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Please quote our reference: PFA/WE/5721/05/CN

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956: DF JONES v CORPORATE SELECTION RETIREMENT FUND (PARTICIPATING EMPLOYER: PALLUCCI HOME DEPOT (PTY) LIMITED) & PALLUCCI HOME DEPOT (PTY) LIMITED

Introduction

- [1] This complaint concerns the withholding of payment of the withdrawal benefit due to a member of a fund.
- [2] The complaint was received by this office on 5 October 2005, and a letter acknowledging receipt thereof sent to you on 7 October 2005. On the same date a letter was dispatched to the respondents requesting them to submit responses to the complaint by no later than 30 October 2005. The first response from the fund's administrator was received on 19 October 2005, while the second one was received on 2 November 2005. The employer's response was received on 28 October 2005. The responses were forwarded to you for a reply on 4 November 2005, and the same was received on 7 November 2005.
- [3] After considering all the written submissions, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.

The complaint

- [4] You are contending that because your employment with Pallucci Home Depot (Pty) Limited ("the employer") terminated on 29 March 2005, your membership of the Corporate Selection Retirement Fund ("the fund") also terminated then and you became entitled to payment of a withdrawal

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

benefit within a reasonable period from the date of withdrawal.

The responses

The administrator's response

- [5] In response, Liberty Life ("the administrator") which administers the fund concedes that you became entitled to a benefit upon your withdrawal, which is reflected in the member benefit statement dated 12 October 2005 as R5 835.62. The administrator states that the employer is refusing to complete the withdrawal notification form on the grounds that it is exercising its right to request the fund to withhold payment of the benefit as set out in the rules of the fund.
- [6] The administrator further states that the employer has furnished it with a copy of an e-mail which the employer regards as an acknowledgement of liability allegedly made by you, wherein you acknowledge liability to the employer in the amount of R5 619.75 in respect of loss suffered by the employer as a result of your failure to follow company procedures in the handling of petty cash. The administrator submits that the e-mail in question is not a valid acknowledgement of liability in that it does not comply with the requirements of the Act, but states that it will not pay out your benefit unless it is directed to do so by this Tribunal.
- [7] On the question of the completion of a withdrawal notification by the employer, the administrator states that the same is a procedural requirement that puts it in a position to ascertain the member's last day of service and other employment details.

The employer's response

- [8] The employer states that it suffered damages through theft and/or fraud and/or dishonesty and misconduct by you to the amount of R17 585.44, of which you repaid R4 017.10. It further states that of the balance of R13 515.30, you admitted liability for R5 619.75 which you agreed in writing to pay. According to the employer you owe it another amount of R4 104.45, which is the balance of a housing loan that you procured from it on the basis of a letter from an entity known as "Circle Seven Trading 54 CC". The employer further states that it subsequently discovered that the letter in question was fraudulent in that the transfer referred to therein was never contemplated and also never took place.
- [9] The employer concludes that in the circumstances it is entitled to instruct the fund to pay over to it the amount of the benefit due to you as compensation to it for the loss that you fraudulently caused.

