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**PER REGISTERED POST**

Dear Sir

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): M B NOMDEE (“complainant”) v ALEXANDER FORBES RETIREMENT FUND (PENSION SECTION) (“first respondent”), ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD (“second respondent”) AND EQUIPMENT SPARE PARTS (AFRICA) (PTY) LTD (“third respondent”)**

**[1] INTRODUCTION**

- 1.1 This complaint concerns the withholding of the complainant’s withdrawal benefit by the first respondent.
- 1.2 The complaint was received by this tribunal on 12 July 2010. A letter acknowledging receipt thereof was sent to the complainant on 20 July 2010. On the same date a letter was sent to the second respondent requesting a response to the complaint by no later than 27 August 2010. On the same date a letter was sent to the third respondent requesting a response to the complaint by no later than 27 August 2010. Letters were sent on 31 August 2010 and 6 September 2010 requesting the third

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respondent to file a response to the complaint by no later than 21 September 2010. A response dated 13 September 2010 was received from the second respondent. On 14 September 2010 a letter was sent to the complainant requesting a reply to the response by no later than 27 September 2010. No further submissions were received from the parties.

- 1.3 Having considered the written submissions before this tribunal, it is found unnecessary to hold a hearing. The determination and reasons therefor appear below.

## **[2] FACTUAL BACKGROUND**

- 2.1 The complainant became a member of the first respondent from 1 September 2007 during his tenure of employment with the third respondent until his dismissal and exit from the first respondent on 1 March 2010.
- 2.2 Following the complainant's dismissal for fraud allegedly committed against the third respondent, the third respondent instituted criminal proceedings and a civil claim against the complainant and contemporaneously advised the first respondent to withhold the complainant's withdrawal benefit pending the finalisation of the civil claim. The loss suffered by the third respondent is alleged to be in the amounts of R765 821.74, R121 604.38 and R357 985.56, respectively. The amounts are claimed jointly and severally between the complainant and his co-defendants, the one paying the other to be absolved.
- 2.3 Subsequent to the termination of the complainant's membership a withdrawal benefit in the amount of R1 429 079.87 became payable to him in terms of the rules of the first respondent. The withdrawal benefit has been withheld at the instance of the third respondent.

### [3] COMPLAINT

3.1 The complainant is dissatisfied with the withholding of his withdrawal benefit by the first respondent. The alleged loss suffered was as a result of the dishonesty of his former colleagues. The misconduct for which he was dismissed does not include dishonesty and therefore section 37D of the Act is inapplicable. The misconduct was also caused by the third respondent's lack of internal controls, inadequate segregation of duties and a very busy schedule. He seeks the immediate payment of his withdrawal benefit.

### [4] RESPONSE

4.1 The second respondent filed a response in its capacity as the administrator of the first respondent. It advised that the complainant completed and submitted a withdrawal notification but it did not process the payment after it received a written request by the third respondent on 19 March 2010 to withhold his benefits until the civil case had been finalised. Provided the Court rules in favour of the third respondent, the amount owing would then be deducted from his benefit. An outstanding housing loan in the amount of R46 170.38 was deducted from the complainant's withdrawal benefit, leaving a current balance of R1 404 619.81 as at 18 June 2010. The estimated tax if the whole benefit were to be commuted is an amount of R325 776.56. According to the third respondent the estimated legal fees in respect of the matter is an amount of R150 000.00 therefore, the amounts claimed against the complainant in the court application is greater than his withdrawal benefit.

4.2 Section 37D of the Act contemplates that the trustees of a fund on receipt of a request from the employer to withhold a member's benefit pending the investigations will not generally and arbitrarily accede to such a request unless a *prima facie* case has been established against

the member. The complaint states that the misconduct for which he was dismissed does not involve dishonesty and therefore the provisions of section 37D do not apply. A case of fraud has been opened against the complainant by the third respondent and hence the provisions of section 37D of the Act apply. The trustees have considered the request by the third respondent and have satisfied themselves that the third respondent deserves the protection guaranteed in term of section 37D of the Act, hence the decision to withhold the benefit. To ensure maximum protection of the complainant's benefit, the trustees are in regular contact with the third respondent regarding the progress of the civil claim.

