 5% per annum, calculated from 7 December 2004 until date of final payment.

Dated at Cape Town on this the day of 2006.

Yours faithfully

Vuyani Ngalwana
Pension Funds Adjudicator