Determination and reasons therefor

- [10] The issue for determination is whether the employer is entitled to instruct the fund to withhold payment of your benefit for the purpose of deducting therefrom the amount that you allegedly admitted to owing to the employer. Related to that issue is the question whether the e-mail relied on by the employer constitutes a valid acknowledgement of liability.
- [11] The answer to those questions lies in the rules of the fund, read with the provisions of sections 37A and 37D of the Act. Rule 12.4 allows the employer or the fund first charge on a benefit due to a member if the said member is indebted to the fund or the employer in respect of a housing loan granted by the employer to the member, a guarantee given by the employer or fund to a third party who has granted a housing loan to the member, or damage suffered by the employer as a result of the member's dishonesty, fraud or misconduct. The member must have made a written admission of liability to the employer, or the employer must have obtained judgment against the member.
- [12] The applicable provision is sub-rule 12.4.1.3, the provisions of which almost mirror those of section 37D (1) (b)(ii) of the Act. Thus, in analyzing the provisions of the sub-rule, guidance will be sought from, and reliance be placed on, the case law dealing with the provisions of the section. In *Moodley v Local Transitional Council of Scottburgh Umzinto North & Another* [2000] 9 BPLR 945 (D), it was held that the word "misconduct" as envisaged in section 37D(1)(b)(ii) should be interpreted as meaning conduct which has an element of dishonesty. The court concluded that negligent conduct is not included within the meaning of "misconduct".
- [13] In your case, it is not clear from the employer's response exactly in respect of which offence you were found guilty at the disciplinary hearing. However, in e-mail that the employer relies on, the employer states that your contract was terminated "as a result of not following company procedures using stores money for pettycash" (*sic*).
- [14] The question arises whether the offence of which you were found guilty falls within any one of the categories set out in sub-rule 12.4.1.3, namely, theft, dishonesty, fraud or misconduct. In my mind, the offence that you were found guilty of does not fall within any of the categories. Furthermore, even if it can be classified as misconduct, it is not the type of misconduct that has an element of dishonesty in it, but is rather of a negligent nature. Thus, the provisions of rule 12.4.1.3 do not apply.
- [15] Even if the offence for which you were convicted did in fact fall within the listed categories, the fund would be authorized to deduct from your benefit

- only if you had admitted liability in writing or had had a judgment granted against in you in respect of the damage caused. The admission of liability must be an unequivocal admission of the member's indebtedness to the employer for damages in a specific amount, which were caused as a result of theft, fraud, dishonesty or misconduct.
- [16] While your alleged admission of liability is in writing, it is not signed (because it is in the form of an e-mail). I have serious misgivings with accepting an unsigned document like this one, especially when one considers that anybody else among your colleagues could have had accessed your computer and sent the e-mail message. Aside from the absence of a signature on the document, the contents thereof can hardly be said to be "unequivocal" in the sense of a "clear and firm" admission of liability. The author of the document nowhere states that s/he *admits* that s/he has caused loss or damage to the employer. S/he merely records the cause for the termination of the contract, and his/her intention to repay an amount of R5 619.75, which is also not stated as being the quantum of the damage suffered by the employer. In the result, the e-mail document does not amount to an unequivocal admission of liability as envisaged in the section.
- [17] The employer states that in addition to your alleged liability in the amount of R5 619.75, you are also indebted to it in the amount of R4 104.45 in respect of the balance of a housing loan that was granted to you by the employer on the strength of a letter from a third party. Sub-rule 12.4.1.1 envisages a loan granted by the employer to enable the member to *obtain, alter, maintain or repair housing* for the member and his dependants. The letter from the third party reads as follows:
- "We are in the process of transferring the property known as 67 Sycamore Way, Bridgetown (Erf No 25345, Athlone), from Mrs. FE Lakay ID Nr: 371103 0232 085 to Ms DF Jones ID Nr. 801113 0108 086.
- In order for the transfer to proceed, Ms Jones would have to pay the sum of R5 500 (Five Thousand Five Hundred Rand), by 7 December 2004 or the transfer becomes null and void."
- [18] It is clear from the above letter that the loan was meant to enable you pay transfer costs of the property. The payment of transfer costs does not amount to obtaining housing, or altering, maintaining or repairing the same, but is meant to cover the costs of transferring a property that has already been purchased (obtained). Thus, it cannot have been the intention of the drafter of the rules that sub-rule 12.4.1.1 should cover the payment of transfer costs as well. This is especially more so when one has regard to the provisions of section 37D of the Act, which lists the nine kinds of deductions that may be made from a pension benefit. Transfer costs are not among the allowable deductions: (See *Odayan v Orion*

Money Purchase Pension Fund & Another [2005] 6 BPLR 523 (PFA) at 524H-525G).

