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REGISTERED POST

Dear Mr. Gibbon,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): BG GIBBON (“complainant”) v ZAI PROVIDENT FUND (“first respondent”) AND ZAI ARCHITECTS CC (“second respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the withholding of the complainant’s retirement benefit by the respondents following his retirement from employment on 30 June 2010.
- 1.2 The complaint was received by this Tribunal from Garlicke & Bousfield Inc, on behalf of the complainant on 16 May 2011. A letter acknowledging receipt thereof was sent to Garlicke & Bousfield on 20 May 2011. On the same date, letters were dispatched to the respondents giving them until 20 June 2011 to file their responses to the complaint. A response was received from Forster Attorneys on behalf of the respondents on 20 June 2011. The complainant’s reply to the respondents’ response was received from Garlicke & Bousfield Inc

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on 5 July 2011. The respondents' response to the complainant's reply was received from Forster Attorneys on 21 July 2011.

- 1.3 After considering the submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. As the background facts are known to the parties, they will be repeated only to the extent that they are pertinent to the issues raised herein. The determination and reasons therefor appears below.

[2] FACTUAL BACKGROUND

- 2.1 This complaint was lodged by Garlicke Bousfield Inc, in their capacity as legal representatives for the complainant ("the complainant's attorneys"). The complainant was employed by the second respondent from 1 July 2003 until 30 June 2010 when he retired from employment. He became a member of the first respondent by virtue of his employment.
- 2.2 Upon his retirement from the first respondent, the complainant became entitled to a retirement benefit from the first respondent. However, the second respondent alleged that the complainant and BGG Close Corporation, in which he was a member, were involved in the alleged wrongful and unlawful conduct against it, which resulted in it suffering damages totalling R3 785 090.05. On 30 November 2010, the second respondent instituted civil proceedings against the complainant and BGG Close Corporations due to the above misconduct in the KwaZulu-Natal High Court, Durban, under the following case number: 15215/2010. The second respondent then instructed the first respondent to withhold the complainant's retirement benefit pending the finalisation of civil proceedings that it instituted against the complainant and BGG Close Corporations. The first respondent complied with this request. The complainant's retirement benefit remains unpaid by the first respondent.

[3] COMPLAINT

- 3.1 The complainant is aggrieved by the withholding of his retirement benefit by the respondents. He submits that the High Court proceedings are underway for significant sums of money and involving a number of issues. The complainant submits further that the benefit that is being withheld by the respondents is his own money to which the second respondent did not contribute. He submits further that the High Court proceedings are going to take a considerable time to finalise and based on the current backlogs in the High Court, another two years. The complainant submits that the withholding of moneys due to him by the first respondent is in the circumstances unreasonable. He submits further that the work relating to Musgrave Centre Refurbishment and Malvern Park Shopping Centre that the second respondent claims to have been misappropriated by him by dishonest means is work that would have been given to him and was indeed given to him regardless of where he was employed. Thus, he contends, the second respondent's claim in this regard is without any substance because he did not dishonestly and inappropriately take work from it.
- 3.2 As for the Malvern Shopping Centre, the complainant submits that there is no work at this time that has been given to him by the developer. He states that if the work is to be allocated to him, then it will be on the same basis as in Musgrave contract, namely, that he is their preferred architect.
- 3.3 The complainant submits that the second respondent's complaint is lodged on the basis of "sour grapes" and is a vindictive act undertaken by it to prevent him from accessing funds in the first respondent that are rightfully his. In this regard, the complainant requests this Tribunal to note that he was the sole contributor to the first respondent and that

the second respondent never contributed any moneys for him to the fund.

- 3.4 Thus, the complainant requests this Tribunal to assist him and order the first respondent to pay his withheld benefit to him without any further delay.

