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REGISTERED MAIL

Dear Mr. Mncube

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): N P MNCUBE (“complainant”) v INVESTEC GROUP RETIREMENT FUND (“respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the respondent’s withholding of the complainant’s withdrawal benefit in terms of section 37D(1)(b) of the Act.
- 1.2 The complaint was received by this office on 4 March 2011. A letter acknowledging receipt thereof was forwarded to the complainant on 7 March 2011. On 10 March 2011 a letter was dispatched to the respondent requesting it to file its response by 11 April 2011. A response was received from the respondent on 13 April 2011. A copy of the response was forwarded to the complainant on 19 April 2011, requesting a reply by 5 May 2011. A reply was received from the complainant on 5 May 2011. No further submissions were received from the parties.

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.

Centralised Complaints Helpline for All Financial Ombud Schemes 0860 OMBUDS (086 066 2837)

- 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 was employed by Investec Bank Limited (“the employer”) from 10 January 2000 to 15 December 2010. He was a member of the respondent by virtue of his employment.
- 2.2 The complainant resigned from employment in December 2010 after he received a letter informing him of a disciplinary hearing concerning allegations of gross misconduct against him. Subsequent to the complainant’s resignation the employer instructed the respondent to withhold the complainant’s withdrawal benefit pending the finalisation of the investigation against him. The employer thereafter opened a criminal case against the complainant.

[3] COMPLAINT

- 3.1 The complainant is dissatisfied that his withdrawal benefit has been withheld by the respondent. He submits that he was a loyal and hardworking employee of the employer for a period of 10 years and that he saved the employer from a loss of R1.4 million only to be suspected of fraud by the employer. He was shocked by the allegations and as a result he fell ill. He was placed on leave pending the investigation.
- 3.2 The complainant submits that he tendered his resignation on 15 December 2010 as he did not want to “wrestle” with his managers,

who threatened him for the last ten years. Furthermore, the notification advised him that the employer and employee relationship will not be the same anymore. His resignation was confirmed by a text message from the employer. Subsequent to that he received his salary for the month of December 2010 as well as money for leave days. The employer is withholding his provident fund benefit for reasons that are unknown to him.

[4] RESPONSE

- 4.1 The respondent confirmed the factual backgrounds as summarised above. It submits that the employer alleged that the complainant created a number of fictitious accounts in the name of a service provider that is unknown to anyone at the employer's Capital Markets Division where the complainant worked. It is further alleged that the complainant facilitated the transfer of money into the service provider's bank account. From the information that the employer has disclosed to the respondent, the Trustees concluded that the employer has a *prima facie* case against the complainant. The facts in support of the criminal case are currently being investigated. The loss suffered by the employer is estimated at R654 535.40. Once the audit into the payments in question has been finalised, the employer will be in a position to confirm the total loss it has suffered.
- 4.2 Furthermore, to ensure maximum protection of the complainant's benefits as a member of the first respondent the Trustees are in regular contact with the employer regarding the progress of the criminal case against him. It is trite law that a pension fund cannot withhold benefits in terms of section 37D of the Act for an unreasonable length of time as that might prejudice the member.
- 4.3 Pension benefits enjoy special protection in terms of section 37A of the Act. However, such protection is subject to the provisions of

section 37D, which sets out specific and limited instances in which pension benefits may be reduced. One of the instances in which a deduction can be made from a member's pension benefit is in respect of debts owing by the member to the employer provided that the requirements set out in Section 37D have been met. Before a fund may deduct from a member's pension benefit to satisfy the claim made by the employer, the section 37D requirements must be complied with. The respondent is empowered by its rules to withhold the complainant's benefit to allow the legal processes against the complainant to proceed while retaining his benefit.

