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Please quote our reference: **PFA/WC/00005222/2013/SGM**

**REGISTERED POST**

Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): SN FORTUIN (“complainant”) v CAPE MUNICIPAL PENSION FUND (“first respondent”) AND ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD (“second respondent”)**

**[1] INTRODUCTION**

- 1.1 The complaint concerns the arrear interest levied on the complainant’s housing loan account as a result of the respondents’ failure to effect deductions from his salary for the housing loan repayments.
- 1.2 The complaint was received by this office on 4 October 2013. A letter acknowledging receipt thereof was sent to the complainant on 15 October 2013. On the same date a letter was forwarded to the respondents giving them until 15 November 2013 to file their responses. A response was received from the first respondent on 15 November 2013. The response was forwarded to the complainant on 20 November 2013, giving him until 4 December 2013 to file further

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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.

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submissions if he wished to do so. A reply was received from the complainant on 28 November 2013. Further submissions were received from the first respondent on 4 and 16 April 2014.

- 1.3 After reviewing the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

## **[2] FACTUAL BACKGROUND**

- 2.1 The complainant is a member of the first respondent by virtue of his employment with the City of Cape Town Municipality (“the employer”). The second respondent is the administrator of the first respondent. The complainant applied for a housing loan of R25 000.00 from the first respondent on 25 April 1999 and this was granted on 4 May 1999. The housing loan repayments were supposed to be deducted by the employer with effect from 31 July 1999. The deductions commenced as per the agreement, which was R96.00 per week. However, for a period of April 2000 until November 2002 the employer stopped deducting from the complainant’s salary and paying to the first respondent. It recommenced making deductions and payments to the first respondent in December 2002. By that time, due to the non-payment of the loan interest had accrued on the arrear amounts and was added to the outstanding balance on the housing loan.

## **[3] COMPLAINT**

- 3.1 The complainant submitted that according to his calculations the housing loan has been paid up but he is still paying it. He submitted that interest rate was fixed at 10.5% and has increased to 15%. He submitted that according to his calculations the loan including interest

has been paid up by an amount of approximately R80 000.00. He submitted that deductions and payment of the loan repayments did not commence as agreed and some deductions were stopped for a period of 2 years and 7 months. He is dissatisfied by the levying of the arrear interest. He submitted that the fact that deductions for loan repayments were not commenced as agreed and were stopped for the above mentioned period is not due to any fault on his part. He submitted that the loan repayment instalments initially were R333.30 and they have now increased to R800.00.

- 3.2 Therefore, the complainant requests this Tribunal to direct the respondents to write off the loan. He further requested that in the event that it is found that there was any maladministration by the first respondent he must be compensated as a result. He is also requesting to be given an opportunity to withdraw from the first respondent and contribute to a different fund.

#### **[4] RESPONSE**

##### *The first respondent*

- 4.1 The first respondent provided a background in which it submitted that rule A6.1.2 permits the board to grant to any defined contribution active member a loan as envisaged in section 19 of the Act. In order to conclude a loan agreement, a member is required to sign a document termed the "Agreement in respect of Housing Loan and Pledge of Fund Benefit", which once the loan is approved constitutes the loan agreement between it and the member. It attached a copy of the loan agreement to the response. It submitted that as part of the agreement, the member signs two further documents, namely a "Member's Declaration" and an "Irrevocable Authority to Deduct", which documents were attached to the response. It further submitted that a letter dated 4 May 1999 was sent to the complainant, which indicated that the

agreed repayment term of the loan was 10 years and the amount to be deducted weekly from his salary was R96.00. It submitted that the employer is responsible for making the salary deductions in repayments of loans granted to employees. It further submitted that the employer commenced making deductions from the complainant's salary with effect from 31 July 1999. For a period from April 2000 until November 2002 the employer stopped making payments of the deductions from the complainant's salary to the first respondent and recommended making the payments from December 2002. It submitted that interest on the arrears resulting from the non-payment was added to the capital value of the loan to be repaid by the complainant.

