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**PER REGISTERED POST**

Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,  
24 OF 1956 (“the Act”): EJ KANNIAH (“complainant”) v NMG UMBRELLA  
PROVIDENT FUND (“first respondent”) AND NMG CONSULTANTS AND  
ACTUARIES (PTY) LTD (“second respondent”)**

**[1] INTRODUCTION**

- 1.1 The complaint concerns the withholding of the complainant's withdrawal benefit by the first respondent in terms of section 37D of the Act.
- 1.2 The complaint was received by this Tribunal on 22 January 2015. A letter acknowledging receipt thereof was sent to the complainant on 23 January 2015. On the same date, the complaint was forwarded to the respondents affording them an opportunity to file their responses by 23 February 2015. A response was received from the second respondent on 4 March 2015. On the same date the response was forwarded to the complainant requesting further submissions, if any, by 11 March 2015. No further submissions were received from the parties.

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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.

1.3 After considering the written submissions before this Tribunal, 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 was employed by the second respondent from 1 September 2011 until his dismissal on 28 August 2014. By virtue of his employment, he was a member of the first respondent.
- 2.2 The second respondent opened a criminal case against the complainant at the Randburg Police Station, under case number CAS428/10/2014.
- 2.3 The first respondent is administered by the second respondent. The second respondent is also a participating employer in the first respondent and the former employer of the complainant.

## [3] **COMPLAINT**

- 3.1 The complainant submitted that he was a member of the first respondent from 1 September 2011 until his dismissal on 28 August 2014. Prior to his dismissal, his employment was suspended on 7 April 2014. His legal representatives challenged his prolonged suspension in a letter dated 22 July 2014. The second respondent responded to the letter on 23 July 2014, stating that its investigation has been completed and a disciplinary hearing will follow soon. The complainant attached the letters in support of his complaint.
- 3.2 The complainant submitted that he was requested by the second respondent to attend a disciplinary hearing on 4 August 2014. He was subsequently dismissed on 28 August 2014. Upon his dismissal, he

duly completed his withdrawal claim forms. He submitted that he engaged his legal representatives to demand the payment of his salary on 25 August 2014, which the second respondent unlawfully withheld. The second respondent subsequently paid his salary.

- 3.3 The complainant further submitted that Rule 6.1 of the Rules of the first respondent provides for the immediate payment of his withdrawal benefit. He submitted that he did not opt to have his fund credit transferred to another approved retirement fund. He followed up on the payment of his withdrawal benefit on numerous occasions. He submitted that he was informed that his benefit is being processed. The complainant submitted that on 20 October 2014, he engaged his legal representatives to follow up with the second respondent on the payment of his benefit. He attached a copy of the letter in support of his complaint. In this letter, his legal representatives demanded payment in the amount of R91 172.60 which was his fund credit as at 1 October 2014, to be paid immediately. In response to his legal representatives demands, the second respondent indicated that a criminal case has been opened against him and that his benefit is being withheld pending the finalisation of the case. However, it seemed that the second respondent only opened the criminal case after it received the letter from his legal representatives, demanding payment of his withdrawal benefit. He submitted that his employment was suspended on 7 April 2014 and the second respondent undertook a lengthy investigation which did not result in any criminal charge being laid against him. He submitted that the second respondent's conduct is malicious and vindictive.
- 3.4 The complainant submitted that his investigation with the SAPS revealed that a criminal case was opened alleging "certain fraudulent activities involving benefits at the second respondent". It was clear that there is no particular case opened against him. To date, he has not been approached by the police. He was informed that the case was

thrown out due to lack of evidence. His legal representatives indicated in an email dated 22 October 2014, to the second respondent that there is no compliance with Rule 10.3 of the first respondents Rules. In the second respondent's response dated 29 October 2014, the latter indicated that Nolands Forensics has been appointed as the investigators in April 2014 and has been tasked with opening a criminal case against the complainant. It further stated that a criminal case was opened on 21 October 2014 and the estimated liability is an amount of R805 000.

- 3.5 The complainant further submitted that he has referred an unfair dismissal dispute to the Commission for Conciliation Mediation and Arbitration ("CCMA"). During the conciliation meeting, the second respondent offered to pay his benefit upon his withdrawal of the unfair dismissal case. However, he did not receive any further correspondence from the second respondent. He instructed his legal representatives on 5 December 2014, to follow up on the payment of his benefit. He did not receive a response to this letter and again instructed his legal representatives on 14 January 2015, to write a letter to the second respondent to demand the payment of his withdrawal benefit. In this letter it was clearly indicated that his withdrawal benefit ought to have been paid in terms of Rule 6.1 of the first respondent's Rules and that there was an undue delay and that the second respondent did not make any *prima facie* case against him in terms of Rule 10(3)(2). Therefore, the complainant submitted that the second respondent has unlawfully withheld his withdrawal benefit.
- 3.6 The complainant requests this Tribunal to investigate the matter and order the second respondent to release his withdrawal benefit in the amount of R91 172.60 together with legal costs on attorney client scale without any further delay.

