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BY REGISTERED POST

Mr. T. C. Buthelezi
1747B Tshangisa Street
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Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 of 1956 (“the Act”): T C BUTHELEZI (“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 his dismissal from employment.
- 1.2 The complaint was received by this tribunal on 24 August 2011. A letter acknowledging receipt thereof was sent to the complainant on 25 August 2011. On the same date a letter was dispatched to the respondent giving it until 26 September 2011 to file a response to the

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complaint. A response was received from the respondent on 23 September 2011. The response was forwarded to the complainant on 29 September 2011. No further submissions were received from the parties.

- 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 July 2010 until he was dismissed on 6 July 2011. He was a member of the respondent by virtue of his employment until his employment was terminated.
- 2.2 The complainant’s employment was terminated following allegations of fraud and dishonesty. The employer has instituted legal proceedings in a court of law against the complainant in respect of the alleged fraud, in the amount of R404 097.11. The employer also requested the respondent to withhold payment of the complainant’s withdrawal benefit pending the finalization of legal proceedings against him. The respondent acceded to the employer’s request and decided to withhold payment of the complainant’s withdrawal benefit until such time that legal proceedings against him are finalized.

[3] COMPLAINT

- 3.1 The complainant is dissatisfied about the withholding of his withdrawal benefit by the respondent. He acknowledges that he was dismissed from

his employment after he was found guilty of fraud by his employer. However, he is not satisfied with the fact that the employer has instructed the respondent to withhold his benefit pending the finalization of the criminal proceedings against him.

- 3.2 He requests this tribunal to assist him in obtaining payment of his withdrawal benefit from the respondent as it is due and payable to him.

[4] RESPONSE

- 4.1 The respondent submits that the complainant was its member from 1 July 2010 until 6 July 2011 when he was dismissed from his 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 The employer requested the respondent to withhold payment of the complainant's benefit as it has instituted legal proceedings against him for damages by reasons of fraud and dishonesty. It states that it duly acceded to the employer's request as it is authorized to do so in terms of section 37D(1)(b)(ii) of the Act read together with rule 9.5.2 of its rules. It also determined that the employer suffered a quantifiable loss caused by the complainant, which exceeded the amount of his withdrawal benefit in the fund.
- 4.4 The respondent established from the employer's forensics department that

a criminal case has been opened against the complainant for fraud. The estimated loss to the employer has been quantified as R404 097.11. The complainant's member share in the fund amounts to R22 360.12. 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 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. As a general rule 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 of 1998 (see section 37A(1) of the Act).

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 EMPLOYEE, 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 purposes of section 37D of the Act read together with rule 9.5.2 is to protect an employer's right to recover losses caused by the misconduct of an employee and has 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 his 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 has 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) at E-G, 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 pending legal proceedings against him for damages caused to the employer by reason of theft or fraud. In *Highveld Steel and Vanadium Corporation Ltd supra* at paragraph 19, the Supreme Court of Appeal held the following regarding the power of a fund to withhold benefits pending finalization of criminal 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 suggest that the respondent exercised its power or discretion in this regard unreasonably. Having regards to the facts the interests of the employer to protect its right to recover damages exceed the complainant's right to access his 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 him. However, the respondent and its trustees should keep track 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

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

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Section 30M Filing: Magistrate's Court