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Mr. I.D. Laing
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Dear Mr. Laing

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): I D LAING (“complainant”) v ORION MONEY PURCHASE PROVIDENT FUND (“first respondent”) AND OLD MUTUAL LIFE ASSURANCE COMPANY (SOUTH AFRICA) LIMITED (“second respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the withholding of benefits in terms of section 37D(1)(b)(ii).
- 1.2 The complaint was received by this office on 23 March 2011. A letter acknowledging receipt thereof was forwarded to the complainant on 24 May 2011. On 27 May 2011 letters were dispatched to the respondents giving them until 27 June 2011 to file their responses. A

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act, 24 of 1956. The service offered by the Pension Funds Adjudicator is free to members of the public.

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response was received from the second respondent on 27 June 2011. Further submissions were received from the complainant on 1 August 2011.

- 1.3 After considering the submissions before this Tribunal it is considered unnecessary to hold a hearing in this matter. As the background facts are known to the parties they will be repeated only to the extent that they are pertinent to the issues raised herein. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 The complainant is the sole partner of Fleetwood Adventure Playgrounds CC (“Corporation”). Mr. B. Motlhoki (“Mr. Motlhoki”) was employed by the Corporation. By virtue of his employment Mr. Motlhoki became a member of the first respondent, a registered pension fund organisation in terms of the Act. The second respondent is the first respondent’s administrator.
- 2.2 On 30 July 2009 the complainant convened a disciplinary hearing wherein Mr. Motlhoki was charged with misconduct and dishonesty. The disciplinary hearing was chaired by an independent labour law practitioner. Mr. Motlhoki was accused of having abused a ‘Nedfleet petrol card’ for a number of years, costing the complainant and thus the Corporation a loss of R19 200.95 in the process. This amount was deducted from the Corporation’s bank account in June 2009. Mr. Motlhoki was ultimately found guilty as charged and his employment with the Corporation was forthwith terminated.
- 2.3 The complainant proceeded to lay a criminal charge against Mr. Motlhoki. The National Prosecuting Authority (“NPA”) charged Mr. Motlhoki accordingly. On 28 September 2010 he was found guilty as charged in the Krugersdorp Magistrate’s Court (“Court”). He was

sentenced to pay a fine of R3 000.00 or serve a term of 8 months imprisonment wholly suspended for 5 years.

- 2.4 The complainant approached the first respondent to request that it deduct from the withdrawal benefits due to Mr. Motlhoki the amount representing the losses suffered by the Corporation as a result of Mr. Motlhoki's dishonesty and pay same to the Corporation. The first respondent refused to accede to this request, citing that it could only do so if Mr. Motlhoki had in writing admitted liability to the Corporation or if a judgment had been obtained against him in a court of law.

[3] COMPLAINT

- 3.1 The complainant is dissatisfied with the first respondent's refusal to deduct an amount representing the losses suffered by the Corporation from Mr. Motlhoki's withdrawal benefit. He submits that Mr. Motlhoki will never admit liability considering that he has in the past denied the accusations against him. He submits that seeing as Mr. Motlhoki was convicted by the Court, he has satisfied the requirement that a court judgment be obtained against him prior to the first respondent making the deduction. He states that section 37D of the Act makes no mention of a section 300 compensation order so there is no reason for the first respondent to refrain from deducting the losses from Mr. Motlhoki's withdrawal benefits.
- 3.2 He seeks an order that the first respondent deduct from Mr. Motlhoki's withdrawal benefit an amount representing the financial losses suffered by the Corporation as a result of him abusing the petrol card.

[4] RESPONSE

- 4.1 The second respondent submits that the first respondent can only make a deduction where Mr. Motlhoki had admitted liability to the

Corporation in writing or where a judgment had been obtained against him in a court of law. The judgment referred to means a judgment in a civil court case against Mr. Motlhoki in favour of the Corporation or a compensatory order in terms of section 300 of the Criminal Procedure Act, 51 of 1977 (“CPA”).

- 4.2 A criminal conviction alone does not amount to a judgment envisaged in section 37D(1)(b)(ii) of the Act. In addition to the conviction the Court should have issued a compensatory order in terms of section 300 of the CPA for the first respondent to be entitled to deduct the money claimed by the complainant. As no such compensatory order was issued by the Court and Mr. Motlhoki has not admitted liability to the Corporation in writing, the complainant must institute civil proceedings against him. Upon obtaining judgment against Mr. Motlhoki the first respondent would be in a position to make the deduction sought.

