Ground & 1st Floors
23 FREDMAN
Cnr. Fredman Drive & Sandown Valley Crescent
Sandown
**SANDTON**
2196

P.O. Box 651826, **BENMORE,** 2010
**Tel:** 087 942 2700; 011 783 4134 **Fax:** 087 942 2644
**E-Mail:** enquiries@pfa.org.za
**Website:** www.pfa.org.za

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**REGISTERED POST**

Dear Madam,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act"): R MAHOMED ("complainant") v RELYANT RETIREMENT FUND ("first respondent"), NMG CONSULTANTS AND ACTUARIES ADMINISTRATORS (PTY) LTD ("second respondent") AND ELLERINE FURNISHERS (PTY) LTD ("third respondent")**

## [1] INTRODUCTION

1.1 The complaint concerns the withholding of the complainant's withdrawal benefit by the first respondent.

1.2 The complaint was received by this Tribunal on 29 June 2011. A letter acknowledging receipt thereof was sent to the complainant on 4 August 2011. On 15 September 2011, the complaint was dispatched to the respondents giving them until 17 October 2011 to file their responses. A joint response was received from the first and third respondents on 24 October 2011. This response was forwarded to the complainant on

14 November 2011. The complainant's reply was received on 18 November 2011.

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 commenced employment with the third respondent on 1 September 1982. She became a member of the first respondent with effect from 1 May 2000. The second respondent is the administrator of the first respondent.

2.2 On 25 November 2009, the complainant's employment was terminated by the third respondent subsequent to an internal disciplinary hearing where she was found guilty of fraud and dishonesty. Following the termination of her employment, she became entitled to payment of her withdrawal benefit by the first respondent in terms of its rules.

2.3 The third respondent, subsequent to an internal forensic investigation, opened a criminal case against the complainant for fraud. The third respondent then requested the first respondent to withhold payment of the complainant's benefit pending the resolution of the court case. The first respondent adhered to the third respondent's request.

## [3] COMPLAINT

3.1 The complainant is dissatisfied that the first respondent is still withholding her benefit following a request from the third respondent. Therefore, the complainant requests the assistance of this Tribunal in this regard.

## [4] RESPONSES

4.1 The first and third respondents submitted that the complainant's benefit is withheld on the request of the third respondent, pending the outcome of a criminal investigation into certain alleged irregular activities whilst she was in the employ of the third respondent. The complainant and her legal representative have also been advised of the above on a number of occasions. The complainant was employed as a manager of the third respondent's store in Stanger. The third respondent suffered extensive losses at the aforesaid store whilst under the management of the complainant. An internal investigation by the third respondent's internal forensic investigators revealed that the losses emanated from alleged fraudulent transactions relevant to self or informally employed customers and the investigation further implicate the complainant's (as well as other staff members) involvement in the deliberate and intentional disregard of internal credit granting policy and other security policies.

4.2 The first and third respondents further submitted that the complainant was dismissed following a disciplinary enquiry and upon referring the matter to the Commission for Conciliation, Mediation and Arbitration ("CCMA") the dismissal was confirmed to be for a fair reason, following a fair hearing. The complainant, at the above hearing, pleaded guilty to a charge of dishonesty relevant to the submission of false information pertaining to the credit granting policy.

4.3 The first and third respondents further submitted that the quantum of the losses as a result of the alleged fraudulent transactions, and which can be confirmed with documentary evidence, exceeds R700 000.00 with a potential total loss to exceed R1.1 million. The complainant's fund credit in the first respondent amounts to approximately R225 000.00, which is

significantly less than the amount of the alleged losses. The complainant (and other staff members) further benefited directly as a result of the alleged fraud as they received commissions and incentives (which have not been taken into account in the loss amount) on the alleged fraudulent transactions.

4.4 The first and third respondents submitted that the matter has been reported to the South African Police Services ("SAPS") in Stanger under case number 588/1/2010 and has since been transferred to the Specialised Commercial Crimes Unit in Durban, where it is currently still under investigation. The investigation has been pending for some time and not due to any delay on their side and beyond their control. This matter has been transferred to a third investigating officer which obviously contributed to the delay in the finalisation of the investigation. The nature of the matter is quite complex and involves a number of transactions. The third respondent's internal investigators already consulted with the investigating officer on a number of occasions and continually provide all updated information as requested by the investigating officer. Upon final determination of the criminal matter, an appropriate compensation order will be requested, in terms of the relevant provisions of the Criminal Procedure Act to meet the requirements of section 37D(1)(b)(ii) of the Act.

4.5 The first and third respondents further submitted that there is sufficient evidence from the internal investigation to make out a *prima facie* case against the complainant (and other former staff members) and further that there is more than a reasonable likelihood that the criminal proceedings will result in a guilty finding.

