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Please quote our reference: **PFA/WC/00103583/2023/TS**

Fund reference: **Nuhaa Rawoot**

Employer reference: **Hennie Niemand**

Dear Madam,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,
24 OF 1956 (“the Act”): Z ADAMS (“complainant”) v FUNDSATWORK
UMBRELLA PROVIDENT FUND (“fund”) AND FPG FOODS (PTY) LTD
 (“employer”)**

[1] INTRODUCTION

- 1.1 The issue which falls for determination is whether or not the withholding of the complainant’s withdrawal benefit is lawful in terms of section 37D(1)(b)(ii) of the Act.

- 1.2 The complaint was received by the Adjudicator on 13 October 2023. On 25 October 2023, letters were sent to the respondents informing them about the complaint and giving them until 27 November 2023 to resolve the complaint. On the same date, a notification of the complaint was sent to the complainant informing him that the matter has been referred to the respondents for possible resolution. On 27 November 2023 the fund filed a response. On the same date, the fund’s response

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was forwarded to the complainant for a reply by 15 December 2023. Further on the same date, a follow up letter was forwarded to the employer for a response by 15 December 2023. On 30 November 2023, the fund's response was forwarded to the employer for a response by 21 December 2023. On 07 December 2023 the employer filed a response. On 13 December 2023 the employer's response was forwarded to the complainant for a reply by 15 January 2024. On 08 January 2024 the complainant filed a reply. On 16 January 2024 the complainant's reply was forwarded to the employer and fund for submissions by 01 February 2024. On 16 January 2024 the fund filed submissions in response to the complainant's reply.

1.3 After reviewing the written submissions made to the Adjudicator, 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 her employment with the employer from 23 November 2015 to 04 May 2023. The complainant was registered as a member of the fund by virtue of her employment with the employer.

2.2 Upon the termination of her employment, the complainant became entitled to receive a withdrawal benefit. The fund has communicated to the complainant that it intends to deduct from her withdrawal benefit, as compensation in favour of the employer caused by the complainant's fraudulent activities and for which she signed acknowledgment of debt in terms of debt in terms of section 37D(1)(b)(ii)(aa) of the Act.

[3] COMPLAINT

- 3.1 The complainant submitted that she had signed two acknowledgements of debts in favour of the employer. On 04 May 2023, she signed an acknowledgment of debt in the amount of R130 000.00 in favour of the employer. She alleged that this amount was made up of R70 000.00 for 'accepting cash on the side' and R60 000.00 in respect of a company loan.
- 3.2 On 13 June 2023, the complainant signed a second acknowledgment of debt in the amount of R335 000.00 in favour of the employer. The complainant alleges that this acknowledgment of debt was signed under duress. She submitted that the employer wanted to hold her liable for all the profits made by vendors and that she was threatened with arrest if she did not sign. She states that this took place at a meeting between herself, the employer and 3 members of SJC Tactical Unit, where she was 'held hostage'. She submitted that she has a recording of the meeting.
- 3.3 The complainant submitted that she logged a dispute with the fund's administrator challenging the second acknowledgement of debt. She alleges that she was subsequently contacted by a member of SJC Tactical Unit, informing her that because she logged a dispute, a criminal case was opened but that he could not make it all go away if she sent an email to the fund's administrator clearing him of duress. She submitted that he then sent her a Whatsapp message of what to write to the administrator, but she did not send the email because it is not what happened.
- 3.4 The complainant submitted that she is suffering financial prejudice.
- 3.5 The complainant submitted that she attempted to contact the fund on numerous occasions thereafter, without success. On 18 September 2023, she was informed that she would receive her payout within 7 to 10 days. However, on 27 September 2023 the fund informed her that it rules in favour of the employer and the decision is final.
- 3.6 The complainant disputes the validity of the second acknowledgement

of debt and would like the fund to honour the first acknowledgement of debt for R130 000.00.

