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REGISTERED POST

Dear Madam,

DETERMINATION IN TERMS OF SECTION 30A OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): FT TSUANE (“complainant”) v DISTELL RETIREMENT FUND (“first respondent”); ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD (“second respondent”) AND DISTELL GROUP LIMITED (“third respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the alleged unlawful withholding of the complainant’s withdrawal benefit by the first respondent following the termination of her employment on the grounds of alleged misconduct.
- 1.2 The complaint was received by this Tribunal on 22 May 2013. A letter acknowledging receipt thereof was sent to the complainant on 30 May 2013. On the same date, letters were dispatched to respondents giving them until 1 July 2013 to file their responses. A response on behalf of the first and second respondents was received on 16 July 2013. No response was received from the third respondent.

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.

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On 26 July 2013, this Tribunal received further submissions from the complainant's attorneys.

- 1.3 Having considered the written submissions before this Tribunal, it is considered unnecessary to hold a hearing in this matter. As the background facts are known to the parties, only those facts that are pertinent to the issues raised herein will be repeated. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 The complainant was employed by the third respondent from 1 May 2007 until her employment was terminated in June 2012 due to alleged misconduct. The alleged misconduct relates to damage to a motor vehicle belonging to the third respondent in an accident whilst in the care of the complainant. The complainant was a member of the first respondent by virtue of her employment.
- 2.2 Upon the termination of the complainant's employment, the third respondent notified the first and second respondents that it has suffered financial loss in excess of R161 715.76 as a result of the complainant's misconduct and that it has instituted a civil claim in this regard at a High Court. The first respondent was requested by the third respondent and agreed to withhold payment of the complainant's withdrawal benefit in terms of section 37D(1)(b)(ii) of the Act pending the conclusion of the civil litigation against the complainant. The withholding of the withdrawal benefit is the subject matter of this complaint.

[3] COMPLAINT

- 3.1 The complainant is dissatisfied with the fact that her withdrawal benefit is being withheld in the first respondent despite the termination of her employment. She states that the withholding of her benefit is causing

her financial strain as she is not employed. Thus, she requests this Tribunal to assist her to obtain payment of her withdrawal benefit in the first respondent.

[4] RESPONSES

Response on behalf of the first and second respondents

- 4.1 The second respondent confirms that it received notification from the third respondent advising that it has suffered financial loss in excess of R161 715.76 as a result of the complainant's alleged misconduct. The third respondent advised that it has instituted a civil claim against the complainant and that summons were issued against her on 7 November 2012. The complainant entered an appearance to defend on 4 March 2013 and has yet to enter a plea. The third respondent is currently applying for a default judgment against the complainant.
- 4.2 The second respondent asserts that pension benefits enjoy special protection in terms of section 37A of the Act. However, such protection is subject to the provisions of section 37D of the Act, which allows a fund to make a deduction from a member's benefit in respect of debt owing by the member to an employer. In order for a fund to make the necessary deduction in favour of an employer, there must be an amount due by a member to her employer, the amount must be in respect of compensation resulting from any damage caused to the employer, the damage caused must be by any reason of theft, fraud, dishonesty or misconduct by the member, and the member must either admit liability in writing to the employer or judgment must be obtained in any court in respect of damages caused to the employer.
- 4.3 It avers that the third respondent has not obtained judgment against the complainant as yet. However, it states that there is pending civil action by the third respondent against the complainant in the High Court. The

second respondent submits that the first respondent is empowered to withhold payment of the complainant's benefit pending the conclusion of the civil proceedings against the complainant as it was held in the matter of *Appana v Kelvinator Group Services of SA Provident Fund* [2000] 2 BPLR 126 (PFA). It avers that the board of trustees of the first respondent is satisfied that due to the nature of the claim against the complainant and the strength of the case against her, it has not exceeded its powers in terms of the Act or the first respondent's rules by withholding payment of the benefit.

- 4.4 The second respondent referred to the matter of *Highveld Steel and Vanadium Corporation Ltd v HFM Oosthuizen* [2008] SCA, where it was argued, *inter alia*, that the object of section 37D(1)(b)(ii) of the Act is to protect an employer against loss occasioned by employees' acts of dishonesty. It was further argued that the object of the section could be thwarted if an employee circumvents it by resigning and claiming payment of her benefits upon discovery of her criminal conduct. Thus, it contends that section 37D(1)(b)(ii) must be interpreted purposively to protect an employer against dishonest conduct by its employees. However, the protection afforded to an employer should be balanced by considering the potential prejudice to an employee who may urgently need access to her benefit and who may in due cause be found innocent. It submits that in this matter, the first respondent is clearly authorised to withhold payment of the complainant's withdrawal benefit until the conclusion of the civil case against her.
- 4.5 It also referred to rule 11 of the first respondent's rules which states that the trustees shall have the right to make deductions from a benefit as permitted in section 37D of the Act. Rule 11.2 states that the benefit may be withheld provided it does not exceed the amount permitted in section 37D(b)(ii) of the Act, that the trustees have satisfied themselves that the employer has made out a *prima facie* case against the member and has a reasonable chance of success in the legal proceedings that it

has instituted against the member. Further, the trustees must be satisfied that the employer has not caused any undue delay in the court proceedings. Thus, the second respondent concludes that the trustees of the first respondent are acting in terms of the rules by withholding the complainant's benefit as they are bound by the rules as confirmed in the matter of *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) All SA 297 (A).

