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Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): LLR NCOBELA (“complainant”) v EDCON PROVIDENT FUND (“first respondent”), ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD (“second respondent”) AND EDCON (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 13 March 2012. A letter acknowledging receipt thereof was sent to the complainant on 22 March 2012. On the same date, the complaint was dispatched to the respondents giving them until 23 April 2012 to file their responses. A response, which was forwarded to the complainant, was received from the second respondent on 7 May 2012. No further submissions were received.

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)

- 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 7 August 2004. He became a member of the first respondent by virtue of his employment. The second respondent is the administrator of the first respondent.
- 2.2 On 31 December 2010, the complainant's employment was terminated by the third respondent subsequent to its internal investigation for fraudulent transactions allegedly committed by the complainant against it. The complainant became entitled to payment of his withdrawal benefit by the first respondent in terms of its rules.
- 2.3 The third respondent, subsequent to an internal investigation, opened a criminal case against the complainant for fraud and theft. 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. The criminal case was subsequently withdrawn due to insufficient evidence. Following the withdrawal of the criminal case against the complainant, he requested the first respondent to pay his withheld benefit. However, the first respondent refused to accede to his request.

[3] COMPLAINT

- 3.1 The complainant submitted that he was suspended from work for

misconduct in November 2010. An internal investigation was done and completed after four weeks. A hearing was held resulting in his dismissal on 30 December 2010. The line manager advised him to claim his pension benefit, however, the human resources manager advised that he should wait three months for payment. However, he did not receive his benefit after three months. He was arrested in June 2011. The criminal case started in June 2011 until December 2011, where the third respondent continuously applied for postponement of the matter. The case was eventually withdrawn by the court, and he has been trying to obtain payment of his benefit since January 2011 without success.

3.2 Therefore, the complainant requests the assistance of this Tribunal in this regard.

[4] RESPONSE

4.1 The second respondent filed a response on behalf of first respondent. The second respondent submitted that upon receipt of the complaint, the first respondent conducted investigations to establish if there was any legal basis to withhold the complainant's fund credit. According to the first respondent's records, the complainant joined the first respondent on 7 August 2006. He was dismissed from employment on 31 December 2010. Following the complainant's dismissal, the third respondent alleged that it had suffered financial prejudice as a result of the complainant's unlawful conduct and requested it to withhold the complainant's benefit pending the finalisation of the criminal case, a copy of the letter containing the third respondent's instructions is attached on the response. The trustees of the first respondent considered the third respondent's request and resolved to withhold payment of the complainant's benefit.

4.2 The second respondent submitted that Rule 11 of the rules of the first respondent deals specifically with circumstances under which a member's benefit may be withheld. Rule 11 provides:

"Notwithstanding any other provisions of these Rules, the Trustees may, where an Employer has instituted legal proceedings in a court of law and/or laid a criminal charge against the Member concerned for compensation in respect of damage caused to the Employer as contemplated in Section 37D of the Act, withhold payment of the benefit until such time as the matter has been finally determined by a competent court of law or has been settled or formally withdrawn; provided that:

- (a) The amount withheld shall not exceed the amount that may be deducted in terms of section 37D(1)(b)(ii) of the Act;
- (b) The Trustees in their reasonable discretion are satisfied that the Employer has made out a prima facie case against the Member concerned and there is reason to believe that the Employer has reasonable chance of success in the proceedings that have been instituted;
- (c) The Trustees are satisfied that the Employer is not at any stage of the proceedings responsible for any undue delay in the prosecution of the proceedings."

4.3 According to the second respondent, the first respondent was requested by the third respondent to withhold the complainant's benefit with a view to eventually effect a deduction from the benefit in respect of compensation due to the third respondent for the damage suffered as a result of the complainant's act of fraud or theft. The third respondent has indicated that the damage it has suffered is estimated to be approximately R80 976.30, excluding legal fees. The complainant submitted that the case against him was thrown out of court. However, according to the information it received from the third respondent, the charges against the complainant were provisionally withdrawn. The South African Police Service ("SAPS") are still investigating the matter further and they have confirmed that the

matter will be placed on the roll again, a copy of the letter from SAPS is attached on the response.