[4] RESPONSE

Fund

- 4.1 The fund submitted that the employer's contribution rate is 13.5% and the member contribution rate is 0%. However, the fund deducts consulting fees (advisory fees), administration fees (product house fees) and risk premiums for unapproved benefits as provided for in the general and special rules. The unapproved benefits are group life cover and disability cover.
- 4.2 The fund submitted that the complainant became its member on 01 December 2017. It attached a detailed investment statement and contribution allocation statement reflecting all contributions received by the fund from the employer in respect of the complainant amounting to R61 542.09.
- 4.3 The fund submitted that on 19 June 2023 the administrator received a signed admission of liability (AOD) from the employer. The document was reviewed and found to be valid and accordingly binding against the fund in terms of section 37D(1)(b)(ii) of the Act. It stated that on 17 July 2023, the complainant requested that the matter be reviewed and alleged the following:
- On 04 May 2023, she signed the withdrawal claim form and indicated that she owed the employer an amount of R130 000.00;
 - She was then put under massive duress on the 13 June 2023 at the employer's tactical unit, threatening her and demanding that she sign the documentation which was prepared, failing which she would be arrested; and
 - She signed two AOD forms which she cannot remember the amounts of, save to state that she remembers that she was signing away entire provident fund.

- 4.4 The fund submitted that it contacted the employer on 20 July 2023 to inform it of the complainant's request based on the allegations of duress. The employer was given time to provide its version as well as any supporting evidence. On 19 September 2023, the fund decided that it would accept the original admission of liability submitted based on the documents before it where the complainant admitted to owing the employer.
- 4.5 The fund submitted that the complainant's withdrawal claim form indicated her admission of owing the company R130 000.00. It relied on the complainant's email dated 25 June 2023 to her employer, admitting to indebtedness in various amounts totalling R216 805.00. The fund considered the complainant's version to be consistent.
- 4.6 The fund submitted that the employer provided a sworn statement by an ex-employee of the South African Police Service ("SAPS") who mediated the process between the complainant and employer on the days she signed the AOD. The fund submitted that the evidence of the fraud was presented to the complainant and the employer had enough evidence to proceed to report a criminal case.
- 4.7 The fund submitted that the former SAPS official also stated that several repayment options were discussed, and the complainant conceded that the only way she could repay the employer was to have her withdrawal benefit paid out to the employer in terms of an admission of guilt form. Further, the employer argued that the caveat subscriber principle applied. The total amount the employer claimed had been reconciled and supporting evidence was provided for each amount claimed.
- 4.8 The fund submitted that as the complainant was unhappy with the decision, she could institute civil proceedings or approach the Adjudicator. Accordingly,

the complainant's withdrawal benefit has not been deducted pending the outcome of this complaint.

Employer's response

- 4.9 The employer submitted that the complainant became a member of the fund effective on 01 December 2017. The employer submitted that its salary structure is based on a cost-to-company principle whereby employees sacrifice a portion of their salaries to make contributions to the fund. Furthermore, the complainant belonged to a member category where 13.5% of her salary was regarded as an employer contribution. In terms of this membership category, no member contributions were made. Throughout the complainant's period of employment, she accumulated a retirement savings benefit of R333 752.51 which was invested in a market-linked investment and fluctuates based on market conditions.
- 4.10 The employer submitted that the complainant's position in the company encompassed supervising the operations the employer's stores and one of the key responsibilities was the selection, evaluation, and approval of transport and security suppliers.
- 4.11 The employer submitted that it became aware that the complainant contacted some of their contracted suppliers to request remuneration/kickbacks in return for the business placed by her with such suppliers. Consequently, she drafted a template to falsify invoices originally submitted by the suppliers and inflated the amounts due on these invoices. She then allegedly falsified invoices and approved them, explicitly using her signature to do so for payment by the employer. The suppliers then proceeded to pay the complainant the kickbacks.
- 4.12 The employer submitted that it employed various methods to assess the extent of fraud committed by the complainant. Initially, the investigation

revealed fraud amounting to R130 000.00. After conclusion, the final extent of fraud was quantified at R359 826.12, which the complainant received in undisclosed payments from the various suppliers.