- 4.3 It is trite law that a fund cannot withhold benefits for an unreasonable length of time as that may prejudice the member. The third respondent served summons on the complainant in August 2010 and it is awaiting the date of the hearing. In the matter of *Sayed-Essop v Non Ferrous Metal Works Pension Fund and Another* (2009) 9 BPLR 1051 (PFA), it was held that where proceedings had been instituted within days of dismissal of the employee and where the delay in the prosecution of the employee was beyond the control of the employer, that a two year delay was not unreasonable. The legal process should therefore be allowed to take its course and if the complainant is not found liable by the court, the first respondent will release his withdrawal benefit in accordance with the rules. Rule 11.3 of the first respondent also makes provision for the withholding of members' benefits as contemplated in section 37D of the Act.

## **[5] DETERMINATION AND REASONS THEREFOR**

- 5.1 The issue for determination is whether or not the withholding of the complainant's withdrawal benefit by the first respondent, pending the outcome

of criminal charges and a civil claim brought by the third respondent against the complainant, is lawful. Section 37D(1) of the Act provides that:

“A registered fund may-

(a) ...

(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-

(i) ...

(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;”

5.2 Thus, before a fund may make any deductions from a member’s benefit in terms of section 37D(1)(b) of the Act the following requirements must be met:

- there must be a benefit payable;
- there must be an amount due by the member to his employer on the date of his retirement or on which he ceases to be a member of the fund;

- the damage 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; and
- the judgment or the written admission of liability must relate to compensation due in respect of the damage caused to the employer by the member.

5.3 Section 37D(1)(b)(ii) of the Act entitles a registered fund to deduct from any benefit due to a member any amount due by a member to his employer on the date on which he ceases to be a member, in respect of compensation for any damages caused to the employer by reason of theft, dishonesty, fraud or misconduct by the member. The member must either have admitted liability to the employer in writing or judgement must have been obtained against the member in a court of law. The section must be purposively interpreted to include the power to withhold payment of a member's pension benefits pending the determination or acknowledgement of such member's liability (see *Twigg v Orion Money Purchase Pension Fund and Another (1)* [2001] 12 BPLR 2870 at paragraph 21)

5.4 In this instance no judgement had been obtained against the complainant and no acknowledgement of liability had been made by the complainant. However, the third respondent had instituted legal proceedings to pursue the recovery of the misappropriated funds. This tribunal has pronounced on numerous occasions that a pension fund has discretion to withhold a member's benefit in instances like this, but the benefit may only be withheld for a reasonable period. A pension fund must weigh the potential prejudice to a member who needs access to the funds against the strength of the employer's claim and may impose conditions on an employer to do justice to the case (see *Highveld Steel*

*and Vanadium Corporation Ltd v Oosthuizen* [2009] 1 BPLR 1 SCA at paragraph 20).

5.5 The complainant's withdrawal benefit was withheld since 1 March 2010. The third respondent investigated and instituted legal proceedings against the complainant and his co-defendants in August 2010. The claim against the complainant involves dishonesty, misconduct and theft. It cannot be said that an inordinate period had elapsed since the complainant's withdrawal from the first respondent. It is a well-known fact that court proceedings, both civil and criminal, take time to be finalised, but the first respondent has undertaken to monitor the progress of the matter so that the withholding does not become unreasonable. It is the finding of this tribunal that the first respondent has properly exercised its discretion and the withholding of the complainant's withdrawal benefit is not unlawful.

**[6] ORDER**

1. In the result, the complaint cannot be upheld and is dismissed.

**DATED AT JOHANNESBURG ON THIS THE 29<sup>th</sup> DAY OF NOVEMBER 2011**

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

**Cc:** Attention: Sandile Maphalala  
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2010

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**Section 30M Filing: Magistrates Court**

*Parties unrepresented*