Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 of 1956 (“the Act”): J C TSHABALALA (“complainant”) v STANDARD BANK GROUP RETIREMENT FUND (“respondent”)

[1] **INTRODUCTION**

1.1 The complaint concerns the withholding of the complainant’s withdrawal benefit by the first respondent following her dismissal from employment.

1.2 The complaint was received by this tribunal on 15 August 2011. A letter acknowledging receipt thereof was sent to the complainant on the same date. On 24 August 2011 a letter was dispatched to the respondent giving it until 26 September 2011 to file a response to the complaint. A response was received from the respondent on 26 September 2011. The response was forwarded to the complainant on 29 September 2011. On 13 October 2011 this tribunal received further submissions from the complainant.
1.3 Having considered the written submissions, it is considered unnecessary to hold a hearing in this matter. As the background facts are known to the parties, only those facts that are pertinent to the issues raised herein will be repeated. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

2.1 The complainant was employed by Standard Bank Group Limited (“the employer”) from 1 October 2004 until she was dismissed on 13 July 2011. She was a member of the respondent by virtue of her employment until her employment was terminated.

2.2 The complainant’s employment was terminated following a disciplinary hearing on 13 July 2011 where she was found guilty of fraud against the employer. The charge indicates that she allegedly misappropriated funds from a client’s bank account, resulting in financial loss to the employer. The employer has instituted legal proceedings in a court of law against the complainant in respect of the alleged fraud. The employer also requested the respondent to withhold payment of the complainant’s withdrawal benefit pending the finalization of the legal proceedings against her. The respondent acceded to the employer’s request and decided to withhold payment of the complainant’s withdrawal benefit until such time that legal proceeding against her are finalised.

[3] COMPLAINT

3.1 The complainant is dissatisfied with the withholding of her withdrawal benefit in the respondent. She acknowledges that she was dismissed from her employment after she was found guilty of fraud by the employer. She also states that there are pending legal proceedings against her that were
instituted by the employer. However, she is not satisfied with the fact that
her withdrawal benefit has been withheld pending the finalization of the
legal proceedings.

3.2 She requests this tribunal to assist her in obtaining payment of her
withdrawal benefit from the respondent.

[4] RESPONSE

4.1 The respondent submits that the complainant was a member from
1 March 2007 until 13 July 2011 when she was dismissed from her
employment for fraud and dishonesty. In terms of section 37D(1)(b)(ii) of
the Act a retirement fund may deduct from a member’s pension benefit
any amount in respect of damages caused to the employer by reason of
theft, dishonesty, fraud or misconduct by the member.

4.2 Rule 9.5.2 of the respondent’s rules also empowers the trustees to
withhold payment of a member’s benefit where the employer has instituted
legal proceedings in a court of law or laid a criminal charge against the
member.

4.3 It submitted that the employer requested it to withhold payment of the
complainant’s benefit as it instituted legal proceedings against her for
damages by reason of fraud and dishonesty. It states that it duly acceded
to the employer’s request as it is authorized to do in terms of section
37D(1)(b)(ii) of the Act read together with rule 9.5.2. It also determined
that the employer has suffered a quantifiable loss caused by the
complainant which exceeded the amount of her withdrawal benefit in the
fund.

4.4 The respondent established from the employer’s forensics department that
a case has been opened against the complainant for fraud with the police. The estimated loss to the employer has been quantified at R404 097.11. The complainant’s member share in the fund to date is R104 323.28. Therefore, it submits that it will continue to withhold the complainant’s benefit in the fund until the legal proceedings are finalised.

[5] **DETERMINATION AND REASONS THEREFOR**

*Introduction*

5.1 The issue to be determined is whether or not the respondent is authorized to withhold the complainant’s withdrawal benefit in terms of the Act, read together with its rules, pending the finalization of the legal proceedings against the complainant.

*The provisions of the Act and the fund’s rules*

5.2 The respondent can only withhold a member’s benefit if it is authorized to do so by the Act and its rules. Generally, pension benefits are not reducible, transferable or executable save to the extent permitted by the Act, the Income Tax Act, 58 of 1962 and the Maintenance Act, 1998. The apposite portion of section 37A(1) of the Act reads as follows:

“37A Pension benefits not reducible, transferable or executable

(1) Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act No. 58 of 1962), and the Maintenance Act, 1998, no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall, notwithstanding anything to the contrary contained in the rules of such fund, 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 judgment or order of a court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment debtor’s financial position in terms of section 65 of the Magistrate’s Court Act, 1944 (Act No. 32 of 1944), and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the fund concerned may withhold or suspend payment thereof… .”