- 4.13 The employer submitted that on 04 May 2023, it requested the complainant to sign an AOD form that would allow it to deduct R130 000.00 from her retirement savings benefit in terms of Section 37D of the Pension Funds Act, 1956 to recover their losses. At the time of the meeting on 13 June 2023 the latest fund value, namely R335 290.25, was used as part of the signed admission documents.
- 4.14 The employer submitted that based on the fact that the extent of the fraud was significantly more than originally calculated, the employer engaged with the complainant to arrange an in person meeting to how it would recover its losses. The meeting was conducted on 13 June 2023 amongst others, Mr du Toit on behalf of SJC Tactical Security CC who was tasked to assess the evidence gathered in relation to this case.
- 4.15 The employer submitted that at no point during the discussion did Mr du Toit engage the complainant in a threatening manner towards the complainant. The employer submitted that the quality of the evidence against the complainant was of such a nature that the employer had the option of calling the SAPS to effect an arrest. The employer submitted that the complainant voluntarily indicated to Mr du Toit that that she wanted this matter to end and asked how she could stop the legal proceedings.
- 4.16 The employer submitted that the complainant advised that she spent all the money acquired through the fraudulent activities and has no money left. It also stated that she conceded that her retirement savings benefit should be used to recover some of the losses incurred by the employer. Accordingly, an AOD was drafted and explained to the complainant on more than one occasion during the meeting. The complainant was also more than once informed that this document entitles the employer to engage with the fund to

claim her retirement savings benefit within the in terms of Section 37D of the Act. The employer stated that the complainant voluntarily accepted this proposal and signed the document out of her own free will.

- 4.17 The employer submitted that the complainant acknowledged that she defrauded the employer to the extent of R335 390.25 and was prepared to instruct the fund to pay her the retirement savings benefit in terms of section 37D of the Act.
- 4.18 The employer submitted that on 19 June 2023, it instructed the fund to surrender the fund benefit of the complainant. On 17 July 2023, the complainant contacted the fund advising that she wanted this matter to be reviewed. She alleged that she was intimidated and threatened at the meeting of 13 June 2023 and that the AOD was signed under duress. As a result, the fund reviewed the information provided by the complainant via email on 17 July 2023.
- 4.19 The employer submitted that the fund advised the complainant that they were, and are, of the opinion that the AOD signed by the complainant on 13 June 2023 is binding on the fund. According to this document, the complainant's full retirement savings benefit amounting to R333 752.51 (before tax) should be paid to the employer. The employer stated that the form signed by the complainant ascribed these actions as a consequence of the fraudulent activities of the complainant that resulted in a total loss of R359 826.12.
- 4.20 The employer submitted that given the various threats of the complainant, she was provided with the contact details of the Adjudicator and advised that she would be allowed time to consider submitting a complaint to this office. It was confirmed to the complainant that her retirement savings benefit would not be paid to the employer until the Adjudicator issued a determination.

- 4.21 The employer submitted that the complainant was instructed to supply evidence of the submission of such a complaint by 13 October 2023, failing which her retirement savings (less tax) would be paid to the employer.
- 4.22 The employer submitted that after the change of heart of the complainant, it decided to open a case of fraud against the complainant with the SAPS under case number CAS 372/7/2023. It stated that civil action will also be considered pending the SAPS investigation.
- 4.23 The employer submitted that during the investigative process, the employer requested the complainant to submit documentary evidence to confirm that the allegations made against her were false, without success. During the investigation, the employer also asked the complainant to avail copies of her bank statements confirming that she indeed was not involved in fraudulent activities. The request was only partially addressed and some bank statements with crucial information in relation to this complaint were allegedly intentionally withheld.
- 4.24 The employer submitted that it believes that the complainant is deviating from the crux of this matter in her complaint. Despite there being concrete evidence to substantiate the allegations against her, it seems she places a higher premium on the alleged actions of Mr du Toit during the meeting of 13 June 2023 and the treatment she allegedly received.
- 4.25 The employer submitted that the fraud it uncovered remains the core of this matter, yet the complainant only briefly addressed this without disputing the fraudulent allegations. The employer denies that it held the complainant hostage, and that the complainant was forced to sign the AOD. Furthermore, it stated that it seems the complainant is unwilling to provide such evidence.
- 4.26 The employer submitted that it has been extremely accommodating towards the complainant and requested the Adjudicator to consider the facts and evidence and to order the fund to make payment representing the full

retirement savings benefit to R333 752.51 (before tax), to the employer without delay.

Complainant's reply

- 4.27 The complainant submitted that Mr du Toit threatened her into signing away her entire provident fund. She submitted that she was not asked to sign the AOD but was forced to do so. She further submitted that Mr du Toit impersonated a police officer and said that he will handcuff her in front of everyone if she did not sign the AOD.
- 4.28 The complainant submitted that she does not deny accepting kickbacks and admitted that she received R70 000.00 on the side from the employer's vendors. She submitted that the R70 000.00 plus the balance of the loan amount of R60 000.00 equals R130 000.00.
- 4.29 The complainant reiterated that she initially signed an AOD for R130 000.00 but alleged that the documents were altered. Furthermore, she alleged that the employer refuses to give her a copy of this R130 000.00 AOD.
- 4.30 The complainant submitted that the employer misled her throughout this whole situation and the incident left her traumatised. The complainant submitted that she needs the fund to pay her withdrawal Benefit.
- 4.31 The complainant submitted that she is disputing the validity of the R335 000.00 AOD which she was coerced into signing.