#### [4] RESPONSES

### *First and second respondents*

- 4.1 The first respondent submitted that it received notice of the complainant's dismissal on 28 August 2014. It was informed that the complainant was dismissed due to, *inter alia*, fraudulent activities relating to benefit payments made from another retirement fund administered by the second respondent
- 4.2 The first respondent submitted that notwithstanding the fact that the complainant completed withdrawal claim forms, the second respondent in its capacity as the employer of the complainant, requested it to withhold payment of his withdrawal benefit in terms of section 37D(1)(b)(ii) of the Act. The second respondent's request included the following information:-
  - The second respondent became aware of potential fraud committed by the complainant during March 2014 and appointed independent investigators, Nolands Forensics, who commenced its investigations on 1 April 2014. The complainant was suspended from service in April 2014 and was dismissed after a disciplinary hearing in August 2014. It attached the statement of findings in support of its response.
  - A criminal case was opened at the Randburg Police Station under case number CAS438/10/2014. An interim report from Nolands Forensics confirms that whilst the second respondent wished to report the matter to the SAPS earlier, Nolands Forensics were only able to present it with sufficient evidence to report the matter on 21 October 2014.
  - The complainant referred the matter to the CCMA and withdrew his case on the day of the hearing i.e. 18 November 2014.
  - The initial investigations revealed the losses incurred by the second respondent as a result of the alleged misconduct of the complainant in the amount of R80 000, however, further instances of possible fraud amounting

to losses of about R702 000.00 were identified and are currently under investigation.

- 4.3 The first respondent refers to the provisions of Rule 10.3 of its Rules, which provides for the withholding of a benefit pending the investigation of a criminal charge against a member. The first respondent was provided with proof of the investigation done by the second respondent and the disciplinary proceedings that were conducted as well as further investigations conducted by the independent investigators, which are still continuing. Based on these investigations, the second respondent informed the first respondent that there was a significant amount of evidence for the state to make out a *prima facie* case against the complainant, once their investigations had been completed.
- 4.4 Considering the complexity of the alleged fraud that was committed, as well as the on-going investigations being conducted by the State and the SAPS, the first respondent concluded that a *prima facie* case had been made against the complainant and there was reason to believe that the second respondent, in its capacity as the former employer of the complainant, has a reasonable chance of success in the proceedings instituted as required in terms of Rule 10.3.2 of the Rules of the first respondent. The first respondent submitted that it nevertheless required to be updated on progress in this investigation on a regular basis and the latest progress report submitted to it was on 20 February 2015. It attached a copy of the progress report in support of its response.
- 4.5 The first respondent submitted that given the information provided to it by the second respondent and supported by Nolands Forensics, it has no reason to believe that there has been an undue delay by the second respondent as contemplated in Rule 10.3.3 of its Rules. The allegations made by the complainant are denied in particular the following:-

- The second respondent only acted when prompted to do so by the complainant's legal representatives.
  - That no case has been opened by the SAPS or that it was thrown out for lack of evidence, as the contrary is evident from the progress report attached to its response.
  - The second respondent had been malicious and vindictive and there is no intention to finalise the matter. However, it is evident from the content of the progress report that Nolands Forensics has taken every reasonable step in order to enable the State and the SAPS to proceed in the matter and they continue to do so.
- 4.6 Therefore, the complaint against it should be dismissed. With regard to cost, it is submitted that a cost order against the respondents will be unfair given the following:-
- Section 30 of the Act does not require legal representation of the parties, however, the complainant elected to appoint legal representatives;
  - The facts of the matter speak for themselves and the relevant Rules of the first respondent are clear and do not require analysis of complex legal principles;
  - The complainant was employed in the retirement funds industry for many years and should have sufficient knowledge of the legal principles, rules and legislation applicable to the matter;
  - The respondent should not be penalised for costs incurred in defending a complaint against its actions that were both reasonable and permissible in terms of the Rules and the provisions of the Act.

**[5] DETERMINATION AND REASONS THEREFOR**

- 5.1 The issue that falls for determination is whether or not the withholding of the complainant's withdrawal benefits by the first respondents, pending the fraud investigation against the complainant is permissible.
- 5.2 The board may only do what is set forth in the rules of the fund. If what it proposes to do, or have been ordered to do, is not within the powers conferred upon it by the rules, it may not do it (see *Tek Corporation Provident Fund and Another v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28]). Rule 10.3 of the first respondent's Rule's provides for the deductions from benefits and Rule 10.3 reads as follows:-

“10.3 In respect of a claim that has been lodged in writing with the Board within such reasonable time of the event giving rise to the benefit as the Board may from time to time set for making such claims, the Board may, notwithstanding the provisions of these Rules, where a Particular Employer has instituted civil legal proceeding in a court of law and/or laid a criminal charge against a Member concerned for compensation in respect of damage caused to the Participating 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, provide that:-

- 10.3.1 The amount withheld shall not exceed the amount that may be deducted in terms of section 37D(b)(ii) of the Act;
- 10.3.2 The board in its reasonable discretion is satisfied that the Participating Employer made a *prima facie* case against the Member concerned and there is reason to believe that the Participating Employer has reasonable chance of success in the proceedings instituted;
- 10.3.3 The board is satisfied that the Participating Employer is not at any stage of the proceeding responsible for any undue delay in the prosecution of the proceedings;

10.3.4 Once the proceedings have been determined, settled or withdrawn, any benefit to which the Member is entitled shall be paid forthwith; and

10.3.5 The Board, with the express written consent of the Member whose benefit is withheld, may, if practical and applicable, permit the value of the Member's benefit as at the time of such request be protected, in whatever matter it believes appropriate, from the possibility of a decrease as a result of poor investment performance."