[4] RESPONDENTS'S RESPONSE

- 4.1 Forster Attorneys submitted a response in their capacity as legal representatives of the respondents (“the respondents’ attorneys”). The respondents’ attorneys submitted that the first respondent has exercised its discretion to withhold any fund due to the complainant in terms of section 37D(1)(b)(ii) of the Act, pending the final determination of the action instituted by the second respondent against the complainant to recover damages and legal costs as a result of the complainant’s alleged dishonesty, theft and misconduct. With regards to their entitlement to do so, they referred to the determination of this Tribunal in the following matters: *Appanna Kelvinator Group Services of SA Provident Fund* 2000(2) BPLR 126 (PFA) and *Twigg v Orion Money Purchase Pension Fund and Another* 2001 (12) BPLR 2870 (PFA)).
- 4.2 The respondents’ attorneys submitted further that in terms of, *inter alia*, section 42 of the Close Corporation Act, as a member of the second respondent, the complainant stood in a fiduciary relationship with it. However, the complainant has breached his duties arising from that fiduciary relationship, *inter alia*, by dishonestly procuring, for his own benefit and/or the benefit of BGG Architects CC, of which he is a member, and whilst still a member of the second respondent, the Musgrave Centre and Malvern contracts, both contracts for which the second respondent had been appointed.

- 4.3 The respondents' attorneys submitted that the representations made by the complainant were false and he knew that they were false and they were made with the intention of inducing the project owners and developers to appoint him, as opposed to the second respondent, as the managing/principal architect in respect of the Malvern Park Shopping Centre Extension and Musgrave Centre Refurbishment projects.
- 4.4 The respondents' attorneys submitted further that whilst it is acknowledged that as matters stand, there is no judgement or court order against the complainant, these proceedings are pending in the KwaZulu-Natal High Court, Durban, case number: 15215/2010, and have reached a stage where pleadings have closed and the parties are awaiting the allocation of trial dates. The amount claimed by the second respondent from the complainant is substantial, being in the sum of R3 785.090.05. Conversely, the amount that would ordinarily have been due to the complainant, by virtue of his resignation from the first respondent, is substantially less.
- 4.5 It is further submitted that although the complainant has not received payment of any benefits which might be due to him from the first respondent by virtue of his misconduct aforesaid, he has procured for himself a substantial income from the projects which he misappropriated from the second respondent. As such, the complainant is benefiting, and will continue to benefit from his misconduct and will not be prejudiced by the non-receipt of any benefit from the first respondent pending the determination of the High Court action.
- 4.6 The respondent's attorneys submitted that the claim by the second respondent is genuine and *bona fide* and the complainant's misconduct fall squarely within the provisions of section 37D(1)(b) of the Act. It is submitted further that there is no suggestion that the complainant requires urgent access to his pension benefits or that he

will be prejudiced in any way should he not receive them now. Given the well-paying projects which he has misappropriated from the second respondent, and the income he will derive therefrom, there will, in any event, be no such prejudice. The respondents' attorneys submitted further that the benefits payable to the complainant have been reinvested and are secured.

- 4.7 The respondents' attorneys submitted that the request for a tax directive occurred prior to the second respondent having knowledge of the misconduct committed by the complainant, as set out above, alternatively, the nature and extent of that misconduct.
- 4.8 The respondents' attorneys submitted that the complainant's allegation of "sour grapes" is nonsensical. The second respondent has a legitimate claim and is expeditiously prosecuting that claim. The fact that the second respondent has already applied for trial dates, upon the close of pleadings, is a clear indication of its wish to have the dispute determined as soon as possible (as is its proposal to arbitrate the dispute)
- 4.9 With regards to the alleged non-payment to the first respondent of the employer portion of contributions by the second respondent, the respondents' attorneys submitted that the second respondent paid contributions to the first respondent on behalf of the complainant. Such payments were structured as part of the complainant's remuneration package.
- 4.10 The respondents' attorneys submitted further that the second respondent is not being unreasonable in withholding the benefit from the complainant. An employer is entitled to protection against an employee who has caused it to suffer loss through theft, dishonesty, fraud or misconduct, and is further entitled to withhold pension benefits pending the determination of liability. The complainant is not being

prejudiced by the non-payment of his pension benefit, and has further not consented to the legal proceedings being shortened by way of arbitration. The first respondent confirms further that the second respondent's claim falls squarely within the provisions of section 37D(b)(ii) of the Act.