- [19] The employer's allegation that "the letter was an act of fraud, in that the transfer referred to in that letter never took place and was never contemplated" can unfortunately not bring the alleged act of fraud within the ambit of rule 12.4.1.3, in that you have neither admitted liability for the alleged fraud, nor has a judgment been granted against you in respect of damage suffered as a result of the alleged fraud.
- [20] In light of my finding that the offence in respect of which you were dismissed is not one of the offences envisaged in sub-rule 12.4.1.3, and that the admission of liability relating to the damage caused by the commission of that offence is not a valid acknowledgement of liability, it will not serve any purpose for the employer to request the fund to withhold your benefit pending the obtaining of a judgment for damages suffered as a result of the offence in question. If the fund complies with such a request it will be acting unlawfully.
- [21] The alleged fraud that was allegedly perpetrated through the medium of falsely representing that an amount of R5 500 was required to pay for transfer costs is, however, a different story. Damages suffered as a result of fraud are covered by rule 12.4.1.3. Thus, if liability is proved in a court of law and a judgment obtained against you, the fund will be authorized to deduct the amount of the loss suffered as a result of the fraud.
- [22] Rule 12.4.3 empowers the fund to withhold payment of a benefit, where sub-rule 12.4.1.3 applies, for a period which is deemed reasonable by the management committee, pending the obtaining of a judgment in any competent court. There is no indication from either the employer or the fund that any proceedings have been instituted to establish your liability for the damage allegedly caused as a result of the alleged fraud. You were dismissed from employment on 29 March 2005, yet 22 months down the line no criminal charges have been preferred against you nor have any civil proceedings been instituted.
- [23] Although the management committee is vested with a discretion to decide on a reasonable period over which the payment of the benefit may be withheld pending the obtaining of a judgment, that discretion must be exercised reasonably. What that means is that the management committee must in fact exercise an independent discretion and not merely act as a rubberstamp for the employer's request. The management committee must also consider all the relevant factors, discard irrelevant factors from consideration, and not unduly fetter its discretion. Among the important relevant factors would be whether the employer has in fact instituted court proceedings against the member. If no proceedings have

been instituted, the reason for not doing so to date and the period of time which has elapsed since the termination of the member's service would be relevant. If the proceedings have been instituted, the date when such proceedings were instituted; the expected duration of the trial; and the prospects of success on the merits.

- [24] I have no doubt that the management committee has not exercised its discretion at all. As the repository of a discretionary power, the management committee has a duty to exercise that power one way or the other. While it does not necessarily have to exercise the discretion in your favour, it may not simply refuse to exercise the discretion.

Relief

- [25] The order of this Tribunal is as follows:

[25.1] It is declared that the withholding of the complainant's withdrawal benefit for the purpose of effecting a deduction therefrom to compensate Pallucci Home Depot (Pty) Ltd ("the employer") for loss of an amount of R5 619.75 is not authorized by the rules of the fund and the Act, and is therefore unlawful.

[25.2] It is further declared that the management committee of the fund has failed to exercise the discretion that is vested in it by rule 12.4.3 to decide on what is a reasonable period over which the fund may withhold the payment of the complainant's benefit pending the institution of court proceedings aimed at establishing the complainant's liability for causing damages in the amount of R4 104.45 to the employer through an act of fraud.

[25.3] The management committee of the fund is directed to, within 7 days of the date of this ruling, exercise the discretion vested in it by rule 12.4.3 properly and in good faith, taking into account the relevant factors, among which must be the factors set out in paragraph 23 *supra*.

[25.4] The fund is ordered to, by no later than 2007, serve a record of the decision of the management committee and the reasons therefor on the complainant and this Tribunal, which record must include, in clear identifiable terms, all the factors that the management committee took into account for purposes of making its decision.

[25.5] The complainant may, if she considers it in her interests to do so, make submissions in response to the management committee's record of decision referred to in paragraph 25.4 above and deliver

the same to the respondents and to this office by 2007.

[25.6] In the event of the management committee failing to submit its record aforesaid by the stipulated date, the Adjudicator shall substitute his own decision for that of the management committee.

SIGNED IN CAPE TOWN ON THIS DAY OF 2007

Yours faithfully

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VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR