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Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): JAE DE BEER (“complainant”) v ILIAD PROVIDENT FUND (“first respondent”); ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD (“second respondent”) AND STEINHOFF DOORS AND BUILDING MATERIALS (PTY) LTD T/A STEINBUILD (“third 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(1)(b)(ii) of the Act.
- 1.2 The complaint was received by this Tribunal on 6 October 2016. A letter acknowledging receipt thereof and requesting further information was sent to the complainant on 13 October 2016. On 21 October 2016, the complaint was forwarded to the respondents affording them an opportunity to file their responses by 21 November 2016. A response was received from the first respondent on 18 November 2016. The complainant made further submissions to this Tribunal on 31 January 2017 and on 15 February 2017. The first respondent made further

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submissions to this Tribunal on 6 February 2017. No further submissions were received from the parties.

- 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 with the third respondent from 23 April 2008 to 8 April 2016. He was a member of the first respondent by virtue of his employment. The complainant's fund credit as at 28 February 2015 to 31 August 2015 was in the amount of R222 918.30.
- 2.2 The third respondent opened a criminal case against the complainant at the Thabazimbi Police Station under case number CAS 110/11/2016, and the case was transferred to the Polokwane Organised Crime Unit.
- 2.3 The second respondent provides consulting and administration services to the first respondent, a registered fund in terms of section 4 of the Act.

[3] COMPLAINT

- 3.1 The complainant submitted through his legal representative that he was employed with the third respondent for 9 years as a General Manager. He submitted that in April 2016 he was investigated by the third respondent for authorising the supply of building supplies to a company called Blue Dust (Pty) Ltd (the customer) in contravention of the rules of the third respondent.

- 3.2 He submitted that he admitted that the goods were supplied to the customer on credit notwithstanding the fact that the customer's credit facility of R250 000.00 had been reached and that all further goods supplied to the customer were done in contravention of the third respondent's rules at the workplace. The complainant submitted that he kept the record of all the goods he supplied to the customer. Furthermore, he had entered into an arrangement with the customer to supply goods to it in this manner on the basis that the customer had been purchasing goods with the employer for 9 years. He further submitted that the customer attended the third respondent's premises at least once a week to make payments in respect of the goods supplied to him and the latter would often settle his outstanding account, including the overdraft facility , during such attendance.
- 3.3 The complainant submitted that he had authorised the supply of goods to the customer in this manner for approximately one and half years and the latter made payments punctually. Furthermore, the customer did not derive any benefit except for the ability to acquire goods beyond the limit of its credit facility. He submitted further that he monitored all payments made by the customer to ensure that the third respondent recover its debts.
- 3.4 The complainant submitted that in September 2015, the customer advised him that his vendor at the mines had been blocked as a result of a dispute regarding his contract. As a result thereof it did not receive any projects to pay his debt with the third respondent. As a result, the customer has failed to pay his outstanding invoice for the goods supplied to him during August and September 2015. The complainant was advised in April 2016, that the third respondent was contemplating disciplinary action against him. He submitted that he gave full cooperation during the investigation. Furthermore, the third respondent

ordered two forensic investigations and the report supported his version of events.

- 3.5 The complainant submitted that he had a meeting with the third respondent wherein the latter threatened to prosecute him for colluding with the customer to cause damage to it. He submitted that the third respondent alleged that he had an interest in the customer's business and that he was receiving benefits from the customer in the form of gifts and or hunting trips. He submitted that he admitted to having established a good relationship with the customer and that he befriended a certain Mr Tait, the joint owner of the customer. He further submitted that he advised the third respondent that he does not have any interest in any business of the customer. The complainant submitted that the third respondent's action caused a complete breakdown of the employment relationship and as a result he tendered his resignation with effect from 8 April 2016. He submitted that when he queried the payment of his withdrawal benefit with the first respondent, he was advised by the latter that its board was requested to withhold his withdrawal benefit by the third respondent, pending investigations against him.
- 3.6 The complainant submitted that there is no basis on which the third respondent will succeed in proving any fraud or theft against him as he did not wilfully deceive it regarding the customer's account. Furthermore, he did not derive any benefit from the supply of goods to the customer. He submitted that the third respondent has instituted legal action against the customer to recover the outstanding debt. He further submitted that the third respondent is not justified to withhold his benefit in terms of the Act and the rules of the first respondent pending the civil action against the customer. He submitted that had the third respondent intended to recover the debt from him, it should have joined him in the civil proceedings against the customer.

