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REGISTERED POST

Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): KCD MOTSHEPE (“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 the complainant’s withdrawal benefit.
- 1.2 The complaint was received by this Tribunal on 21 April 2016. A letter acknowledging receipt thereof was sent to the complainant on 20 May 2016. On the same date, the complaint was forwarded to the respondents giving them until 20 June 2016 to file responses to the complaint. On 2 June 2016, a response was received from the first respondent. A response was received from the second respondent on 28 June 2016.

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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 employed by the third respondent from 12 January 2015 until her exit on 4 January 2016. She was a member of the first respondent by virtue of her employment.

2.2 The first respondent is administered by the second respondent.

[3] COMPLAINT

3.1 The complainant submits that upon exit from the second respondent she was not paid a withdrawal respondent. She contacted the second respondent regarding the payment of her withdrawal benefit and was advised that she would not receive a benefit as the second respondent trained her and paid her a bonus subject to her working a period of one year. She believes that she is entitled to a benefit as she contributed to the first respondent.

3.2 She requested that this Tribunal to investigate the matter and order payment of her withdrawal benefit.

[4] RESPONSES

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 complainant was its employee from 12 January 2015 until her resignation on 4 January 2016. It stated that it regarded the complainant as absent without leave as she did not return to work after it reopened in January 2016. It states that the complainant submitted her resignation letter without serving notice period in terms of the Basic Conditions of Employment Act 75 of 1997 (“BCEA”). It indicated that it is entitled to make any necessary deductions in lieu of the notice period the complainant did not serve. The second respondent submitted that the complainant was granted an advance payment provided she remained employed for a period of one year. It attached a copy of a letter signed by the complainant confirming that should she exit the second respondent prior to the expiry of the twelve month period, then the proportionate amount in lieu of the outstanding period will be deducted from the complainant’s salary or any money due to her by it.

[5] DETERMINATION AND REASONS THEREFOR

Merits

5.1 The issue that falls to be determined by this Tribunal is whether or not the contemplated deduction from the complainant’s benefit is permissible.

5.2 As a general rule, section 37A of the Act provides that pension benefits shall not be reducible, transferable or executable. The object of 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) 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;"

5.3 The second respondent indicated that the complainant failed to serve a notice period and received an advance payment from it. She did not adhere to the conditions of such payment. The critical issue to be examined and determined by this Tribunal is whether or not the deduction as contemplated by the second respondent is permissible in terms of section 37D of the Act.

5.4 In *Rowan v Standard Bank Staff Retirement Fund and Another* (2) [2001] 2 BPLR 1643 (PFA) at 1648B-D, this Tribunal held that section 37D(1)(b)(ii) provides that a number of requirements must be met before a deduction is permissible. These requirements are as follows:

- an amount must be due by a member of a fund to his or

his employer;

- the amount must be due at the date of retirement or on which the member ceases to be a member of the fund;
- the amount must be in respect of compensation payable for damage caused to the employer, or legal costs recoverable from the member;
- the damage caused to the employer must be by reason of theft, dishonesty, fraud or misconduct by the member;
- the member must have furnished a written admission of liability to the employer in respect of the compensation in respect of the delictual damages caused to the employer; or
- judgment obtained against the member in a court in respect of the compensation.

5.5 If these conditions are met, the fund may deduct the amount due by the member to the employer from the member's benefit payable in terms of the rules and pay it to the employer. It is common cause that the complainant committed breach of contract by failing to serve her notice period and honouring the conditions for the advance payment she received from the second respondent. The second respondent further stated that the complainant failed to serve her notice period as envisaged in the BCEA.

5.6 This Tribunal notes with considerable concern the second respondent's submissions that it will effect any deductions from the complainant's salary, as the complainant did not serve a notice period. It further appears from the submissions that it intends making a deduction from the complainant's benefit for the 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 that entail the permissible deductions from a member's benefit. However, it elected to address the deductions for breach of contract and advances from the first respondent. It is not the first instance where the second respondent made submissions regarding deductions that are not permissible in terms of the Act. Should the second respondent attempt or act contrary to the provisions of section 37D going forward, this Tribunal will order punitive damages against it. The first respondent must also take heed of the actions of the second respondent and ensure that it does not entertain its unlawful requests. Deductions permissible from a member's benefit are limited in terms of section 37D of the Act and should fall within the categories as mentioned in paragraph 5.4 above.

- 5.7 In light of the foregoing, the withholding of the complainant's benefit as well as the contemplated deduction therefrom is not authorised by section 37D of the Act. Therefore, the first respondent must be ordered to pay the complainant her withdrawal benefit.

[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, plus interest at the rate of 9% *per annum* from 29 February 2016 until date of payment less only the deductions permitted in terms of the Act, within three weeks of this determination.

DATED AT PRETORIA ON THIS 19TH DAY OF AUGUST 2016

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M filing: High Court

Parties: Unrepresented