Fund's further submissions

- 4.32 The fund submitted that it was not present on the day the AOD was signed. Therefore, statements were requested from the employer and all parties who were present on the day. It stated that it responded to the complaint in detail.

Employer's reply to recording taken by complainant

- 4.33 On 15 April 2024, the employer submitted that the recording originates from a meeting conducted on 13 June 2023, attended by the following individuals:
- The complainant;
 - Mr Tonny van der Merwe, Operations Executive and previous direct supervisor of the complainant; and
 - Mr Charl du Toit and others from SJC Tactical Security, the designated investigator and mediator for this matter.
- 4.34 The employer submitted that considering the offences committed by the complainant, the employer engaged the expertise of Mr Charl du Toit to spearhead the investigation. Mr Charl du Toit, bearing extensive experience as a former member of the SAPS, notably within the Organised Crime Unit, was deemed suitably qualified to handle the complexities of this case.
- 4.35 The employer submitted that it deemed the firm stance adopted by Mr du Toit during the meeting as imperative, particularly in light of the complainant's steadfast denial in the face of undisputable evidence indicating her involvement in activities resulting in unauthorised personal gain to the detriment of the company.
- 4.36 The employer submitted that the complaint before the Adjudicator concerns the complainant's claim that she signed an AOD under duress, as defined by Corbet J in *Arend & Another v Astra Furnishers (Pty) Ltd*. It stated that the submission will demonstrate that the elements of duress, as required to vitiate the AOD, are not met in this complaint and that the AOD should be upheld as valid and binding.
- The fear must be a reasonable one:
The complainant must establish that the fear instilled by the alleged threat was reasonable. In the context of the present case, the fear of criminal

prosecution does not meet this criterion as the employer had a lawful right and possibly a duty to report any actions by the complainant that could be construed as criminal. Moreover, the mention of legal consequences for certain actions does not inherently constitute an unreasonable fear but a statement of potential outcomes grounded in the law.

- The fear must be caused by the threat of some considerable evil to the person concerned to his/her family:

The threats to the complainant does not concern any harm to her physical being or that of her family. Rather, it related to the potential for legal repercussions stemming from her own actions. This does not constitute an evil of the nature contemplated by the definition of duress in law.

- The fear must be the threat of imminent of inevitable evil:

The potential for criminal prosecution would follow a legal process, subject to the principles of justice and fairness, including the right to a fair trial. This process is neither imminent nor inevitable without a thorough investigation and due process, which belies the claim of duress under this element.

- The threat or intimidation must be *contra bonos mores*:

The employer's mention of criminal prosecution, based on the complainant's actions cannot be considered unlawful or against good morals. It stated that reporting potential criminal activity or advising an individual of the potential legal consequences of their actions is not only lawful, buy, in certain circumstances, expected.

- The moral pressure used must have caused damage:

The complainant has not substantiated any specific damage resulting directly from any moral pressure allegedly exerted by the employer. The act of entering into an AOD to settle a debt does not, in itself, constitute damage but rather a resolution of a financial obligation.

□ Application of case law present to present matter:

i. *Medscheme Holdings (Pty) Ltd and Another v Bhamjee* The Supreme Court of Appeal in *Bhamjee* clarified the requirement for duress to involve a fear induced by an unlawful threat. It distinguished between lawful negotiation and the exertion of undue pressure. The complainant's assertion fails to demonstrate how the employer's action constituted an unlawful threat rather than a lawful articulation of potential consequences of her actions.

ii. *Visser and Another v Kotze*

In *Visser*, the court underscored the necessity for the fear to be of an imminent and inevitable evil, further stating that not every threat which includes a contract amounts to duress. The threat must be shown to be both unlawful and immediate, conditions not substantiated in the current matter where the fear of criminal prosecution hinges on a lawful process following criminal actions of the complainant.

iii. *CTN Cash and Carry v Gallagher*

This case further distinguishes between a hard commercial bargaining and duress. The acknowledgement of a debt, even if prompted by the threat of legal action, falls within the realm of commercial negotiation rather than duress. The employer's mention of potential criminal proceedings constitutes a permissible legal stance rather than an undue exertion of pressure.

