



4th Floor
Riverwalk Office Park
Block A, 41 Matroosberg Road
Ashlea Gardens, Extension 6
PRETORIA
SOUTH AFRICA
0181

P.O. Box 580, **MENLYN**, 0063
Tel: 012 346 1738 / 748 4000
Fax: 086 693 7472

E-Mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Please quote our ref: **PFA/KN/000026080/2016/UM**

REGISTERED POST

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): A PILLAY (“complainant”) v RFS UMBRELLA PROVIDENT FUND (“first respondent”); RFS ADMINISTRATORS (PTY) LTD (“second respondent”) AND KINTETSU WORLD EXPRESS SOUTH AFRICA (PTY) LTD (“third 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 14 June 2016. A letter acknowledging receipt thereof was sent to the complainant on 22 June 2016. On the same date, the complaint was forwarded to the respondents giving them until 22 July 2016 to file responses to the complaint. On 22 July 2016, a response was received from second respondent. A follow-up response letter was sent to the third respondent on 26 July 2016, affording it a further opportunity until

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)

10 August 2016 to respond. A response was received from the third respondent on 1 August 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 employed by the third respondent from 1 May 2006 until 11 November 2013. He was a member of the first respondent by virtue of his employment. The first respondent is administered by the second respondent.

[3] COMPLAINT

3.1 The complainant submits that he resigned in November 2013 and was advised by the third respondent that he would be paid his benefit. He submitted that he was subsequently told by the third respondent that he would be charged. He received summons which he is currently defending. He states that he is being prejudiced by the first and second respondents as they refuse to effect payment of his withdrawal benefit.

3.2 He requested this Tribunal to investigate the matter and order payment of his withdrawal benefit, plus interest of 20% *per annum* for failure to pay his withdrawal benefit timeously.

[4] RESPONSES

First and second respondents

4.1 The first respondent submitted that the complainant resigned from the third respondent on 11 November 2013. The last contribution received on the complainant's behalf was for November 2013. It submitted that

its procedure entails that a withdrawal form be completed and signed by the employee and the employer. The third respondent refused to sign and release the withdrawal form. It states that the complainant provided it with a withdrawal form signed by himself without the signature of the third respondent. It submitted that to date, the third respondent refuses to sign the withdrawal form. The withdrawal benefit that is due to the complainant is R542 926.48 as at 21 July 2016 which includes investment returns to date. The second respondent has record of court proceedings by means of summons issued against the complainant by the third respondent. It submitted that the civil matter between complainant and the third respondent has been placed on the court roll for 13 to 17 February 2017. After analysing the facts, the first respondent submitted that the complainant must be paid what is due to him for the following reasons:

- There is no judgment against the fund or the complainant to withhold any benefit in terms of section 37D.
- Enough time was allowed for the third respondent to provide the judgment for damages and the member is now being prejudiced by withholding his payment.
- The court matters are civil proceedings between the employee and his employer.

The first respondent submitted that the claim by the complainant for the payment of 20% interest *per annum* should be dismissed on the basis that his fund credit was invested in the market as per his last chosen investment portfolio. It submitted that it awaits proof of bank details from the complainant by means of a bank letter or bank statement with a bank stamp not older than three months and confirmation of his income tax number.

Third respondent

- 4.2 The third respondent submitted that there is a pending case against the complainant which is set down for trial on 17 February 2017. It

provided this Tribunal with a copy of the Notice of Set Down and a copy of the summons. It stated that the case against the complainant was opened in 2014 however, due to seriousness of the matter, it is still on-going.

[5] DETERMINATION AND REASONS THEREFOR

Merits

5.1 The issue that falls to be determined by this Tribunal is whether or not the 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 third respondent indicated that the complainant committed breach of contract by failing to fulfil his obligations in terms of his employment contract. It states that the complainant used information obtained during his employment with it for his own benefit, despite his employment contract providing for such restraint. The critical issue to be examined and determined by this Tribunal is whether or not the deduction as contemplated by the third 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 civil action instituted against the complainant relates to the breach of his employment contract. It is alleged as per the summons that the complainant breached his obligations in his employment contract for his own benefit.

5.6 In the present case, the deduction relating to a breach of contract is not permissible in terms of the categories of section 37D of the Act. Furthermore, the fact that the third respondent has instituted civil action against the complainant does not justify the withholding of the complainant's withdrawal benefit. This Tribunal notes with concern the passive role adopted by the first respondent by failing to request reasons or documentary proof for the withholding of the benefit. If the first respondent made this simple request at the onset, it would be in a better position to assess the claim based on the merits thus, preventing the complainant from incurring prejudice. Almost three years have passed and the complainant has not been paid his withdrawal benefit. Section 7C(2)(a) of the Act provides that the board shall take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and provisions of the Act are protected at all times. As a result of the first respondent's negligent conduct, the complainant suffered prejudice in that he has potentially been denied access to benefits which would have become available upon exit from the third respondent. The contemplated deduction falls outside the scope of section 37D(b)(ii) and thus the withholding is illegal. (see *Mellet v Orion*

Purchase Pension Fund (SA) and another [2001] 12 BPLR 2824 (PFA)). Therefore, the first respondent must be ordered to pay the complainant punitive damages in the amount of 5% of his benefit for its failure to satisfy itself as to whether or not the contemplated deduction was allowable thus resulting in the complainant not being paid his benefit timeously.

- 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. The first respondent must be ordered to pay the complainant his withdrawal benefit plus interest, upon receipt of proof of his banking details and income tax reference number.

[6] **ORDER**

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

6.1.1 The complainant is ordered to provide a copy of his recent banking details and income tax number to the second respondent. The complainant is directed to send the aforementioned documentation to:

Email: marting@rfssolutions.co.za

Fax: 012 523 5334

6.1.2 The first respondent is ordered to pay the complainant the withdrawal benefit, plus interest at the rate of 9% *per annum* from 31 December 2013 to date of payment, less only deductions permitted in terms of the Act, within two weeks of receiving the documents referred to in paragraph 6.1.1;

6.1.3 The first respondent is ordered to pay the complainant compensation in the amount of 5% of his fund benefit as at 21 July 2016, over and above the withdrawal benefit and attendant

late payment interest for its failure to pay the complainant timeously; within two weeks of receiving the documents referred to in paragraph 6.1.1;

DATED AT PRETORIA ON THIS 13TH DAY OF SEPTEMBER 2016

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M filing: High Court

Parties: Unrepresented