The rules of the first respondent provide for a benefit to be withheld pending the outcome of a criminal charge against its member.

5.3 The relevant sub-section of section 37D(1)(b)(ii) of the Act for the purposes of this determination provides as follows:

"A registered fund may-

(a) ...

(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 Accordingly, section 37D(1)(b)(ii) of the Act requires the following requirements to be met before a fund may make any deductions from a member's benefit:

- there must be a benefit payable;
- there must be an amount due by the member to his employer on the date of his retirement or on which he ceases to be a member of the fund;
- the damage caused to the employer must be by reason of theft, dishonesty, fraud or misconduct by the member;
- the member must either admit liability in writing to the employer or judgment must be obtained in any court; and
- the judgment or the written admission of liability must relate to compensation due in respect of the damage caused to the employer by the member.

5.5 Therefore, the rules of the first respondent correlate with the provisions of section 37D(1)(b)(ii) in that they all allow deductions from benefits due or payable to a member.

5.6 The object of section 37D(1)(b)(ii) is to protect the employer's right to pursue the recovery of money misappropriated by its employees. It is a fact that there are lengthy delays in finalising cases of this nature and as a result, it might take some time for the case against the complainant to be finalised. Thus, payment of a benefit to a member whilst awaiting the outcome of a civil or criminal case might render that outcome futile, in particular if it is in favour of the employer.

- 5.7 The complainant submitted that the second respondent only opened the criminal case after it received the letter from his legal representatives, demanding payment of his withdrawal benefit. He submitted that his employment was suspended on 7 April 2014 and the second respondent undertook a lengthy investigation which did not result in any criminal charge being laid against him. He submitted that the second respondent's conduct is malicious and vindictive. The complainant further submitted that his investigation with the police revealed that a criminal case was opened alleging "certain fraudulent activities involving benefits at the second respondent". It was clear that there is no particular case opened against him. To date, he has not been approached by the police. He was informed that the case was thrown out for the lack of evidence. His legal representatives indicated in an email dated 22 October 2014, to the second respondent that there is no compliance with Rules 10.3 of the first respondents Rules. In the second respondent's response dated 29 October 2014, the latter indicated that Nolands Forensics has been appointed as the investigators in April 2014 and has been tasked with opening a criminal case against the complainant. It further stated that a criminal case was opened on 21 October 2014 and the estimated liability is an amount of R805 000.
- 5.8 The first respondent submitted that given the information provided to it by the second respondent and supported by Nolands Forensics, it has no reason to believe that there has been an undue delay by the second respondent as contemplated in Rule 10.3.3 of its Rules. The allegations made by the complainant are denied in particular the following:-
- The second respondent only acted when prompted to do so by the complainant's legal representatives.

- That no case has been opened by the SAPS or that it was thrown out for lack of evidence, as the contrary is evident from the progress report attached to its response.
  - The second respondent had been malicious and vindictive and there is no intention to finalise the matter. However, it is evident from the content of the progress report that Nolands Forensics has taken every reasonable step in order to enable the State and the SAPS to proceed in the matter and they continue to do so.
- 5.9 It is common cause between the parties that there is an allegation of fraud against the complainant. The first respondent submitted that in terms of the progress report received from the second respondent, investigations are still underway. The second respondent avers that it suffered a loss in an estimated amount of R80 000, however, further instances of possible fraud amounting to losses of an amount of R702 000 are being investigated. The board of the first respondent is satisfied that the second respondent has established a *prima facie* case against the complainant. The first respondent submitted that the board will continue to monitor the progress of this matter on a regular basis in order to ensure that there is no undue delay by the second respondent.
- 5.10 Having regard to the rules of the first respondent and the Act, there is nothing in the first respondent's conduct to suggest that it acted outside the scope of its powers as contained in section 37D(1)(b)(ii) of the Act, by withholding the complainant's benefits pending the finalisation of the criminal case against the complainant. Thus, the withholding of the complainant's withdrawal benefit by the first respondent, pending the outcome of the criminal charge, is permitted by the rules and the law (see *Twigg v Orion Money Purchase Pension Fund and Another* (1) [2001] 12 BPLR 2870 (PFA)). The first respondent must monitor the progress of the criminal proceedings against the complainant to ensure that it is not delayed for a long period to the prejudice of the complainant. Therefore, the complaint should be dismissed.

**[6]     ORDER**

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

**DATED AT PRETORIA ON THIS 23<sup>RD</sup> DAY OF APRIL 2015**

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**MA LUKHAIMANE  
PENSION FUNDS ADJUDICATOR**

**Section 30M filing: High Court**

*Complainant represented by DMS Attorneys*

*Respondent's unrepresented*