4.6 The first and third respondents further submitted that section 37D(b)(ii) of the Act provides for compensation against retirement benefits for damages caused to employers due to fraud, dishonesty, etc. There is

sufficient justification in law for the first respondent to adhere to the third respondent's request to withhold the complainant's retirement benefit. In this regard, the respondent referred to the following determinations, *Allison v IMATU Retirement Fund & Another* and *Frederick v NMG Consultants and Actuaries (Pty) Ltd and Another*, which dealt with the question of withholding of benefits pending the institution of civil or criminal proceedings. In both cases, the question whether the fund's power in terms of the Act includes a power to withhold a member's benefits pending the institution of civil or criminal proceedings by the employer was answered in the affirmative. It was held that in order to protect the employer's right to pursue recovery of misappropriated monies, the provision of deduction should be interpreted to impliedly include the power to withhold payment of the benefit pending the determination or acknowledgement of liability. It was further held that the power to withhold must be exercised reasonably and the benefit should not be withheld for an unreasonably long period of time.

4.7 The first and third respondents further submitted that they have done everything reasonable in their power to investigate and pursue the recovery of the alleged losses as quickly as possible. If the complainant is successful and is permitted to receive the proceeds of her retirement fund credit, they could suffer prejudice as they have no knowledge as to whether the complainant has resources to meet any compensation order in terms of the Criminal Procedure Act, that may be given against her. If considered against balancing of all competing interests (in particular the purpose of section 37D of the Act, the potential prejudice they may suffer and the complexity of the investigation) they respectfully submit that no order should be made compelling the release of the complainant's retirement benefits until such time as the criminal proceedings have been finalised.

*Complainant's reply*

4.8 The complainant submitted that she was dismissed on 25 November 2009 and at that stage she signed and submitted the withdrawal notification form for payment of her withdrawal benefit. Almost two years have passed since she was dismissed.

4.9 The complainant submitted that there is a complete absence of a satisfactory explanation in relation to:

- The amounts that are alleged to be the subject matter of the possible claim with sufficient information to enable this Tribunal to assess the veracity of such claim and the basis of the suggestion that the complainant would, as a matter of law, be liable for such losses. The complainant denies any basis for a claim to be made against her.
- An attempt to quantify the claim. The complainant denies that there is any substance whatsoever to the alleged claim of losses suffered.
- Any explanation as to the delays with regard to instituting proceedings for the recovery of the amount to the extent that there have been delays with regard to the SAPS investigation, there was no bar to a civil claim being instituted.
- A satisfactory explanation as to the reasons for the delay in taking any steps for the recovery of the amount due.

4.10 The complainant further submitted that there is no substantiation for the bold allegations of complexities of investigation and the possibility of a claim existing for the amount alleged to be due. As such, the prejudice suffered by her with regard to the delay in the payment of her pension benefits wholly outweighs the third respondent's interest to recover the alleged financial losses.

## [5] DETERMINATION AND REASONS THEREFOR

5.1 The issue for determination is whether or not the withholding of the complainant's benefit by the first respondent is lawful. The complainant is aggrieved by the withholding of her withdrawal benefit. The first respondent submitted that the withholding took place at the instance of the third respondent pending the outcome of the criminal investigations and legal proceedings against the complainant.

5.2 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, 99 of 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

fund benefits. However, it allows for exceptions to this principle in certain circumstances. Section 37D(1)(b) 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-
>
> (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'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 A pension fund may withhold payment of a member's pension fund benefits pending the determination or acknowledgement of such member's liability (see *Highveld Steel and Vanadium Corporation LTD v Oosthuizen* [2009] 1 BPLR 1 (SCA), at paragraph 19). Further, in *Sayed-Essop v Non-Ferrous Metal Works Pension Fund and Another* [2000] 9 BPLR 1051 (PFA), it was held that where the delay in the prosecution of the member is not due to the fund's or employer's fault, the withholding of

benefits for two years was not unreasonable.

5.5 On the facts of the present case, the complainant's employment was terminated on 25 November 2009. An internal forensic investigation was conducted and completed by the third respondent and the matter was subsequently reported to the police in Stanger in January 2010, under case number 588/1/2010. The case has since been transferred to the Specialised Commercial Crimes Unit in Durban. The charges against the complainant involve dishonesty and fraud. The case has been transferred to the third investigating officer, which obviously contributed to the delay in the finalisation of the investigation. In the circumstances, the progress report suggests that there is a delay in the prosecution of the complainant, but it is not due to the fault of the first respondent or third respondent.

5.6 In light of the above, it is the finding of this Tribunal that the discretion to withhold the complainant's benefit is being exercised properly and the first respondent cannot be ordered to pay the benefit to the complainant at present.

**[6] <u>ORDER</u>**

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

**DATED AT JOHANNESBURG ON THIS 27TH DAY OF FEBRUARY 2013**

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**MA LUKHAIMANE**

**DEPUTY PENSION FUNDS ADJUDICATOR**

**Section 30M Filing: High Court**

*Complainant represented by Henwood Britter & Caney Attorneys*

*Respondents unrepresented*