



4<sup>th</sup> Floor  
Riverwalk Office Park  
Block A, 41 Matroosberg Road  
Ashlea Gardens  
**PRETORIA**  
**SOUTH AFRICA**  
0081

P.O. Box 580, **MENLYN**, 0063  
Tel: 012 346 1738, Fax: 086 693 7472  
E-Mail: [enquiries@pfa.org.za](mailto:enquiries@pfa.org.za)  
Website: [www.pfa.org.za](http://www.pfa.org.za)

---

Please quote our reference: **PFA/GA/12173/2012/SM**  
**BY REGISTERED POST**

Dear Madam,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): M COOPMAN (“complainant”) v CORPORATE SELECTION RETIREMENT FUND (“first respondent”), LIBERTY GROUP LIMITED (“second respondent”) AND AFROCENTRIC DESIGN (PTY) LTD (“third respondent”)**

**[1] INTRODUCTION**

- 1.1 The complaint concerns the alleged unlawful withholding of a death benefit by the first respondent following the death of the complainant’s husband, Mr LT Coopman (“the deceased”).
- 1.2 The complaint was received by this Tribunal on 20 June 2012. A letter acknowledging receipt thereof was sent to the complainant on 2 July 2012. On the same date, a letter was dispatched to the first and second respondents giving them until 2 August 2012 to file their responses. Another letter was sent to the third respondent on 19 November 2012 giving it until 19 December 2012 to file a response. 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.

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

response on behalf of the first and second respondents was received on 2 August 2012. No response was received from the third respondent.

- 1.3 Having considered the written submissions before this Tribunal, 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 is the wife of the deceased who passed away on 5 August 2009. She lodged this complaint as a beneficiary of the deceased's death benefit and on behalf of her two children, Nichole and Samantha Coopman. The deceased was employed by the third respondent and was a member of the first respondent from 1 March 2000 until his death. Prior to his death, the deceased was suspended from his work on 20 July 2009 due to alleged financial mismanagement.
- 2.2 A death benefit became payable to the beneficiaries of the deceased upon his death. During November 2010, the first respondent received a letter from the Booyens Police Station indicating that there is a pending investigation for fraud against the deceased. In August 2010, the third respondent issued summons against the deceased estate claiming damages for fraud allegedly committed by the deceased whilst he was employed as Operations Director of the company.
- 2.3 On 10 February 2012, the second respondent also received a letter from the third respondent's attorneys (L Ncube Attorneys) advising that there is pending civil action against Absa Bank where the deceased's estate was joined as a third defendant. In light of the above, the fund decided to

withhold payment of the deceased's death benefit in terms of section 37D(1)(b)(ii) of the Act pending the conclusion of the civil litigation. The withholding of the death benefit is the subject matter of this complaint.

**[3] COMPLAINT**

3.1 The complainant states that although she was advised that there was a forensic investigation relating to the alleged fraud by the deceased, the company has failed to produce prove of such investigation to substantiate its claim against the deceased. She confirms that a criminal case for fraud was opened at Booyens Police Station against the deceased. However, she contends that it has been almost three years since the case was opened and the third respondent is unable to provide the investigating officer and the prosecuting authority with any proof of fraud. She asserts that the civil case between the third respondent and Absa bank was postponed due to insufficient evidence by the third respondent. The third respondent has also failed to calculate any amount as its loss against the deceased's estate.

3.2 The complainant submits that the third respondent is unjustly using delaying tactics in the form of a non-existent court order it claims to have against her or the deceased' estate. She asserts that this is prejudicial to her and her two children in that they cannot access the death benefit. She indicates that the board of trustees also failed in its duty to make a decision in the interests of the deceased's beneficiaries by paying the death benefit. Therefore, she contends that the first respondent did not in accordance with section 37D(1)(b)(ii) of the Act.

**[4] RESPONSE**

4.1 The second respondent submits that the portion of the complaint relating

to unapproved benefits does not fall within the definition of a “complaint” as defined in section 1 of the Act. This is due to the fact that such benefits relate to a long-term insurance policy. Thus, it asserts that its response is limited to the approved death benefit payable following the deceased’s death.