4.37 The employer submitted that the elements required to establish duress, as set forth by Corbett J in *Arends and Another v Astra Furnishers (Pty) Ltd*, are not met in this case. The employer stated that its actions, being within the realm of lawful conduct, do not fulfil the criteria for duress as claimed by the complainant. It requested that the AOD should remain in force as a valid agreement between the parties.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

5.1 The issue which falls for determination is whether or not the continued withholding of the complainant's withdrawal benefit is lawful in terms of section 37D(1)(b)(ii) of the Act.

5.2 As a general principle of law, pension benefits are not reducible, transferable or executable save for certain exceptions as outlined in sections 37A and 37D of the Act. The relevant section of the Act in this complaint is section 37D(1)(b), specifically sub-section (ii) thereof. Section 37D(1) provides as follows:

“37D(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 common cause facts are summarised as follows:

5.3.1 The complainant was employed by the employer from 23 November 2015 to 04 May 2023 and became a member of the fund by virtue of her employment on 01 December 2017;

- 5.3.2 During the course of her employment with the employer, the complainant was responsible for authorising payments to suppliers as part of her duties;
- 5.3.3 The complainant committed fraud against the employer by inflating supplier invoices and then benefitted from the fraud by receiving bribes from the suppliers;
- 5.3.4 The employer conducted an investigation and uncovered the fraudulent conduct of the complainant;
- 5.3.5 The complainant signed two acknowledgments of debts in favour of the employer in terms of which the employer would be authorised to claim a deduction from the complainant's benefit held with the fund. The first acknowledgment of debt was signed on 04 May 2023 for the amount of R130 000.00 and the second acknowledgement was signed on 13 June 2023 for R359 826.12.
- 5.4 The dispute in this matter centres around the validity of the second acknowledgment of debt and the circumstances that gave rise to it, as occurred during the meeting on 13 June 2023 attended by the employer and its representative, and the complainant.
- 5.5 Having listened to the recording of the meeting, the authenticity of which is not disputed, it is clear that there are three sides to the story. Neither party has accurately described what transpired in the meeting in their submissions to the Adjudicator. To mention just one example, there was neither a hostage situation, as alleged by the complainant, nor were the exchanges during the meeting polite, as alleged by Mr du Toit.
- 5.6 It is clear that the purpose of the meeting on 13 June 2023 was to discuss the quantum of the complainant's liability towards the employer. The complainant had already, by that stage, signed the first acknowledgment of debt and admitted to her fraud. There was no point to meet with her again simply to

confront her with further evidence of fraud. Her employment already terminated on 04 May 2023. The employer could have and should have proceeded to report the matter to the SAPS but it was motivated to meet with the complainant for the purpose of striking a deal. According to the employer's submissions, at the time the meeting occurred, the complainant's latest fund value of R334 290.25 was used as part of the Admission of Liability and Acknowledgment of Debt. This is a clear indication of the employer's motives for meeting.

- 5.7 At the meeting on 13 June 2023, the complainant was threatened with criminal prosecution and it was indicated that the amount of R130 000.00 (presumably in relation to the first acknowledgment of debt) was not enough to make up for the loss suffered by the employer. She was told that she has none of the money left that she stole but Mr du Toit informed her that he had a solution for her (recording at 08:47). It appears that she was then given a document to sign after which the employer undertook to get rid of the evidence and that she would be able to walk out and never hear from the employer again. She was told that if she did not sign, then the employer would approach the SAPS. The offer was made to the complainant by the employer to buy immunity from prosecution with the proceeds of her withdrawal benefit.
- 5.8 An amount of R600 000.00 was mentioned and the complainant protested at the amount stating that she did not receive all of the money. She averred that the money was shared between certain of her accomplices and was of the view that she should only be liable for the amounts that she received. Notwithstanding that she did not agree with the amount, she signed the document on the basis that she would avoid criminal prosecution by agreement with the employer. It is clear from the exchanges that there was no consensus on the quantum of liability. A deal was struck with the threat of prosecution being used as a bargaining tool.
- 5.9 She was then informed that if she did anything to stop the money from being deducted from her provident fund, the criminal case would be pursued. The

employer affirmed its commitment that if they can recover the funds, then it will not proceed further with criminal prosecution. Once the money “hits the bank”, she would be free.