Third respondent's response

4.6 The third respondent was requested to file a response to the complaint as required in terms of section 30F of the Act. However, no response was received from the third respondent.

[5] THE COMPLAINANT'S REPLY

5.1 The complainant denies that the financial loss suffered by the third respondent amounts to R161 715.76. She states that the vehicle which was damaged in the accident was insured and the third respondent was only responsible for payment of excess. The amount of the excess is an accurate representation of the quantum of the loss suffered by the third respondent. She contends that the third respondent has chosen not to disclose the true and actual amount of its loss to this Tribunal.

5.2 The complainant denies that she entered an appearance to defend and failed to file a plea. She asserts that she served and filed her plea on time. The third respondent is out of time with serving and filing its discovery affidavit and failed to explain the delay in this regard. The court file does not contain any application for default judgment and instead it is awaiting allocation of the trial date. The complainant submits that the third respondent has not taken steps to ensure the prosecution of the civil case with relative expedition. Thus, she contends that the conduct of the third respondent falls short of the

requirements of section 37D of the Act.

- 5.3 Further, the complainant states that the amount being withheld exceeds the amount of excess that is payable by the third respondent and as a result, the withholding of the benefits is contrary to rule 11.2. The complainant submits that the civil case has no reasonable prospects of success and the third respondent has made no attempt to prosecute the matter with expedition. Therefore, the withholding of the benefit is not justifiable in terms of the Act and the first respondent's rules.

[6] DETERMINATION AND REASONS THEREFOR

The issue for adjudication

- 6.1 The issue that falls for determination is whether or not the first respondent is lawfully authorised to withhold payment of the complainant's withdrawal benefit in terms of the Act.

The withholding of the withdrawal benefit

- 6.2 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 of 1998 (see Section 37A(1) of the Act). The policy behind section 37A of the Act is to protect members' pension benefits. However, it allows for exceptions to this principle in certain circumstances. Section 37D(1)(b)(ii) of the Act 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-

(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.”

6.3 In the matter of *Rowan v Standard Bank Staff Retirement Fund and Another* (2) [2001] 2 BPLR 1643 (PFA) at 1648B-D), this Tribunal held that the provisions of section 37D(1)(b)(ii) reveal 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 her 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;
- the compensation must be in respect of any damage caused to the employer;
- 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
- alternatively, the employer ought to have obtained a judgment in a court in respect of the compensation.

6.4 The purpose of section 37D of the Act is to protect an employer's right to recover losses caused by the misconduct of an employee and is a legitimate objective of protecting employer's rights to recover debts due

(see *Dakin v Southern Sun Retirement Fund* [1999] 9 BPLR 22 (PFA). While this objective is not an absolute right of the employer, what is implicit is that the employer may request a fund to withhold benefits pending the determination of proceedings against the member.

- 6.5 The submissions indicate that the complainant has not admitted liability to the third respondent in writing for the alleged misconduct. The third respondent has also not obtained any judgment in court in respect of the alleged damages caused to it by the complainant. However, the submissions indicate that the third respondent has instituted a civil case against the complainant for the alleged damages. The third respondent issued summons against the complainant on 7 November 2012. Although the second respondent states that the third respondent subsequently requested a default judgment against the complainant, this has not materialised and this is also being disputed by the complainant's attorneys. The civil matter is currently awaiting a trial date. Although there has been a delay by both the complainant and the third respondent in terms of filing pleadings, it is clear that there is a pending civil matter between the third respondent and the complainant.
- 6.6 In the matter of *Highveld Steel and Vanadium Corporation Ltd and Oosthuizen* [2009] 1 BPLR 1 (SCA) at E-G, the Supreme Court of Appeal held that section 37D(1)(i)(aa) and (bb) of the Act did not intend that proof of liability for damages must be available on termination of the employment contract on the grounds of misconduct. It held that an interpretation that requires proof of liability on termination of employment will render the protection afforded to the employer by section 37D(1)(b) meaningless. As a matter of logic, it is only in few cases that an employer will have obtained judgment against its employee by the time the latter's employment is terminated because of the delay in finalising court cases. Thus, the section must be interpreted purposively in order to protect the right of the employer to recover its losses.

6.7 Therefore, the first respondent complied with the requirements of section 37D(1)(b)(ii) in withholding the payment of the complainant's withdrawal benefit pending the conclusion of the civil case. There is nothing which indicates that the first respondent exercised its power or discretion in this regard unreasonably. The interest of the third respondent to protect its right to recover damages has to be taken into account having regard to the complainant's right to access her withdrawal benefit. The complainant has not provided any evidence which indicates that the third respondent is unreasonably delaying the prosecution of the civil case or that it has not taken reasonable steps to bring the civil matter to a conclusion.

6.8 In light of the above, the first respondent is legally authorised to withhold payment of the complainant's withdrawal benefit pending the finalisation of the civil case.

[7] **ORDER**

1. In the result, the complaint cannot be upheld and is dismissed.

DATED AT PRETORIA ON THIS 22ND DAY OF AUGUST 2013

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M Filing: High Court

No legal representation