- 4.2 It submitted that on or about September 1999, the complainant requested that his repayment amount be reduced from R96.00 to R76.59. This was agreed to and at the same time the loan repayment term was extended from 10 years to 25 years. The loan agreement was also amended to reflect the amended term of repayments of the loan. The first respondent attached to its response a letter sent to the complainant dated 29 July 2011, in which it explained that the maximum repayment period granted for his loan agreement is 25 years. It also attached the amended loan agreement. The first respondent submitted that it wrote a letter to the complainant and advised him that his current home loan deduction is not sufficient to cover the required instalment to ensure that at least the monthly interest that is accruing on the outstanding balance is repaid. Consequently his home loan balance is not reducing but increasing. He was advised that his repayment would be increased to the agreed repayment amount as per his housing loan application with effect from 1 June 2006.
- 4.3 The first respondent submitted that the object of the Adjudicator in terms of section 30D of the Act is to dispose of complaints lodged in terms of section 30A of the Act. In terms of the relevant provision of the definition of complaint in the Act, the complainant must allege (and

prove) that he has *“sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission.”* It submitted that the Adjudicator does not have the power to reduce the amount of a loan due in terms of section 19(5) of the Act. It further submitted that the Adjudicator may, however, if she determines that there was maladministration on its part and that the maladministration caused loss equal in value to the arrear interest, require it to pay damages to the complainant equal to the arrear interest. It is assumed that the Adjudicator will treat the complaint as having been framed that way.

- 4.4 It further submitted that it is acting in accordance with the Act, its rules, the loan agreement and other loan-related documentation entered into with the complainant in requiring him to pay interest on the arrears which have arisen both from the failure by the employer to make certain deductions of loan repayments and due to the complainant himself seeking to reduce the amount. The consequences of the arrears and interest thereon were not due to the maladministration on its part and even if the Adjudicator were to make a finding of maladministration, the complainant has not sustained prejudice as a consequence.
- 4.5 In terms of the loan agreement, the complainant has a contractual obligation to repay the loan with interest at the rate set out in the loan agreement. It submitted that the declaration signed by the complainant provides that he acknowledges that he is lawfully indebted to it in the amount of the loan and that it will be repaid “together with the interest that accrues thereon from time to time.”
- 4.6 The first respondent submitted that the employer’s failure to make deductions from the complainant’s salary and pay to it caused the arrear interest to be added to the capital of the loan. This did not have the effect of altering the complainant’s obligation in terms of the loan agreement. It submitted that although the employer fulfils the role of

assisting its employees in repaying their housing loans by deducting the loan repayments from their salaries and paying to it, it is primarily the member's responsibility to ensure that this is done. It submitted that it is the complainant who applied for the loan and accepted this debt and repayments thereof by signing the declaration, so it is his responsibility to ensure that repayments are made in order to avoid arrear interest.

- 4.7 The first respondent submitted that this Tribunal has held in the *Felander* determination (PFA/WE/17425/2007) as follows:

“Inasmuch as it was the employer's duty to effect deductions against the complainant's salary and pay the amount over to the respondent, it was the complainant's primary responsibility to ensure that the deductions were indeed made and that the monies were paid over to the respondent.” (paragraph 4.2); and

The respondent cannot be faulted for the employer's failure to effect the said deductions. (paragraph 4.3)”

- 4.8 It further submitted that the failure by the employer to deduct loan repayments from the complainant's salary is not attributable to it. It stated that it has sought to mitigate the impact of the employer failing to deduct employees' loan repayments from salaries by seeking the view of the Financial Services Board (“FSB”) on whether it may treat cases such as the complainant's differently to the way that it has treated similar cases in the past. The legal basis for this submission was section 19(6)(a) of the Act which provides that the Registrar “*may, under exceptional circumstances and on such conditions and for such periods as he may determine, temporarily exempt any fund compliance with any provision of sub-section (5) of (5)B(a).*”
- 4.9 The first respondent further submitted that the FSB responded in a letter dated 27 January 2012, *inter alia*, that it:-

