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PER REGISTERED POST

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): MS NDEBELE (“complainant”) v SOUTH AFRICAN NATIONAL BLOOD SERVICE PROVIDENT FUND (“first respondent”); ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD (“second respondent”) AND SOUTH AFRICAN NATIONAL BLOOD SERVICE (“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 of the Act.
- 1.2 The complaint was received by this Tribunal on 1 February 2017. A letter acknowledging receipt thereof was sent to the complainant on 9 February 2017. On the same date, the complaint was forwarded to the respondents affording them an opportunity to file their responses by 9 March 2017. A response was received from the third respondent on 2 March 2017. On 10 March 2017, this Tribunal granted the first respondent an extension to submit a response by 16 March 2017. A

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response was received from the second respondent on 23 March 2017. No further submissions were received from the parties.

- 1.3 After considering the 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 a member of the first respondent by virtue of his employment with third respondent from 5 January 2009 to 15 September 2015.
- 2.2 The third respondent opened a criminal case against the complainant at the Florida Police Station under case number CAS 566/07/2015 and also instituted civil proceedings against the complainant in the High Court of South Africa Gauteng Local Division Johannesburg under case number 07095/17.
- 2.3 The complainant's fund credit as at 19 May 2017, was in the amount of R462 290.30.

[3] COMPLAINT

- 3.1 The complainant submitted that he was employed with the third respondent as a Refrigeration and Air-Conditioning Supervisor from January 2009 until his dismissal on 15 September 2015, following a prolonged disciplinary process for charges of dishonesty and a corrupt relationship with suppliers. The complainant submitted that subsequent to the internal disciplinary process, the third respondent opened a criminal case against him at the Florida Police Station under case number CAS 566/07/2015 for his alleged fraud and corruption with a supplier. Following months of investigation and numerous submissions of evidence to the Investigating Officer, the docket was finally referred

to court for prosecution. However, the criminal case was withdrawn by the prosecutor on 20 May 2016 due to a lack of evidence.

3.2 The complainant submitted that on 21 October 2015, he submitted his withdrawal claim documents to the third respondent. He was advised that his claim was put on hold pending the finalisation of the criminal investigation. He submitted that he provided the first respondent with a copy of the outcome of the criminal matter. The complainant submitted that he followed up on the payment of his withdrawal benefit. On 29 July 2016, he received a letter advising that the third respondent has instituted civil proceedings against him. He submitted that as at 1 February 2017, he had not yet been served summons. However, the first respondent continues withholding his withdrawal benefit. He followed up on the payment of his withdrawal benefit on numerous occasions, to no avail. The complainant submitted that two years have passed and he has not received payment of his benefit.

3.3 The complainant requests this Tribunal to investigate the matter and order the payment of his full withdrawal benefit.

[4] RESPONSES

First and second respondents

4.1 The second respondent submitted a response on behalf of the first respondent. The second respondent submitted that the complainant was dismissed from employment and exited the first respondent. The third respondent subsequently requested the first respondent to withhold payment of the complainant's withdrawal benefit pending criminal investigations. The second respondent submitted that Rule 11 of the first respondent's Rules provides for the circumstances under which a member's benefit may be withheld.

- 4.2 The second respondent submitted that the first respondent was requested to withhold the complainant's benefit with a view to eventually effect a deduction from the benefit in respect of compensation due to the third respondent for damages suffered as a result of the complainant's fraud. The third respondent has indicated that the loss it suffered is in an amount of R3 746 297.87, which is in excess of the complainant's benefit.
- 4.3 The second respondent submitted that the complainant has furnished the first respondent with proof that the criminal case against him has been withdrawn by court due to a lack of evidence. However, the third respondent has instituted civil proceedings against the complainant for recovery of the loss caused by his conduct. The second respondent attached a copy of the combined summons in support of its submissions.
- 4.4 The second respondent submitted that the board of management of the first respondent has agreed to continue withholding the complainant's benefit pending civil proceedings against him. The board is satisfied that the third respondent's interest deserves the protection afforded to it in terms of section 37D(1)(b)(ii) of the Act, as to release the money will result in the third respondent not being able to recover from the complainant what it has lost as a result of his fraud. Therefore, the withholding is reasonable and in line with the registered Rules of the first respondent.