- 4.11 The respondents' attorneys submitted that in light of the above, the respondents oppose the relief sought by the complainant and request that this Tribunal permits the respondents to withhold any funds due to the complainant pending the determination of its High Court action under the Kwa-Zulu Natal High Court, Durban case number 15215/2010.

Complainant's reply

- 4.12 The complainant's attorneys submitted that the money held by the first respondent on behalf of the complainant is money that solely belongs to him and was contributed by him out of his money earned from the second respondent. It is stated that the complainant needs to access the money urgently because, upon his departure from the employment of the second respondent, he established a new architectural business in partnership with a Eugene Mngadi under the style of BGG Architects CC. The complainant's attorneys state further that the complainant is in need of working capital for his new business and hence the urgent need to access his money held by the first respondent.
- 4.13 It is further submitted that the complainant is not obliged to agree to arbitration and further that, arbitration is not necessarily a quicker process and certainly not a cheaper process in that the parties will in addition to their own legal costs, have to fund the cost of an arbitrator and a venue. In the circumstances, it is the complainant's right to deal with the respondents' claims against him through the forum of the High

Court, which in any event was the forum initially chosen by the respondents.

- 4.14 The complainant's attorneys state that since lodging the complaint, it was instructed by the complainant that through the intervention of the Project Manager in respect of the Malvern Shopping Centre project, the question of the fees due to the second respondent and the complainant has been resolved and the second respondent has been fully paid its entitlement. The project is being proceeded with on the basis that the Project Manager and the developers of the Malvern Shopping scheme have of their own volition, chosen the complainant to complete the project in question. In the circumstances, the complainant's attorneys submit that the second respondent's claims in this regard have in fact fallen away.
- 4.15 The complainant's attorneys submitted further that as far as the Musgrave Centre work is concerned; it remains the complainant's contention that the work was always going to be allocated to him whether or not he remained in the employ of the second respondent. It had been work that he had undertaken on behalf of the owners of that Centre, from time to time, prior to his joining the second respondent. He had continued to deal with them throughout his employment with the second respondent and consequently after his departure, that work would have been given to him by the Project Managers. The complainant's attorneys submitted that in the circumstances, the complainant disputes most emphatically that the true nature of the dispute between him and the second respondent is one as envisaged in terms of section 37D(1)(b)(ii) of the Act. It is in fact, a purely commercial dispute over the question of entitlement to work.
- 4.16 Given what is stated above and in the complainant's complaint, the complainant's attorneys state that it is the respectful submission of the complainant that as the first respondent's rules make no provision for

the withholding of the complainant's entitlement, this matter is not an appropriate one for the withholding of benefits as alleged by the respondents using as their authority the cases cited in their response above. It is furthermore, the respectful submission of the complainant that the first respondent is in effect controlled by the second respondent and the withholding of his benefits has not been reasonably exercised and the effect of the withholding of his benefits is to delay his access to them for a disproportionate length of time and to his detriment.

- 4.17 The complainant's attorneys concluded by submitting that in the circumstances, it remains the submissions of the complainant that this is an appropriate case for this Tribunal to exercise its authority in ordering the first respondent to release the complainant's benefits to him.

Respondents' response to the complainant's reply

- 4.18 The respondents' attorneys submitted that the respondents pointed out that, upon termination of the complainant's employment with the first respondent, and prior to its knowledge of the complainant's misconduct, the complainant was paid out his loan account in the sum of approximately R 625 000.00 and in respect of the Musgrave project, BGG Architects CC would have received an initial payment of approximately R1.2 million, which incorporated work done by the second respondent. As such, it is submitted that the complainant's contention that he is in urgent need of funding is without foundation.