“is in agreement with the position which the Pension Funds Adjudicator has taken in the matter of N Felander and other similar matters. That is, that the primary responsibility to repay the housing loan is the complainant’s, that the fund cannot be ordered to write-off the interest on the outstanding loan amount and that the fund is obliged in terms of its rules and the Act to charge interest on the housing loans it granted to members at the prescribed rate” and

“cannot allow the fund to write-off the arrear interest owed on the housing loans granted by the fund to its members in terms of its rules”

- 4.10 It submitted that even if it is determined that there was maladministration on its part the complainant has not suffered prejudice as a result of being required to pay the interest on the arrears. This is because as a result of repaying the interest that the first respondent is required to levy in terms of the Act, the complainant’s member share account is credited with the amount of the loan and interest thereon. Hence when the complainant pays the interest, he is effectively repaying himself and will receive this benefit upon exit from it.
- 4.11 The first respondent further submitted that the complainant had the benefit of the use and enjoyment of the higher salary for the period during which deductions were not made and could, if he so wished, have invested the additional salary in a way which offset the interest which was building up on the loan.
- 4.12 It submitted that it is not correct, as alleged by the complainant that the interest rate applicable to his loan was fixed at 10.5% but was increased to 15%. The interest rate on his loan has always been 15% in terms of Regulation 27. The complainant is also misinformed that some employees have left the employer without repaying their housing loans. It submitted that if there is an outstanding housing loan balance when a member leaves, this is deducted from the benefit in terms of section 37D of the Act.

## Further submissions

4.13 The first respondent's legal representative submitted that the first respondent sent letters to the complainant notifying him of the outstanding contributions. She submitted that the first and second respondents are currently searching for copies of the letters and as the issue at hand dates back to 2000, databases and files need to be searched.

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

### *Introduction*

5.1 The issues to be determined is firstly; whether or not the complainant's housing loan should be written off due to the interest accrued on the housing loan as a result of the employer's failure to effect regular deductions from his salary, secondly; whether or not the complainant should be compensated as a result of the alleged maladministration by the respondents and the employer and thirdly; whether or not the complainant should be allowed to withdraw from the first respondent whilst he is still employed.

### *Maladministration of the fund*

5.2 The complainant applied for a housing loan of R25 000.00 from the first respondent and this was granted on 4 May 1999. The housing loan repayments were deducted by the employer with effect from 31 July 1999. The employer stopped deducting from the complainant's salary for a period of 2 years and 7 months. By that time, due to the accrual of interest on the arrear amounts, the outstanding balance on the loan had increased. The complainant seeks the home loan written

off and he is requesting that the first respondent must refund him the money he has already paid towards the interest charged.

- 5.3 By accepting the housing loan, the complainant accepted that the primary responsibility to repay the loan was his. It was the complainant's responsibility to check his salary slips and ensure that amounts were being deducted from his salary and paid to the first respondent by the employer. This Tribunal ruled in *Felander v Cape Municipal Pension Fund* (PFAWE/17425/2007/CN), which was also a case in which the employer failed to make deductions from a member's salary for housing loan repayments and pay them to the fund, as follows:

"Inasmuch as it was the employer's duty to effect deductions against the complainant's salary and pay the amount to the respondent, it was the complainant's primary responsibility to ensure that the deductions were indeed made and that the monies were paid over to the respondent. The complainant cannot claim to have been unaware that for a period of four months no deductions had been effected on his salary since same would have been reflected on his salary slip.

The respondent cannot be faulted for the employer's failure to effect the said deductions. Thus, as against the respondent, no delictual act or maladministration can be found to have been committed."

- 5.4 The first and second respondents cannot be ordered to write off the arrear interest levied on the outstanding amount, nor can they be ordered to write off the outstanding housing loan. Further, in order for the complainant's claim to succeed, the elements of a *delictual* action must be proved. Thus, it must be proved that the employer and respondents committed an intentional or negligent act or omission, which was wrongful, which caused the complainant to suffer pecuniary loss for which a civil remedy for recovery of damages is available.

