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Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): SS RATLALA (“complainant”) v BOKAMOSO RETIREMENT FUND (“first respondent”) AND AKANI RETIREMENT FUND ADMINISTRATORS (PTY) LTD (“second respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the deduction of the complainant’s withdrawal benefit following the termination of his service.

- 1.2 The complaint was received by this Tribunal on 3 February 2017. A letter acknowledging receipt thereof was sent to the complainant on 9 February 2017. On the same date, a letter was forwarded to the respondents giving them until 9 March 2017 to file responses to the complaint. On 16 March 2017, a response was received from the first respondent. No response was received from the second respondent. No further submissions were received from the parties.

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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 commenced employment with the second respondent from 1 July 2012 until 31 August 2014, at which stage his service was terminated. The first respondent is administered by the second respondent.
- 2.2 Following the termination of his service, a portion of the complainant's withdrawal benefit was deducted and paid over to the second respondent.

[3] COMPLAINT

- 3.1 The complainant submits that when he resigned from his employment with the second respondent, he was informed that he owed the second respondent an amount of R17 305.96. This amount represented the refund in respect of the performance bonus paid to him during the subsistence of his employment.
- 3.2 The complainant mentions that the Principal Officer of the first respondent and the second respondent's finance manager indicated that he needed to authorise the first respondent to deduct the said amount from his withdrawal benefit. He avers that even though he was aware of the fact that the said deduction was not permissible in terms of the Act, he provided the said authorisation. He submits that he granted the said authorisation so that his withdrawal benefit could be paid.

3.3 The complainant requests this Tribunal to investigate the complaint and to order the first respondent to refund him the money that was wrongfully deducted from his withdrawal benefit.

[4] RESPONSE

First respondent

4.1 The first respondent confirms that the complainant was in the employ of the second respondent and was its member until he exited the second respondent.

4.2 It submits that it was notified by the complainant on 26 September 2014 *via* e-mail correspondence that he owed the second respondent an amount of R17 000.00 and authorised it to deduct the said amount from his withdrawal benefit and pay it over to the second respondent in order to settle his debt. It annexed a copy of the said e-mail correspondence.

4.3 It submits that on the strength of the aforementioned correspondence, it deducted the debt from the complainant's benefit and paid him the remainder of the benefit in terms of Rule 37(1) of its rules.

4.4 It concludes that no further benefit is due to the complainant and the complaint should be dismissed.

Second respondent

4.5 The second respondent was afforded an opportunity to comment on the allegations made against it, as required by section 30F of the Act. No response was received from it. In the circumstances, this Tribunal

has no other alternative but to dispose of the matter on the basis of available facts.

[5] **DETERMINATION AND REASONS THEREFOR**

Introduction

5.1 The issue for determination is whether or not the first respondent's conduct of making a deduction in respect of a performance bonus from the complainant's benefit is legal.

Merits

5.2 As a general rule, section 37A of the Act provides that pension benefits shall not be reducible, transferable or executable and ceded. 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 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.

5.4 In the present matter, the first respondent states that in attaching the complainant's withdrawal benefit, it relied on the e-mail correspondence received from the complainant on 26 September 2014, whose contents read as follows:

“As discussed telephonically, this serves as authorization for Akani to deduct the shortfall amount of approximately R17 000 from my pension benefit.

Kindly arrange for the payment to be made today, as agreed....”

- 5.5 What is evident from the provisions of section 37A of the Act is that pension benefits can only be attached if the requirements set out therein have been met, namely; a member must have caused damage to the employer by reason of any theft, dishonesty, fraud or misconduct and in respect of which a member has admitted liability or where judgment has been obtained against the member. It appears that the first respondent interprets the e-mail correspondence sent by the complainant to amount to an acknowledgement of liability in terms of section 37D(1)(b)(ii)(aa) of the Act, which is highly misplaced. The complainant submitted that the amount he owed the second respondent was in respect of a performance bonus refund. Essentially, the second respondent sought a refund of the performance bonus from the complainant. Evidently, the receipt of a performance bonus by the complainant does not relate to damage suffered by the second respondent due to any theft, dishonesty, fraud or misconduct perpetrated by the complainant as envisaged in terms of section 37D(1)(b)(ii) of the Act. Therefore, the first respondent could not attach the complainant's withdrawal benefit under the current circumstances.
- 5.6 In light of the above, this Tribunal concludes that the e-mail correspondence relied upon by the first respondent in authorising the attachment and deduction of the complainant's withdrawal benefit, does not satisfy the requirements of section 37D(1)(b)(ii)(aa) of the Act in that it does not amount to an acknowledgment of liability. Therefore, the first respondent acted unlawfully in deducting the complainant's benefit. Secondly, the conduct of the complainant on the basis of which the deduction was implemented does not satisfy the yardstick

that was used in the *Rowan* case in determining the circumstances and conduct under which a pension benefit may be deducted and attached. Thus, there was no legal basis for the first respondent to attach the complainant's withdrawal benefit and pay it over to the second respondent. In the circumstance, the first respondent must be ordered to pay the complainant's withdrawal benefit which is equivalent to the amount deducted and paid over to the second respondent, together with interest.

5.7 In the premise, the conduct of the respondents deserves deprecation in the strongest terms. As key players in the pension fund industry, the respondents are expected to observe the application of the Act and act in utmost good faith, which was certainly absent in the present instance. What is of grave concern is that this Tribunal has referred countless matters of non-compliance involving the second respondent to the Financial Services Board ("FSB"). In essence, the second respondent has become law unto itself, which cannot be countenanced. In light of the above concerns, this Tribunal refers this matter to the FSB for necessary corrective action to be taken against the respondents.

[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 his withdrawal benefit which is equivalent to the amount that was deducted and paid over to the second respondent, less deductions permitted in terms of the Act, together with interest at the rate of 10.5% *per annum* calculated from 24 November 2016 to date of payment, within two weeks of this determination; and

- 6.1.2 The first respondent is ordered to provide the complainant with a detailed breakdown of the benefit paid in terms of paragraph 6.1.1 above, within two weeks of making such payment.

DATED AT PRETORIA ON THIS 19TH DAY OF MAY 2017

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M filing: High Court

Parties: Unrepresented