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**REGISTERED POST**

Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): KUTTING SA (PTY) LTD (“complainant”) v OLD MUTUAL SUPERFUND PROVIDENT FUND (“fund”) AND OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LIMITED (“administrator”)**

**[1] INTRODUCTION**

1.1 The complaint concerns the request by the complainant to the fund to withhold a former employee’s withdrawal benefit in terms of section 37D(1)(b)(ii) of the Act.

1.2 The complaint was received by this Tribunal on 21 September 2021. A

letter notifying the complainant that the matter was referred to the respondent for possible resolution was sent on 27 September 2021. On the same date, a notification of the complaint was sent to the respondent affording them until 27 October 2021 to resolve the complaint. A response was received from the fund on 21 October 2021. On 27 October 2021, an acknowledgement of the complaint was

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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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sent to the complainant. Further submissions were received from the complainant on 10 March 2022.

- 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 is a private company and participating employer in the fund. Mr J Mabunda ("Mr Mabunda") was employed with the complainant from 18 June 2018 until 30 June 2021. He was a member of the complainant by virtue of his employment.
- 2.2 Upon exiting the fund, a withdrawal benefit became due and payable to Mr Mabunda. The fund withheld his withdrawal benefit at the instance of the complainant pursuant to section 37D(1)(b)(ii) of the Act.

## **[3] COMPLAINT**

- 3.1 The complainant is aggrieved with the fact that the fund does not accept the acknowledgement of debt ("AOD") form that was signed by Mr Mabunda. It averred that Mr Mabunda entered into an AOD agreement in that upon his exit from the fund, it would recover several debts incurred by him from his fund credit. It indicated that a portion of the debt was recovered, however, Mr Mabunda is still liable for massive stock loss as a result of alleged theft to the value of R44 913.67, together with a loan that he obtained under false pretence prior to his exit from service to the value of R9 000.00. It indicated that the total outstanding debt is R53 913.67 and Mr Mabunda has a fund credit of R50 653.36.

- 3.2 The complainant is dissatisfied with the fact that the fund advised it that a number of items listed on the AOD are not allowed in terms of section 37D(1)(b)(ii) of the Act. Further, it wants Mr Mabunda's denial of the signed AOD to be disregarded to enable it to recover the alleged damages.
- 3.3 The complainant requests this Tribunal to investigate the matter and order the fund to pay damages that it incurred as a result of the alleged theft, dishonesty and misconduct by Mr Mabunda.

*Complainant's further submissions*

- 3.4 The complainant confirmed that it is currently not insured for any losses/theft resulting from its employees. Thus, a claim in respect of stock losses was not submitted to its insurance. It provided a letter from its insurance confirming same.

**[4] RESPONSES**

*Fund*

- 4.1 The fund stated that Mr Mabunda was employed with the complainant, which participates in it. It confirmed that Mr Mabunda became its member on 1 February 2019 and has a fund credit of R54 003.12.
- 4.2 The fund stated that the complainant notified it on 5 July 2021 that Mr Mabunda exited its service on 31 May 2021. It submitted that the complainant enquired on the progress of Mr Mabunda's payment of withdrawal benefit on 2 August 2021, however, the enquiry was sent to the incorrect electronic mail address. It stated that on 6 August 2021, the complainant followed up on its request for an update regarding the payment of the Mr Mabunda's withdrawal benefit. On 11 August 2021, the fund provided the complainant with a prior claim form for it to

complete. On 11 August 2021, the complainant furnished the fund with a completed claim form, AOD and a liability form.

4.3 The fund submitted that on 27 August 2021, Mr Mabunda contacted it to enquire about the progress in the payment of his withdrawal benefit and was informed that it is in the process of validating his lien and AOD. On 8 September 2021, the complainant followed-up on the progress regarding the payment of Mr Mabunda's withdrawal benefit and it was informed that the matter was referred to its review department. On 9 September 2021, the fund's legal department advised it of the following:

- The complainant can only recover damages caused by Mr Mabunda as a result of theft, fraud, or dishonest misconduct. Further, from the list of 10 items on the AOD, the fund stated that it is of the opinion that the following items do not constitute employee's theft, fraud, or dishonest misconduct: notice period not worked, salary adjustment, traffic fine, damage to company vehicle, unpaid deliver note, loan repayment, lost company cell phone and repayment of issued personal protective equipment (PPE). The fund's legal department advised the fund to liaise with Mr Mabunda concerning the stock loss of February and May to ascertain if it falls within the ambit of fraud, theft, or dishonest misconduct.