- 5.5 In the present matter the first respondent submitted to this Tribunal a copy of the letter dated 4 May 1994 that it sent to the complainant advising him that a housing loan has been granted and that an amount of R96.00 will be deducted weekly from his salary. The employer was responsible to deduct this amount from the complainant's salary. Thus, the respondents have not committed any act or omission as a result of which the complainant suffered loss.
- 5.6 If any party can be held responsible for an actionable loss that the complainant may have suffered, it would be the employer. However, it should be noted that the complainant received monthly salary advices from the employer, which would have reflected whether or not any housing loan repayments were made. No deductions were effected for a period of 2 years and 7 months, so this meant that the complainant's salary was larger. Thus, the complainant has not proved that he has suffered any loss. Therefore, the respondents and the employer cannot be held liable for damages. Moreover, the complainant is partly at fault as he requested that his weekly repayments be decreased to R76.59 from R96.00, which extended the loan term from 10 years to 25 years. The first respondent attached to its response a letter sent to the complainant in which it explained that the maximum repayment period granted for his loan agreement will change to 25 years. The first respondent also advised that it would not decrease his repayments any further since the amount of R76.59 is the minimum amount that he is allowed to pay. The manner in which the letter was phrased suggested that the complainant actually requested a longer period than 25 years, which the first respondent made clear it was unable to grant. This Tribunal afforded the complainant the opportunity to dispute the first respondent's submissions, including the letter attached to the response. The complainant had an opportunity to respond to the letter if he did not understand the contents thereof. However, there is nothing submitted before this Tribunal indicating that the complainant was not aware that his loan period would be extended to 25 years as a result of

the reductions of the loan repayments. As a result, he should have expected that the outstanding housing loan would increase due to the accruing arrears. However, funds need to be careful of the manner in which they communicate with members allowing concessions without explaining the financial and legal consequences thereof. The first respondent also submitted that it subsequently notified the complainant after the arrangement was made that his home loan deduction is not sufficient to cover the required instalment to ensure that monthly interest accruing on the outstanding amount is repaid. The first respondent also notified the complainant of the outstanding contributions. Due to the lapse of time, the notification could not be located as at the finalisation of this matter by this Tribunal. Therefore, the first respondent acted in the best interest of the complainant in ensuring that there are no more arrears accruing on the outstanding housing loan.

#### *Withdrawal from the fund*

- 5.7 The complainant has requested this Tribunal to make an order allowing him to exit the first respondent and transfer to a fund of his choice. There is nothing before this Tribunal that indicates that prior to lodging his complaint with this Tribunal, the complainant requested the first respondent to terminate his membership with it. It also appears that the first respondent did not address this part of the complaint. However, it is prudent to examine the provisions of the rules to establish whether it is possible.
- 5.8 The registered rules of a fund are binding on a fund and its members (see *Section 13 of the Act; Tek Corporation Provident Fund and Others v Lorentz* [2003] 3 BPLR 227 (SCA)). The board's authority therefore needs to be determined with reference to the fund rules.

5.9 Rule A15.4 of the first respondent's rules deal with termination of membership in the first respondent and it provides as follows:

**"A15.4 Termination of membership**

15.4.1 No **Active Member** may withdrawal from the **Fund** while he or she remains in **Service**; and **Membership** shall cease upon termination of **Service**, unless otherwise provided for in these **Rules**."

5.10 The complainant is currently employed with the employer and is an active member of the first respondent. According to the first respondent's rules, the complainant can only be allowed to withdraw from it upon termination of service. Due to the fact that the complainant is currently employed by the employer, the first respondent cannot comply with his request to withdraw from it as the rules do not permit him to exit whilst he remains in service. Therefore, this part of the complaint falls to be dismissed.

**[6] ORDER**

1. In the result, the complaint cannot succeed and is dismissed.

**DATED AT PRETORIA ON THIS 23<sup>RD</sup> DAY OF APRIL 2014**

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

**Section 30M Filing: High Court**

*Parties: unrepresented*