- 3.7 He submitted that the decision to withhold his withdrawal benefit constitutes an irregular exercise of the first respondent's discretionary powers. Furthermore, he has not admitted liability for the amounts to be recovered from the customer. He submitted further that the first respondent is not entitled to withhold his withdrawal benefit in terms of section 37D(1)(b)(ii) of the Act and Rule 11.2 of its rules.
- 3.8 The complainant requests this Tribunal to investigate the matter and order the payment of his withdrawal benefit without any further delay.

Further submissions

- 3.9 On 31 January 2017, the complainant submitted that section 37D of the Act recognised grounds on which the first respondent would be entitled to withhold his benefit. He submitted that he did not sign any acknowledgement of liability. He submitted further that it is clear from the second respondent's submissions that it has not investigated the alleged incident nor has it considered any documentary proof from the third respondent. Furthermore, the second respondent failed to consider the prejudice he is suffering as a result of the withholding of his benefit despite the lack of evidence and grounds to support the withholding of his benefit.
- 3.10 The complainant submitted that he made full disclosure regarding the incident with the customer in contravention of the third respondent's workplace rules. He submitted that the first respondent failed to address the material issues he raised in his complaint to warrant the withholding of his benefit. He submitted that he requests this Tribunal to order the payment of his withdrawal benefit.
- 3.11 On 15 February 2017, the complainant submitted that the third respondent has applied for the liquidation of the customer to recover the debt which is a standard practice in contracts. He provided this

Tribunal with a copy of the notice of motion filed by the third respondent against the customer, wherein it applied for the latter's estate to be wound up.

[4] **RESPONSES**

First respondent

- 4.1 The first respondent submitted that upon receipt of the complaint, the second respondent conducted an investigation and established that the complainant was employed with the third respondent from April 2008 to April 2016 and was as a result, its member.
- 4.2 It submitted that in April 2016, the third respondent conducted an investigation on the complainant after discovering that he authorised the supply of goods in contravention of its policy. It submitted that the third respondent scheduled a disciplinary hearing against the complainant on 14 April 2016, however, the complainant tendered his resignation on 8 April 2016. It submitted further that the third respondent then opened a case with the South African Police Service (SAPS) with a view to obtain judgment against the complainant.
- 4.3 It submitted that the third respondent requested the second respondent to withhold payment of the complainant's benefit while the SAPS conducts its investigations on the criminal case. It further submitted that Rule 11.2 of its rules make provision for the withholding of a member's benefit where an employer has instituted legal proceedings in a court of law or criminal charge against the member. Furthermore, this Tribunal in *Appana v Kelvinator Group Services of SA Provident Fund* [2000] 2 BPLR 126 (PFA) held that the right to make deductions from benefits implies that a fund also has the power to withhold benefits pending determination of liability.

4.4 The first respondent submitted that as authorised by its rules, its board requested the complainant's withdrawal benefit to be withheld until the court gives a ruling on the case against him. It submitted that consideration was given to withholding only the amount owed by the complainant to the third respondent and then paying the balance to him. However, his withdrawal benefit is in the amount of R245 907.00 and is less than R654 000.00 that he allegedly owes to the third respondent, as a result the whole benefit had to be withheld until the finalisation of the criminal case. It submitted that it requests the complaint to be dismissed as the withholding of the complainant's benefit is authorised by its rules.

Further submissions

4.5 On 6 February 2017, the first respondent submitted that a criminal case was opened at the Thabazimbi SAPS with case number CAS 110/11/2016. Furthermore, the case was transferred to its regional office in Polokwane. It submitted further that investigation is currently being conducted by the Hawks due to the value of the alleged theft and fraud. It submitted that the investigation officer is Lieutenant Moloto at the Hawks in Polokwane.

Third respondent

4.6 The third respondent was afforded an opportunity to comment on the allegations made against it as required in terms of section 30F of the Act. However, no response was received from it. In the circumstances, this Tribunal will dispose of the matter on the basis of the available facts.