4.4 On 10 September 2021, the fund contacted Mr Mabunda to obtain his version of events in respect of the complainant's *lien*. It stated that Mr Mabunda telephonically indicated that he refutes the allegation of stock loss and undertook to furnish his version of events in writing and same was provided on the same date indicating that the complainant has recovered the damages incurred for the stock loss from its own insurance company. The fund referred Mr Mabunda's version of events to its legal department and it advised of the following:

- "Please inform the employer that we are unable to give effect to the AOD as the member is disputing it. Thus, the complainant may approach the Office of the Pension Funds Adjudicator."

4.5 The fund informed the complainant on 15 September 2021, that it was unable to give effect to the AOD as Mr Mabunda was disputing it. On 17 September 2021, the complainant informed the fund of its intention to lodge a complaint with this Tribunal. On the same date, the fund referred the complainant's feedback to its legal department for further input and it advised as follows:

- "The business process of verifying the information and signature contained in the AOD is a requirement by the Adjudicator itself in the case of *Mentoor v SuperFund Provident Fund*. The employer is welcome to lay a complaint if it is aggrieved by the Administrator's decision. A copy of the complaint is to be provided to us, so we may place a hold on the processing of the claim pending the outcome of the decision by the PFA".

4.6 The fund advised the complainant of the above and further informed Mr Mabunda that the complainant laid a formal complaint with this Tribunal. It further informed Mr Mabunda that it would withhold payment of his withdrawal benefit pending the outcomes of the complaint filed with this Tribunal.

## [5] **DETERMINATION AND REASONS THEREFOR**

### *Introduction*

5.1 The issue which falls for determination is whether or not the complainant is legally entitled to request the withholding of Mr Mabunda's withdrawal benefit in accordance with the provisions of section 37D(1)(b)(ii) of the Act.

### *Fund rules and Mr Mabunda's benefit entitlement*

5.2 Rule 9.2(2) of the fund provides for the withholding of benefits and reads as follows:

The FUND may also reasonably withhold payment of a portion or the whole of any benefit payable in respect of a MEMBER or a BENEFICIARY provided that:

- a) The amount of benefit so withheld does not exceed the amount that may be deducted in terms of the ACT;
- b) The FUND is satisfied that the PARTICIPATING EMPLOYER has established a prima facie case against the MEMBER concerned;
- c) The FUND is satisfied that the PARTICIPATING EMPLOYER is not at any stage responsible for any undue delay in the prosecution of the proceedings;
- d) Once the proceedings have been finally determined by a competent court of law, or settled or withdrawn, any benefit amount to which the MEMBER or BENEFICIARY is entitled, and which was withheld, is paid immediately.

5.3 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. It reads 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;"

5.4 On a plain reading of the provision, section 37D(1)(b)(ii) does not authorise the withholding of a member's benefit where he is potentially liable for theft, fraud or misconduct against the employer. However, the Supreme Court of Appeal ("SCA") in the matter of *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* [2009] 1 BPLR 1 (SCA) held at paragraph [19] that:

*"Such an interpretation would render the protection afforded to the employer by section 37D(1)(b) meaningless, a result which plainly cannot have been intended by the Legislature. It seems to me that to give effect to the manifest purpose of the section, its wording must be interpreted purposively to include the power to withhold payment of a member's pension benefits pending the determination or acknowledgement of such member's liability. The Funds therefore had the discretion to withhold payment of the Respondent's pension benefit in the circumstances."*

- 5.5 In *Appana v Kelvinator Group Services of SA Provident Fund* [2000] 2 BPLR 126 (PFA) at page 129 D-G, the Adjudicator held:

*“The purposive approach requires the interpreter to attach a meaning to the words which will promote the aim of the provision. Or to put it differently the purpose of the legislation must be determined and then given effect to.*

*The purpose of rule 8.2.1.4 and section 37D(b), as stated, is to protect the employer’s patrimony from diminution by member misconduct and to allow an appropriate set-off against the pension benefits. Thus in order to give effect to the purpose of rule 8.2.1.4, we must extend the textual meaning of the words to include not only a power to deduct but also the power to withhold a benefit pending the determination of liability.*

*An interpretation of rule 8.2.1.4 along these lines is essentially an application of the ex accessorio eius, de quo verba loquuntur maxim applied by our courts usually in respect of enabling legislation. The maxim provides that if a statutory provision confers a power, it also by implication confers those powers reasonably necessary to achieve the principal aim.”*

- 5.6 It is accordingly permissible for a board of a fund to withhold a benefit in terms of section 37D(1)(b)(ii) of the Act

### *Analysis*

- 5.7 In this matter, the complainant requested the fund to withhold Mr Mabunda’s withdrawal benefit and avers that the request is in compliance with section 37D(1)(b)(ii) of the Act. Accordingly, it is appropriate to consider whether the request by the complainant is lawful in terms of the Act.
- 5.8 In this instance, Mr Mabunda’s employment terminated on 30 June 2021. The complainant submitted that it entered into AOD with Mr Mabunda relating to the admission of liability for the alleged damages. The complainant indicated that Mr Mabunda had several debts with it, however, a portion was recovered in respect of salary, payment of



leave and overtime. Further, it stated that Mr Mabunda was still liable for massive stock loss as a result of his direct responsibility due to alleged theft to the value of R44 913.67, as well as obtaining a loan of R9 000.00 from it under false pretence prior to his exit from service, which it deems a dishonest misconduct. The complainant averred that the fund refused to accept the AOD which was signed by Mr Mabunda to enable it to recover the financial loss that it suffered. It submitted that the telephonic consultation that the fund had with Mr Mabunda should not supersede the AOD. The fund indicated that it was unable to give effect to the AOD, as Mr Mabunda disputes it indicating that the complainant has already recovered the damages it incurred from its insurance company. Thus, the fund decided to withhold Mr Mabunda's withdrawal benefit pending the outcome of the complaint from this Tribunal.

5.9 The submissions indicate that there is no pending criminal or civil case against Mr Mabunda and there was no civil judgement obtained against him. Further, there is no indication or an intention from the complainant to do so.

5.10 The matter turns on whether or not the admission of liability signed by Mr Mabunda is valid and binding. The facts indicate that the fund could not give effect to the AOD in that Mr Mabunda alleges that the complainant already recovered its loss from its insurance company. However, the AOD clearly states the nature of the alleged stock loss, the amount of the loss suffered by the complainant and is admittedly signed by Mr Mabunda. The AOD lists a number of alleged misconduct as follows:

- Notice period not worked :R15 433.60;
- Salary advance from 25-31 May :R2 849.28;
- Stock loss February 2021 :R 25 242.09
- Stock loss May 2021 :R19 671.58;
- Traffic fine :R 470.00;

- Damage to company vehicle :R4 350.00
- Unpaid delivery note :R5 444.48;
- Loan repayment :R9 000.00
- Lost company cell phone :R2 500.00; and
- Repayment of issued PPE :R1 800.55

5.11 However, the complainant confirmed that a portion was recovered in respect of salary, payment of leave and overtime. Before a fund can withhold a benefit at the request of an employer, the member's misconduct must fall within the ambit of section 37D(1)(b)(ii) of the Act. The section requires that the alleged damage must have been caused through theft, dishonesty, fraud or misconduct by the member. In the matter of *Moodley v Scottsburg/Umzinto North Local Transitional Council* 2000 (4) SA 524 (D) the High Court dealt with the meaning of misconduct contemplated by section 37D(b)(ii) of the Act as follows:

“I am of the view that the common denominator of the specific words is dishonesty – they are species of the same genus, that is dishonesty, and it consequently follows that the meaning of the general word “misconduct” must be inferred from that of the specific words, which means that misconduct used in this section must be interpreted to include dishonest conduct, or at least an element of dishonesty.”

