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REGISTERED POST

Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): MLK MOLETSANE (“complainant”) v BOKAMOSO RETIREMENT FUND (“first respondent”) AND AKANI RETIREMENT FUND ADMINISTRATORS (PTY) LTD (“second respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the withholding of a withdrawal benefit.
- 1.2 The complaint was received by this Tribunal on 7 December 2015. A letter acknowledging receipt thereof was sent to the complainant on 8 December 2015. On the same date, the complaint was forwarded to the first and second respondents giving them until 18 January 2016 to file responses to the complaint. On 21 January 2016, a follow up letter was sent to the respondents affording them a further opportunity until 1 February 2016 to provide a response. Follow-up response e-mails were sent to the respondents in February 2016, May 2016 and June 2016. On 2 June 2016, a response was received from the first

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respondent. A response was received from the second respondent on 22 June 2016.

- 1.3 After reviewing 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 in the employ of the second respondent from 3 January 2005 until her service was terminated on 30 September 2015. The complainant was a member of the first respondent by virtue of her employment. The first respondent is administered by the second respondent.

[3] COMPLAINT

- 3.1 The complainant submits that she was employed by the second respondent from January 2005 until September 2015. She stated that her fund credit was confirmed by the actuaries, a tax directive was issued and her PAYE was paid to the South African Revenue Service ("SARS") on 7 November 2015. She indicated that she authorised the second respondent to deduct study loans and bonus advances made to her from her withdrawal benefit. She submitted that despite several follow-ups with the second respondent she has not been paid her withdrawal benefit. She states that she is currently experiencing financial difficulties due to the non-payment of her withdrawal benefit.
- 3.2 The complainant seeks an order directing the first respondent to pay her withdrawal benefit.

[4] RESPONSE

First respondent

- 4.1 The first respondent confirmed receipt of the complaint. It stated that it did not receive any documentation from the second respondent in order to process and effect payment of the complainant's withdrawal benefit.

Second respondent

- 4.2 The second respondent confirmed that the complaint was its employee until her resignation in September 2015. It states that the complainant owes it an amount relating to a study loan. It indicated that there is a forensic investigation underway pertaining to a number of transactions performed by the complainant, these transactions were performed over weekends and its offices are closed on weekends. The second respondent indicated that it confronted the complainant about the transactions and she subsequently resigned. It stated that the complainant was paid an advance and she resigned before the expiry of a period of twelve months. It submitted that it awaits completed forms from the complainant to finalise the claim. The second respondent submitted that it will then make all the necessary deductions as envisaged in Section 34 of the Basic Conditions of Employment Act 75 OF 1997 ("BCEA") and Section 37 of the Act. It submitted that the amounts due to the complainant will be made payable to her once all deductions have been made.

[5] **DETERMINATION AND REASONS THEREFOR**

Introduction

- 5.1 This Tribunal needs to determine whether or not reasonable and lawful grounds exist in this case for the complainant's withdrawal benefit to be withheld.
- 5.2 Save to the extent permitted by the Act, the Income Tax Act, 1962 ("ITA") and the Maintenance Act, 1998 ("Maintenance Act"), no benefit provided for in the rules of a pension fund organisation or a right to such benefit shall 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 (Section 37A(1) of the Act).
- 5.3 Section 37D(1)(b)(ii) provides for an exception to this general rule and reads:

"(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 –

...

(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 Therefore, a registered pension fund organisation is, notwithstanding the general provisions of section 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 her employer by reason of her dishonesty, theft, fraud or misconduct. The first and second respondents’ Rules also provide in Rule 42(5) that:

“The TRUSTEES may, where an EMPLOYER has instituted legal proceedings in a court of law 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 cash withdrawal 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:

- (i) the TRUSTEES 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 a reasonable chance of success in the proceedings that have been instituted; and
- (ii) 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; and
- (iii) once the proceedings have been determined, settled or withdrawn, any benefit to which the MEMBER is entitled, is paid forthwith, or, if any amount in unlawfully deducted from the benefit in terms of section 37D, the balance thereof is paid forthwith.”

- 5.5 Therefore, the provisions of section 37D of the Act and the Rules allow the reduction of benefits to compensate for loss caused to the employer by reason of an employee's theft, fraud, misconduct and dishonesty. However, in terms of section 37D, the condition is that the member concerned must have admitted liability to the employer in writing, or a judgment should have been obtained against her in a court of law.
- 5.6 In the present matter, the complainant has neither in writing admitted liability to the second respondent, nor has the second respondent instituted legal proceedings against her. It is clear from the submissions that the second respondent alleges fraudulent activity on the part of the complainant but it does not have concrete proof of the alleged fraud.
- 5.7 The second respondent did not provide this Tribunal with any submissions indicating that either civil or criminal proceedings have commenced against the complainant for the recovery of the alleged loss it incurred as a result of the complainant's alleged dishonesty or theft. In light of the above, this Tribunal's finds that there are no proper, lawful and reasonable grounds for the complainant's benefit to be withheld in the circumstances.
- 5.8 This Tribunal notes with considerable concern second respondent's submissions that it will effect deductions from the complainant's salary in terms of section 34 of the BCEA. It further appears from the submissions that it intends deducting from the complainant's benefit study loans and advance payments made to her. There are two main reasons for such concern. Firstly, the second respondent made submissions in its capacity as employer and fund administrator. The second respondent has an advantage over other employers, as a fund administrator it ought to be familiar with the Act and its provisions, in this instance it would entail the permissible deductions from a members

benefit. However, it elected to address the deductions for study loans and advances via this Tribunal despite the fact that there are no provisions in section 37D for these specific deductions. Secondly the second respondent makes mention of effecting deductions in terms of Section 34 of the BCEA. Section 34(1) of the BCEA clearly stipulates that an employer may not make any deductions from an employee's remuneration unless certain criterion is met. Therefore, it only provides for deductions from an employee's remuneration and not a benefit the employee is entitled to in terms of the Act. Thus, the first respondent is only entitled to make deductions from the complainant's benefit as provided in terms of the Act.

[6] ORDER

6.1 In the result, the order of this Tribunal is as follows:

6.1.1 The first respondent is directed to pay the complainant's withdrawal benefit, less only the deductions permitted in terms of the Act, within three weeks of this determination.

DATED AT PRETORIA ON THIS 12TH DAY OF JULY 2016

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M filing: High Court

Parties: Unrepresented