- 4.4 The second respondent submitted that since the third respondent did not institute civil legal proceedings against the complainant, the legal process to bring the criminal case is not in the third respondent's hands but in the hands of the National Prosecuting Authority. It is for this reason that the trustees of the first respondent are satisfied that there is no undue delay on the part of the third respondent. The complainant has not been acquitted by a court and whatever delays that are being experienced are not within the control of either the first respondent or the third respondent. The third respondent has shown that it is seriously pursuing the matter by laying criminal charges against the complainant with the SAPS under case reference number Durban North CAS: 216/06/2011, and maintaining contact with the investigating officer assigned to the case to check on the progress in having the complainant prosecuted.
- 4.5 In view of the information presented to the trustees by the third respondent, the trustees are of the view that as the third respondent dismissed the complainant for misconduct, the third respondent has established a *prima facie* case against the complainant. The third respondent is therefore, entitled to recover damages it suffered as a result of the complainant's unlawful acts as contemplated in section 37D(1)(b)(ii). The second respondent submitted that the trustees have appropriately exercised their discretion when giving effect to the third respondent's request to withhold the benefit following submission of this complaint. The third respondent's interest deserves the protection afforded to it in terms of section 37D(1)(b)(ii) of the Act, because to release the money will result in the third respondent not being able to recover from the complainant's misconduct.

- 4.6 The second respondent submitted that the complainant's gross benefit as at the date of dismissal amounted to R32 268.67. An amount of R1 514.08 was deducted from the gross benefit and paid to the South African Revenue Services ("SARS")
- 4.7 The second respondent referred to the following cases of *Appanna v Kelvinator Group Services of SA Provident Fund* [2000] 2 BPLR 126 (PFA) and *Buthelezi v Municipal Gratuity Fund and Another (1)* [2001] 5 BPLR 1996 (PFA), where it was held in both matters that the purpose of section 37D(b) of the Act is to protect an employer's right to pursue recovery of misappropriated monies and in order to give effect to that purpose, the provision for deduction should be interpreted to impliedly include the power to withhold payment of the benefit for a reasonable time pending the determination or acknowledgment of liability.
- 4.8 The second respondent submitted that the trustees are alert to the fact that the third respondent's right to have the complainant's benefit withheld is not absolute and has to be considered in light of the complainant's rights to receive his benefits. The trustees are also satisfied that, due to the nature of the charges laid against the complainant, the circumstances of the case, and the strength of the case against the complainant, the period that elapsed since the complainant exited the first respondent is not at all unreasonable and also is not due to an undue delay on the part of the third respondent.
- 4.9 The second respondent concluded by submitting that, in view of the above, the withholding is reasonable and in line with the rules of the first respondent. Therefore, the complaint against the first respondent should be dismissed and the first respondent shall continue to withhold the complainant's benefit pending finalisation of the criminal proceedings instituted by the third respondent.

[5] **DETERMINATION AND REASONS THEREFOR**

- 5.1 The issue that falls 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 his withdrawal benefit. The respondents contended that the withholding took place at the instance of the third respondent pending the outcome of the criminal investigations and 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 The complainant's employment was terminated on 31 December 2010 and his case was brought before a court of law in June 2011. The facts show that the case was temporarily withdrawn as further investigation by SAPS is still pending. The charges against the complainant involve dishonesty and fraud. In the circumstances, the progress report suggests that the third respondent has a genuine interest in finalising this matter timeously. The delay in the prosecution of the complainant is not due to the third respondent's fault. 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] ORDER

1. In the result, the complaint is dismissed.

DATED AT JOHANNESBURG ON THIS 22nd DAY OF NOVEMBER 2012

MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M Filing: Magistrate's Court

Parties unrepresented