- 4.4 The respondent submits that in this case the employer has instituted criminal action against the complainant and is in the process of determining the total loss it has suffered in order for the prosecutor to seek a compensation order. The trustees submit that the legal process should therefore be allowed to take its course and if the complainant is found not guilty by the court the respondent will release his benefit to him in accordance with its rules. In order to protect the complainant's rights, the fund has requested and receives regular updates on the progress of his matter. The trustees are satisfied that there have been no unique delays caused by the employer.
- 4.5 Rule 11.2 of the respondent's rules makes provision for the Trustees to withhold payment of a benefit on the basis of a criminal charge laid by the employer against the complainant for damages caused to the employer as contemplated in section 37D.
- 4.6 In conclusion, the respondent submits that the complainant withdrew from the fund in December 2010. The trustees are of the view that the employer has a *prima facie* case against the complainant and they continue to monitor the progress of the prosecution in this case. In the circumstances the complaint against the respondent should be

dismissed on the grounds that the complainant's benefit is being withheld in terms of the rules and the provisions of the Act.

Complainant's further submission

4.7 The complainant submits that he finds it "very strange" that the employer is still investigating his misconduct at this point in time. They ordered him to appear before a disciplinary hearing on 14 December 2010, so they would have presented their evidence at this time. He learned about the criminal case through the response as no-one had previously informed him about it. He submits that he does not have financial resources to fight the employer, hence he requests this tribunal to assist him. He submits that he has debts to pay and a family to feed, so the continued withholding of his benefit is causing him financial hardship.

[5] DETERMINATION AND REASONS THEREFOR

5.1 The complainant was not paid his withdrawal benefit by the respondent after leaving the employer's service and terminating his fund membership. What falls to be determined is whether the respondent is permitted to withhold the complainant's withdrawal benefit following an instruction to that effect from the employer. The employer accused the complainant of fraud and misconduct and opened a criminal case against him at Sandton Police Station.

5.2 Save to the extent permitted by the Act, the Income Tax Act, 58 of 1962 ("ITA") and the Maintenance Act, 99 of 1998 ("Maintenance Act"), no benefit provided for in the rules of a pension fund 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 (see section 37A(1) of the Act).

- 5.3 A registered pension fund organisation is, notwithstanding the general provisions of section 37A, empowered by section 37D(1) of the Act to deduct from any benefit due to a member an amount representing the damages sustained by his employer by reason of his dishonesty, theft, fraud or misconduct. However, the member concerned must have admitted liability to the employer in writing or a judgment should have been obtained against him in this respect in a court of law.
- 5.4 It is common cause that the complainant has neither in writing admitted liability to the employer, nor has a judgment been obtained against him in a court of law at present. It thus needs to be determined whether or not withholding of his benefit is nevertheless lawful.
- 5.5 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 971-98B). Maya JA in *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* (103/2008) [2008] ZASCA 164 ("Highveld"), held that the provisions of section 37D(1)(b) should be interpreted to include the fund's power to withhold any benefits due to a member to ensure the enforcement of an award which may be made in favour of the employer.
- 5.6 For fear of dissipation of benefits prior to obtaining a judgment of a court of law determining the complainant's liability to the employer, section 37D(1)(b) must be interpreted to include the first respondent's power to withhold his withdrawal benefits pending the determination of his liability (see *Highveld Steel and Vanadium, supra*). Therefore,

the employer is within its rights to instruct the respondent to withhold his benefits.

- 5.7 The employer has alleged that it suffered loss as a result of fraud or misconduct committed by the complainant. The present complaint was lodged 3 months after the complainant's resigned from his employment. It is now 11 months since he resigned and the criminal case has not yet been finalised. In *Sayed-Essop v Non-Ferrous Metal Works Pension Fund and Another* [2000] 9 BPLR 1051 (PFA), it was held that where the delay in the prosecution of the member is not due to the fund's or employer's fault, the withholding of benefits for two years was not unreasonable.
- 5.8 The respondent submitted that the employer opened a criminal case and the police are still investigating it. The delay in the complainant's prosecution has not been occasioned by the employer's fault. The respondent submits that to ensure maximum protection of the complainant's benefit the Trustees are in regular contact with the employer regarding the progress of the criminal case lodged against him. His benefit has not been unreasonably withheld. The respondent's conduct in withholding the complainant's benefit is lawful. The Trustees must ensure that the withholding does not become unreasonable, so they need to keep abreast of developments in the criminal case. The complainant is entitled to payment if the withholding period becomes excessive.

[6] ORDER

1. The complaint is dismissed.

DATED AT JOHANNESBURG ON THIS 29TH DAY OF NOVEMBER 2011

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

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