5.3 The policy behind section 37A of the Act is to protect members’ pension benefits. However, it allows for exceptions to this principle in certain circumstances. Section 37D(1)(b)(ii) is one of the exceptions to the general rule. It reads as follows:

“(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 Rule 9.5.2 of the respondent’s rules reads as follows:
“On the receipt of a formal request by the EMPLOYER, the TRUSTEES shall, in accordance with such procedures as they may determine from time to time, and having satisfied themselves as to the reasonableness of such request, delay payment of any benefit or part thereof to or in respect of a MEMBER pending the outcome of any internal investigation, disciplinary enquiry or legal proceedings.”

5.5 Rule 9.5.3, in turn, provides that in the event that the employer does not obtain an admission of liability from the member or the State or the employer have not instituted legal proceedings against the member, within a reasonable time the trustees shall effect payment of the benefit due to, or in respect of, the member without further delay.

5.6 The purpose of section 37D of the Act read together with rule 9.5.2 of the respondent’s rules is to protect an employer’s right to recover losses caused by the misconduct of an employee and is a legitimate objective of protecting employer’s rights to recover debts due (see Dakin v Southern Sun Retirement Fund [1999] 9 BPLR 22 (PFA). While this objective is not an absolute right of the employer, what is implicit is that the employer may request a fund to withhold benefits pending the determination of legal proceedings against the member. Where the member is unsuccessful in defending the proceedings, the fund is entitled to deduct from the member’s benefit and pay it over to the employer.

5.7 The submissions indicate that judgment has not been obtained against the complainant in respect of the alleged fraud against the employer. The complainant has also not admitted liability or signed any acknowledgment of liability in respect of the alleged fraud. However, the facts indicate that there are pending legal proceedings against the complainant for damages caused to the employer by reason of fraud and dishonesty. There is nothing to suggest that the employer delayed instituting legal proceedings against the complainant following the termination of her employment. The
respondent has also established that the employer’s request for the withholding of the complainant’s benefit was reasonable having regard to the loss it suffered as a result of the alleged fraud by the complainant.

5.8 In *Highveld Steel and Vanadium Corporation Ltd and Oosthuizen* [2009] 1 BPLR 1 (SCA), the Supreme Court of Appeal held that the legislature did not intend that proof of liability for damages must be available on termination of the employment contract on the grounds of misconduct. It held that an interpretation that requires proof of liability on termination of employment will render the protection afforded to the employer by section 37D(1)(b) meaningless. As a matter of logic it is only in a few cases that an employer will have obtained a judgment against its employee by the time the latter’s employment is terminated because of the delay in finalizing court cases. Thus, the section must be interpreted purposively to give effect to its purpose, which is to protect the right of the employer to recover its losses.

5.9 Therefore, the respondent complied with the requirements of section 37D(1)(b)(ii) in withholding the complainant’s benefit as there is a pending case against her for damages against the employer. In the *Highveld Steel and Vanadium* matter, at paragraph 19, the Supreme Court of Appeal held the following regarding the power of a fund to withhold benefits pending finalization of legal proceedings in terms of section 37D(1)(b):

“It seems to me that to give effect to the manifest purpose of the section, its wording must be interpreted purposively to include the power to withhold payment of a member’s pension benefits pending the determination or acknowledgement of such member’s liability. The fund therefore had the discretion to withhold payment of the respondent’s pension benefit in the circumstances.”

5.10 There is nothing to indicate that the respondent exercised its power or discretion in this regard unreasonably. Having regard to the facts, the
interest of the employer in protecting its right to recover damages far exceed the complainant’s right to access her benefit at this stage.

5.11 In light of the above, the first respondent is authorized to withhold the complainant’s withdrawal benefit pending the finalization of the legal proceedings against her. However, the respondent and its trustees should keep abreast of the court proceedings and they must ensure that the withholding does not endure for an unreasonable length of time.

[6] ORDER

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

DATED AT JOHANNESBURG ON THIS 29TH DAY OF NOVEMBER 2011

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

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Section 30M Filing: Magistrate’s Court