Third respondent

- 4.5 The third respondent provided this Tribunal with a copy of summons that has been served on the complainant on 27 February 2017. In the summons, it is alleged that the complainant engaged in an irregular fraudulent relationship in terms of which he facilitated payment of

inflated and/or false invoices and misrepresented to the third respondent that the submitted invoices reflected the correct purchase price and payment. Further that, he facilitated and made representations for the payment of goods that were not delivered and/or double payment for the same delivered goods. The complainant knew that the third respondent would act on the false and/or inflated invoices and misrepresentations. The complainant benefitted financially from the payments made and as a result, the third respondent suffered damages in the amount of R3 746 297.87.

[5] DETERMINATION AND REASONS THEREFOR

5.1 The issue that falls for determination by this Tribunal is whether or not the withholding of the complainant's withdrawal benefit by the first respondent, pending the outcome of the civil investigation against him is permissible.

5.2 The rules of a fund are supreme and binding on its officials, members, shareholders and beneficiaries and anyone so claiming from the fund (see section 13 of the Act and *Tek Corporation Provident Fund & Others v Lorentz* [2000] 3 BPLR 227 (SCA) at paragraph [28]). Rule 11.2 of the first respondent's Rules provides for deductions from benefits and read as follows:

"11.2 Notwithstanding any other provisions of these Rules, the Trustees may, where an Employer has instituted legal proceedings against the Member 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 out a *prima facie* case against the Member concerned and there is reason to believe that the Employer has 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.”

The Rules of the first respondent provide for a benefit to be withheld pending the outcome of a criminal or civil charge against its member.

5.3 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)(ii) 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) of the Act 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.

5.7 The third respondent opened a criminal case against the complainant in July 2015. The complainant's employment terminated in September 2015. The criminal case against the complainant was withdrawn in May 2016, due to a lack of evidence. On 29 July 2016, the third respondent advised the complainant that civil proceedings will be instituted against

him. However, it was only on 27 February 2017 that the third respondent instituted civil proceedings against the complainant in the High Court of South Africa Gauteng Local Division Johannesburg under case number 07095/17. The third respondent's alleged loss is in the amount of R3 746 297.87. The board of the first respondent is satisfied that the amount being withheld is in excess of the complainant's benefit. The third respondent commenced with criminal proceedings against the complainant in July 2015. The criminal case was withdrawn by the prosecutor on 20 May 2016 due to a lack of evidence. The third respondent only commenced with civil proceedings against the complainant in February 2017 after the complainant had lodged a complaint with this Tribunal. No reasons have been advanced for this delay. In the matter of *Buthelezi v Municipal Gratuity Fund and Another* (1) [2001] 5 BPLR 1996 (PFA), the court held that the implicit power to withhold the benefit must be exercised reasonable and within reasonable time, that is, the employer should not be allowed to withhold the benefit indefinitely. In this instance this Tribunal finds that there was an unreasonable delay in the proceedings against the complainant.

- 5.8 The board of the first respondent failed to act with due care, diligence and good faith in dealing with the complainant's withdrawal benefit. The conduct of the first respondent in this matter is unacceptable and amounts to dereliction of its fiduciary duties (see *Watson v Corporate Selection Retirement Fund* [2013] 3 BPLR 439 (PFA)). By allowing the first respondent to withhold the complainant's withdrawal benefit for an unreasonable period, the complainant will fall within the abuse of power by the third respondent. The first respondent should not be facilitating such abuse as it is not in the best interest of the complainant or its proper governance in terms of the Act. The need for allowances granted should be respected, exercised with caution and should not be abused.

5.9 Although, the withholding of the complainant's withdrawal benefit by the first respondent in section 37D(1)(b)(ii) of the Act, pending the outcome of the civil case, is permitted by the Rules and the law (see *Appanna v Kelvinator Group Services of SA Provident Fund* [2000] 2 BPLR 126 (PFA)), the withholding should be reasonable. This matter has already been delayed by the third respondent, resulting in prejudice of the complainant. Therefore, in the absence of an acknowledgement of debt, a judgment as required by section 37D(b)(ii)(bb) and the implicit power to withhold the benefit, the complainant is entitled to payment of his withdrawal benefit without any further delay.

[6] ORDER

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

6.1.1 The first respondent is ordered to pay the complainant a withdrawal benefit, less any deductions permitted by the Act, within two weeks from the date of this determination; and

6.1.2 The first respondent is ordered to provide the complainant with a breakdown of his payment together with the payment made in paragraph 6.1.1 above.

DATED AT PRETORIA ON THIS 20TH DAY OF JUNE 2017

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M filing: High Court

Parties unrepresented