[5] **DETERMINATION AND REASONS THEREFOR**

Introduction

- 5.1 The complainant is aggrieved about the alleged unlawful withholding of his retirement benefit by the respondents. He contends that the

withholding of his retirement benefit by the respondents is in the circumstances as set forth above, unreasonable. The respondents' attorneys submitted that the withholding took place at the instance of the second respondent, pending the finalisation of the civil proceedings that it has instituted against the complainant. It thus needs to be determined whether or not the first respondent is authorised by law to withhold the complainant's retirement benefit pending the finalisation of the civil proceedings instituted against the complainant.

- 5.2 As a general rule, section 37A of the Act provides that pension benefits shall not be reducible, transferable or executable. The policy behind section 37A is to protect members' pension benefits. However, there are exceptions to this principle in certain circumstances. Section 37D(1)(b)(ii) is one of the exceptions to the general rule. It provides that:

- “(1) A registered fund may-
- (a) ...
 - (b)
 - (c) 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 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;”

- 5.3 Therefore, a registered pension fund organisation is, notwithstanding the general provisions of sections 37A, empowered by the Act to deduct from any benefit due to a member in terms of the Rules, an amount representing damages suffered by his employer by reason of his dishonesty, theft, fraud or misconduct. The *proviso* is that the member concerned must have admitted liability to the employer in writing; or a judgement should have been obtained against him in a court of law. 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 (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 the member’s benefit and pay it over to the employer.
- 5.4 The submissions indicate that judgement was not obtained against the complainant in respect of the alleged misconduct and dishonesty against the second respondent. The complainant also did not admit liability or sign any acknowledgement of liability in respect of the alleged misconduct and dishonesty. However, there is nothing to suggest that the second respondent delayed the institution of legal proceedings against the complainant following his retirement from employment. The respondents had also established that the second respondent’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 misconduct and dishonesty by the complainant.

- 5.5 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 judgement 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.
- 5.6 In the present matter, the damage that the complainant allegedly caused to the second respondent by reason of the alleged dishonesty and misconduct amounted to R3 785 090.05. The first respondent confirmed that the current value of the complainant's benefit in the fund amounts to R374 404.98. For fear of dissipation of benefits prior to obtaining a judgement of a court of law determining the complainant's liability to the third respondent, section 37D(1)(b) must be interpreted to include the first respondent's power to withhold his retirement benefit pending the determination of his liability by the courts in which legal proceedings have been instituted.
- 5.7 Therefore, the respondents complied with the requirements of section 37D(1)(b)(ii) when they withheld the complainant's benefit as there is a pending case against him for damages against the second respondent. In the *Highveld Steel* case mentioned above, at paragraph 19, the Supreme Court of Appeal held the following regarding the power of a fund to withhold benefits pending finalisation 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”.

- 5.8 There is nothing to indicate that the respondents exercised their powers or discretion in this regard unreasonably.
- 5.9 In light of the above, it cannot be said that the withholding of the complainant’s withdrawal benefit is unreasonable because the submissions indicate that all reasonable measures had been taken by the second respondent to expedite matters and the second respondent has shown a genuine interest in finalising this matter without delay. The progress report suggests that the pleadings have now been closed and the second respondent is only awaiting the allocation of a trial date. Therefore, the first respondent acted lawfully in withholding the complainant’s benefit upon a receipt of a request in this regard from the second respondent. Therefore, it is the finding of this Tribunal that the discretion to withhold the complainant’s benefit is being exercised properly. Thus, only when the complainant is successful in defending the proceedings will his benefit be paid to him by the first respondent. It follows therefore, that the first respondent cannot be ordered to pay the benefit to the complainant at present.

[6] ORDER

1. The complaint is dismissed.

DATED AT JOHANNESBURG ON THIS 8TH DAY OF FEBRUARY 2013

MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M filing: High Court

Parties represented by their Attorneys