- 5.10 The issue of whether the threat of criminal prosecution constitutes a form of duress has come before the courts. In *Arend and Another v Astra Furnishers (Pty) Ltd* [1974] All SA 522 (C), the court held that:

“...generally speaking a contract induced by the threat of criminal prosecution is unenforceable on the ground of duress and, in certain instances, also on the ground that it involves the compounding of a crime and the stifling of a prosecution. It is not necessary to express a positive view on whether this rule obtains where the party threatened in fact owes a liquidated amount to the party making the threat and the agreement involved merely the payment of the amount since, for the reasons already stated, that is not the position in this case.”

- 5.11 In the current matter, it is clear that the complainant did not sign the acknowledgment of debt out of her own free will. She was induced to do so under the threat of criminal prosecution wherein it was made clear to her that if she did not sign, she would be put into handcuffs and taken to the Commercial Crimes Unit. Further, that if she did sign, the employer would make everything go away.
- 5.12 The complainant’s fraudulent conduct is an offence under the Prevention and Combating of Corrupt Activities Act, 2004 (“PRECCA”). From the employer’s submission, it only decided to report the matter to the SAPS after the complainant had a change of heart about the acknowledgment of debt. The employer clearly considered itself to be in a position to decide whether or not to report the matter and such position was contrary to the provisions of section 34 of PRECCA which places a positive duty on the employer to report the matter to the Directorate for Priority Crime Investigation. Thus, the deal

struck at the meeting on 13 June 2023 was unlawful and consequently contra bonos mores. The Adjudicator cannot uphold an agreement that is unlawful.

5.13 It is worth noting that whilst the complainant did admit to committing fraud, the quantum of her liability is not a liquidated amount. In annexure N to the employer's submissions, it is indicated that at least R120 000.00 of the employer's calculated loss consists of an estimation, i.e. approximately one third of its claim.

5.14 In *Ilanga Wholesalers v Ebrahim and Others* [1974] 2 All SA (D), the court held:
"In the Jans Rautenbach case TRENGROVE, J., refers to a number of authorities which are similar in terms. I respectfully agree with the conclusion of the learned Judge in that case, viz, that where the sum which the debtor agrees to pay in fear of arrest is in fact the sum which is due the creditor does not act contra bonos mores in using the threat of criminal prosecution to induce him to acknowledge his true liability. In these circumstances, he is doing no more than to exercise his legal rights. Where, however, the creditor does not know and probably cannot establish (and a fortiori where he knows that he cannot establish) the amount of the debtor's indebtedness it seems to me an improper use of his rights to threaten to prosecute the debtor unless the debtor undertakes to pay an amount which the creditor more or less arbitrarily estimates to be due. No doubt even where the plaintiff does not know the exact amount stolen he is fully within his legal rights in threatening to prosecute the debtor but to use the threat of such proceedings to extort an undertaking to pay an amount which he knows he cannot prove to be due in a court if law constitutes, in my view, an abuse of his legal rights."

5.15 Accordingly, the fund's decision to make a deduction from the complainant's benefit falls to be set aside. The second acknowledgment of debt was a result of duress and the employer may not rely on same for the purposes of claiming a deduction in terms of section 37D(1)(b)(ii) of the Act.

5.16 The fund must also consider whether, in terms of the first acknowledgment of debt, the full R130 000.00 debt relates to a claim under section 37D(1)(b)(ii) since the complainant averred that R60 000.00 of that amount related to the repayment of a company loan. Whilst the complainant submitted that the first acknowledgment of debt can be honoured, the fund must still ensure that it acts within the confines of section 37D(1)(b)(ii) before making a deduction.

5.17 Since this matter is not currently before the Adjudicator, it will not be determined.

Conclusion

5.18 The complainant's complaint must be upheld.

[6] ORDER

6.1 In the result, the order of the Adjudicator is as follows:

6.1.1 The fund's decision to make a deduction in favour of the employer based on the second acknowledgment of debt dated 13 June 2023 is hereby set aside.

DATED AT PRETORIA ON THIS 25TH DAY OF APRIL 2024

NAHEEM ESSOP DEPUTY
PENSION FUNDS ADJUDICATOR

Cc:

Section 30M Filing: High Court
The parties: Unrepresented