5.12 In this matter, the complainant alleges that it suffered a massive stock loss as a result of Mr Mabunda's direct responsibility due to alleged theft to the value of R44 913.67, as well as obtaining a loan of R9 000.00 from it under false pretence prior to his exit from service, which it deems a dishonest misconduct. The fund indicated that it was unable to give effect to the signed AOD, as Mr Mabunda disputes it indicating that the complainant has already recovered the damages it incurred from its insurance company. However, the facts indicate that the complainant did not recover the damages it incurred from its insurance company, as it is currently not insured. It provided a letter confirming same from its insurance. Thus, the fund decided to withhold Mr Mabunda's withdrawal benefit pending the outcome of the

complaint from this Tribunal. The failure of Mr Mabunda to execute his employment duties does not fall within the misconduct as contemplated in section 37D(1)(b)(ii). Thus, any withholding of his benefit on this ground is unlawful (see *Mellet v Orion Purchase Pension Fund (SA) and Another* [2001] 12 BPLR 2824 (PFA)).

- 5.13 The complaint against Mr Mabunda relates to theft and misconduct as contemplated by section 37D(1)(b)(ii) of the Act, which he admitted liability for stock loss to the value of R44 913.67 and obtaining a loan of R9 000.00 under false pretence. It must be noted that to qualify for misconduct in terms 37D(1)(b)(ii) of the Act, there must be an element of intention or dishonesty, a mere negligent conduct would not suffice. The evidence indicates that there was an element of dishonesty, theft and misconduct in Mr Mabunda's action as he admitted liability in the alleged theft and misconduct. Thus, Mr Mabunda's actions were intentional misconduct. The alleged stock loss and obtaining a loan under false pretence under these circumstances amount to misconduct as contemplated by section 37D(1)(b)(ii) of the Act.
- 5.14 Further, the facts indicate that Mr Mabunda clearly signed the admission of liability in respect of stock loss and obtaining a loan under false pretence out of his own free will without any force or pressure. On the basis of the maxim *caveat subscriptor*, Mr Mabunda is presumed to have known or understood the consequences of signing the admission of liability indicating that he caused damage to the complainant by reason of misconduct. Further, on the basis of the doctrine of quasi-mutual assent, the fund was reasonably entitled to assume that by signing the document, Mr Mabunda was signifying his intention to be bound by the terms and conditions thereof (see *Mbokazi v Textile & Allied Workers Provident Fund and Another* [2002] 3 BPLR 3200 (PFA) at 3206C-D).

5.15 Thus, the fund acted lawfully in terms of its rules and section 37D(1)(b)(ii) of the Act in relying on the admission of liability signed by Mr Mabunda. The admission of liability is valid in that it states the nature of the alleged misconduct, the amount of the loss of R44 913.67 and R9 000.00 suffered by the complainant. Further, same was signed by Mr Mabunda on 14 June 2021. Accordingly, the withholding of the complainant's withdrawal benefit is lawful.

5.16 In the circumstances, the continued withholding of the amount claimed by the complainant was lawful as Mr Mabunda signed an acknowledgement of liability for the said amount. The fund should deduct the amount claimed by the complainant from Mr Mabunda's fund credit and then pay it over to the complainant. The fund should then pay the complainant the balance of his fund credit.

**[6] ORDER**

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

6.1.1 The withholding of Mr Mabunda's withdrawal benefit is lawful in terms of section 37D(1)(b)(ii) of the Act;

6.1.2 The fund is ordered to deduct the amount claimed by the complainant as indicated in this determination, for which Mr Mabunda had admitted liability, from his fund credit and pay it over to the complainant, within two weeks of this determination; and

6.1.3 The fund is ordered to pay Mr Mabunda any balance of his fund credit within three weeks of the date of this determination.

**DATED AT PRETORIA ON THIS 17<sup>TH</sup> DAY OF MARCH 2022**

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**MA LUKHAIMANE**  
**PENSION FUNDS ADJUDICATOR**

**Section 30M Filing: High Court**

*Parties unrepresented*