- 4.2 It states that a fund is entitled to withhold payment of a benefit to a member where there is a pending legal action by an employer to recover damages in terms of section 37D(1)(b)(ii) of the Act against the member. The fund rules also allow the fund to withhold payment of a benefit in such circumstances. It confirms that the fund received a letter in November 2010 from the Booyens Police Station indicating that there is a pending investigation for fraud against the deceased. It indicates that it also received a letter dated 7 December 2009 where the South African Police Service (“SAPS”) informed that an investigation is pending and requested the fund to withhold payment of any benefits.
- 4.3 It confirms that in August 2010, the third respondent issued summons against the deceased’s estate. In November 2011, the Principal Officer of the board of trustees sent a letter to the SAPS requesting an update regarding the pending criminal investigation. However, the board of trustees did not receive any response from the SAPS to date. On 10 February 2012, the attorneys for the third respondent advised that a civil action has been instituted against Absa bank where the deceased’s estate was joined as a third party.
- 4.4 Thus, the second respondent indicates that it appears that the third respondent is taking steps to recover its alleged loss from the deceased’s estate. It avers that it is common for civil cases to take a long time before their conclusion. Accordingly, the board of trustees acted reasonably in withholding payment of the death benefit in terms of section 37D(1)(b)(ii)

of the Act. It concludes that the fund is not a party to the dispute between the third respondent and the complainant and as a result, it cannot comment on the correctness of any of the allegations made in the criminal investigation.

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

### *Technical point*

5.1 This determination only relates to the approved death benefit payable to the deceased's beneficiaries. The complainant's claim relating to unapproved benefits is not a benefit payable by the fund in terms of its rules. Thus, this Tribunal does not have jurisdiction to adjudicate a complaint arising from the unapproved benefits.

### *The withholding of the death benefit*

5.2 The issue that falls for determination is whether or not the first respondent is authorised to withhold payment of the death benefit in terms of the Act in this matter.

5.3 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). 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 In the matter of *Rowan v Standard Bank Staff Retirement Fund and Another (2)* [2001] 2 BPLR 1643 (PFA) at 1648B-D), this Tribunal held that the provisions of section 37D(1)(b)(ii) reveals that a number of requirements must be met before a deduction is permissible. These requirements are as follows:

- an amount must be due by a member of a fund to his or her employer;
- the amount must be due at the date of retirement or on which the member ceases to be a member of the fund;
- the amount must be in respect of compensation payable;
- the compensation must be in respect of any damage caused to the employer;
- the damage caused to the employer must be by reason of theft, dishonesty, fraud or misconduct by the member;
- the member must have furnished a written admission of liability to the employer in respect of the compensation in respect of the delictual damages caused to the employer; or
- alternatively, the employer ought to have obtained a judgment in a court in respect of the compensation.

5.5 The purpose of section 37D of the Act 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 proceedings against the member.

- 5.6 The submissions indicate that the complainant has not admitted liability to the third respondent for the alleged fraudulent conduct. The third respondent has also not obtained a judgment in court in respect of the alleged damages caused to it by the deceased. However, the submissions indicate that there is a pending civil case against the deceased's estate for damages against the third respondent. The attorneys for the third respondent confirmed that the deceased's estate was joined as a defendant in the civil matter between the third respondent and Absa bank. The matter has been set down for a hearing in February 2013. On 20 May 2013, this Tribunal requested more information regarding the pending civil matter. The second respondent advised that it has received confirmation from the third respondent's attorneys that the civil matter is still pending in the South Gauteng High Court. A new trial date will be set within two weeks. Thus, although there has been a delay by the third respondent in claiming its alleged loss in court, it is clear that there is a pending civil matter between the company and the deceased's estate.
- 5.7 In the matter of *Highveld Steel and Vanadium Corporation Ltd and Oosthuizen* [2009] 1 BPLR 1 (SCA) at E-G, the Supreme Court of Appeal held that section 37D(1)(i)(aa) and (bb) of the Act 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 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 finalising 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.

- 5.8 Therefore, the first respondent complied with the requirements of section 37D(1)(b)(ii) in withholding the payment of the death benefit as there is a pending civil case against the deceased's estate for alleged damages against the third respondent. There is nothing which indicates that the first respondent exercised its power or discretion in this regard unreasonably. The interest of the third respondent to protect its right to recover damages has to be taken into account having regard to the complainant's right to access to the death benefit. The facts indicate that the employer has taken reasonable steps to claim damages against the deceased's estate in terms of section 37D(1)(b)(ii).
- 5.9 In light of the above, the first respondent is legally authorised to withhold payment of the deceased's death benefit pending the finalisation of the civil case.

**[6] ORDER**

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

**DATED AT PRETORIA ON THIS 24<sup>TH</sup> DAY OF MAY 2013**

---

**MA LUKHAIMANE**  
**DEPUTY PENSION FUNDS ADJUDICATOR**

**Section 30M Filing: Magistrate's Court**

*No legal representation*