[5] DETERMINATION AND REASONS THEREFOR

- 5.1 The complainant seeks a deduction from Mr. Motlhoki’s withdrawal benefit of an amount representing the financial losses suffered by the Corporation as a result of the latter’s dishonesty, in light of his conviction by a criminal court. It needs to be determined whether or not the first respondent is legally obliged and entitled to effect the deduction sought.
- 5.2 Save to the extent permitted by the Act, the Income Tax Act (“ITA”) and the Maintenance Act, 1998 (“Maintenance Act”), no benefit provided for in the rules of a pension fund organisation or a right to such benefit shall be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgement or order of a court of law (Section 37A(1) of the Act).

5.3 Section 37D(1)(b)(ii) provides an exception to this general rule and states that:

“(1) A registered fund may -

...

(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 -

...

(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;”

5.4 Therefore a pension fund is entitled to deduct any monies due by a member to a participating employer by reason of theft, dishonesty, fraud or misconduct provided the member has admitted liability to the employer in writing or a judgment has been obtained against the member in any court of law. The object of section 37D(1)(b) is to protect an employer’s right to pursue the recovery of money misappropriated by its employees (see *Twigg v Orion Money Purchase Pension Fund* (1) [2001] 12 BPLR 2870 (PFA) at para 21, *Charlton v Tongaat-Hulett Pension Fund* [2006] 2 BPLR 94 (D) at 97I-98B).

5.5 A pension fund may only effect a deduction in instances where there is a written admission of liability to the employer by the member or a court judgment for the damages has been obtained against the member. This Tribunal must determine whether or not these requirements have been met in the present matter. Mr. Motlhoki has not admitted liability to the Corporation in writing and this much was admitted by the complainant by stating that the former would never admit liability as he has in the past denied all charges against him. Therefore, the complainant cannot rely on a written admission of liability to claim the money from Mr. Motlhoki's withdrawal benefit.

5.6 As stated above, Mr. Motlhoki was successfully prosecuted by the NPA and convicted by a criminal court on 28 September 2010. It must be determined whether or not his conviction by the Court amounted to a 'judgment' as envisaged in section 37D(1)(b)(ii). In *Records v Barlows Pension Fund* [2000] 8 BPLR 920 (PFA) ("*Records*") at paragraph 26, this Tribunal determined whether or not a criminal conviction in a magistrate's court amounted to 'judgment' as contemplated in section 37D(1)(b)(ii) and stated that:

"The magistrate's judgment being a criminal conviction for theft is based on the requirements of criminal law and criminal procedure, it does not amount to a judgment in respect of compensation for damage caused to the employer as required by section 37D. The words "any court" in section 37D refer primarily to the civil courts rather than the criminal courts as it is only the former which normally award damages for compensation. However, a magistrate in a criminal case, in exceptional circumstances regulated by the Criminal Procedure Act of 1977, can award compensation for damage or loss to injured persons (subject to certain conditions) and the effect of such an award is the same as a civil judgment."

5.7 Section 37D(1)(b)(ii) requires a judgment of court for the deduction to be effected. The judgment must be a determination of the employee's liability to the participating employer and the monetary value of such liability.

- 5.8 As stated in *Records*, a criminal conviction without a compensatory order in terms of section 300 of the CPA does not amount to a 'judgment' as envisaged in the Act. This is so because although extensive investigations into the merits of the accusations made against an employee may have been conducted and such merits having been examined, tried and accepted by the court, a conviction in this regard only finds that the employee concerned is guilty of the offence as charged. It does not proceed further to determine whether or not the employee concerned is liable to compensate his employer and if so, how much he is liable to pay to the employer. Only in instances where a compensatory order in terms of section 300 of the CPA was sought and granted by the court does the employee become liable to compensate the employer. In such an instance the pension fund has legal grounds upon which to effect the deduction. Where a compensatory order has not been granted by the court in a criminal case there is no determination of the employee's liability to the employer and therefore the fund has no power to effect the deduction sought, despite the conviction.
- 5.9 In the present complaint by the complainant's own admission the criminal court, when convicting Mr. Motlhoki, did not issue a compensatory order in terms of section 300 of the CPA. The conviction alone does not amount to a 'judgment' as envisaged by section 37D(1)(b)(ii) for the reasons advanced above and as found in *Records*. Therefore the first respondent has no legal grounds upon which to deduct any money from Mr. Motlhoki's withdrawal benefit. Until such time as the complainant secures a civil judgment of court in terms of which Mr. Motlhoki is found liable to compensate the Corporation, no deduction can be made from his benefit. If made, such a deduction would be unlawful as it would not comply with section 37D(1)(b)(ii). Therefore, the first respondent cannot withhold Mr. Motlhoki's benefit, nor can it pay any amount to the Corporation or the complainant.

[6] **ORDER**

6.1 The complaint is dismissed.

DATED AT JOHANNESBURG ON THIS 31st DAY OF OCTOBER 2011

DR. E.M. DE LA REY
ACTING PENSION FUNDS ADJUDICATOR

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