[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 respondent, pending the finalisation of a criminal investigation against him is permissible and justified in terms of section 37D(1)(b)(ii) of the Act.
- 5.2 The board may only do what is set forth in the rules of the fund. If what it proposes to do, or has 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 11.2 of the first respondent's rules provides for deductions from a member's benefits and reads as follows:

"Notwithstanding any other provisions of these Rules, the Trustees may, where an Employer has instituted legal proceedings in a court of law and/or laid a criminal charge 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 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:

- (a) the amount withheld shall not exceed the amount that may be deducted in terms of Section 37D(1)(b)(ii) of the Act;
- (b) the Trustees in their reasonable discretion are satisfied that the Employer has made 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;
- (c) 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;
- (d) once the proceedings have been determined, settled or withdrawn, any benefit to which the Member is entitled is paid forthwith; and
- (e) the Trustees, at the express written request of a member whose benefit is withheld, may, if applicable and practical, permit that value of the Member's benefit as at the time of

such request to be isolated, in whatever manner the Trustees believe appropriate, from the possibility of a decrease therein 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) 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) 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 (see *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* [2009] 1 BPLR 1 (SCA)).

5.7 The complainant conceded that he supplied goods to the customer on credit notwithstanding the fact that the customer's credit facility of R250 000.00 had been reached and that all further goods supplied to the customer were done in contravention of the third respondent's

policy at the workplace. He submitted that the customer has been purchasing goods with the third respondent for 9 years. Furthermore, the customer attended the third respondent's premises at least once a week to make payments in respect of the goods supplied to him and the latter would often settle his outstanding account, including the overdraft facility, during such attendance. He submitted further that he disclosed all the details regarding the supply of goods to the third respondent. Furthermore, he submitted that he does not have an interest in the customer's business and that he was not receiving benefits from the customer. He submitted that had the third respondent intended to recover the debt from him, it could have joined him to the civil litigation it instituted against the customer to recover the debt. He submitted further that the third respondent has applied for the liquidation of the customer to recover the debt which is a standard practice in contracts. It provided this Tribunal with a copy of the notice of motion filed by the third respondent against the customer, wherein it applied for the latter's estate to be wound up.

- 5.8 The first respondent submitted that the third respondent opened a criminal case against the complainant at the Thabazimbi Police Station under case number CAS 110/11/2016. The case has since being transferred to the Hawks in Polokwane. On 6 February 2017, this Tribunal telephonically confirmed with Colonel Brancon, who advised that the matter is with their Commercial Crimes Unit and Lieutenant Colonel Modiba is investigating the matter. The first respondent submitted that the third respondent suffered loss in the amount of R654 000.00 and the complainant's fund credit is in the amount of R245 907.00.
- 5.9 The board of the first respondent decided to withhold the complainant's withdrawal benefit on the basis that a criminal case has been opened against him. The complainant submitted that the third respondent has instituted a civil litigation against the customer for the recovery of the

amount due and it did not join him in the proceedings. E provided this Tribunal with a copy of the notice of motion for the liquidation of the customer. The first respondent failed to dispute this version of the complainant. The purpose of section 37D in respect of withholding of benefit is to protect the employer's right to recover misappropriate monies by employees (see *Twigg v Orion Money Purchase Pension Fund and Another* (1) [2001] 12 BPLR 2870 (PFA)). In the present matter, the third respondent cannot recover the debt from both the complainant and the customer. The first respondent has already instituted civil litigation against the customer to recover the debt from the customer. Therefore, it cannot recover the same amount from the complainant as it will be unjustifiably enriched should its recovery mechanism against the customer succeed.

- 5.10 Although the rules of the first respondent allow for the withholding of a member's benefit in cases where there is a pending criminal case for the recovery of the loss, such discretion must be exercised properly. The fact that there is a criminal case being investigated does not automatically authorise the first respondent to withhold the complainant's benefit. Therefore, the conduct of the first respondent's board to withhold the complainant's withdrawal benefit is not in line with section 37D(1)(b)(ii) of the Act. The first respondent failed to consider all the facts of the matter. Had it investigated the matter further, it could have established that the third respondent has taken measures to recover its loss by instituting civil litigation against the customer. Therefore, the decision of the first respondent to withhold is unreasonable. Thus, the first respondent must be ordered to pay the complainant's withdrawal benefit without any further delay.

[6] **ORDER**

- 6.1 In the result, this Tribunal makes the following order:

- 6.1.1 The first respondent is ordered to pay the complainant the withdrawal benefit it is holding made up of contributions received on his behalf for the period April 2008 to April 2016, within two weeks of the date of this determination, together with late payment interest at a rate of 10.5% *per annum* calculated from May 2016 to date of payment; and
- 6.1.2 The first respondent is ordered to provide the complainant with a breakdown of the payment made in paragraph 6.1.1 above within two weeks of such payment.

DATED AT PRETORIA ON THIS 17TH DAY OF FEBRUARY 2017

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M filing: High Court

Respondents unrepresented and the complainant represented by De Bruyns Attorneys