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Please quote our reference: **PFA/GP/00103055/2023/TBM**

Fund Reference: **34233016**

**PER REGISTERED POST**

Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,  
24 OF 1956 (“the Act”): M MPAMBANI (“complainant”) v MUNICIPAL  
GRATUITY FUND (“fund”) AND PIKITUP JOHANNESBURG (SOC)  
LTD (“employer”)**

**[1] INTRODUCTION**

- 1.1 This complaint concerns the payment of the complainant’s fund credit to an incorrect person by the fund following his incarceration.
- 1.2 The complaint was received by the Adjudicator on 04 October 2023. On 19 October 2023 and 24 October 2023, a notification of the complaint was sent to the respondents affording them until 19 November 2023 to resolve the complaint. On 25 October 2023, a letter was sent to the complainant notifying him that the complaint was forwarded to the respondents for possible resolution. An interim response was received from the employer on 24 October 2023. On 29 November 2023, a letter acknowledging receipt of the complaint was sent to the complainant.

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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.

**Centralised Complaints Helpline for Other Financial Ombud Schemes 0860 OMBUDS (086 066 2837)**

On the same date, respondents were requested to submit their responses by 18 January 2023. The fund filed its response on 07 November 2023. On 23 January 2024, a follow-up letter was sent to the employer following the expiry of the date given to it to file its response. It was given a further opportunity until 02 February 2023. Further submissions were received from the complainant on 22 January 2024. Telephonic submissions were received from the complainant on 02 April 2024.

- 1.3 Having considered the written submissions, it is considered unnecessary to hold a hearing as the background facts are well known to the parties. Only those facts that are pertinent to the issues raised herein shall be considered. The determination and reasons therefor appear below.

## **[2] FACTUAL BACKGROUND**

- 2.1 The complainant commenced employment from 1990 until his incarceration on 29 November 2016. He was registered with the fund under the participation of the employer.
- 2.2 On 07 September 2018, the complainant's fund credit of R810 413.07 was paid to an incorrect person while he was incarcerated.

## **[3] COMPLAINT**

- 3.1 The complainant confirmed that he was employed from 1990 until 29 February 2016. He submitted that while he was in custody his withdrawal benefit was unlawfully claimed on his behalf. The

complainant is aggrieved with the fact that the fund was able to process a withdrawal benefit claim in his absence.

- 3.2 The complainant submitted that firstly, the face on the identity document is not his, secondly, the fund took into account an affidavit deposited by the Correctional Services purporting to be himself. He indicated that the affidavit was not stamped and signed as required. He also submitted that the fund accepted a withdrawal claim form that had errors and thought that the fund administrator would be weary of such.
- 3.3 In support of his submissions, the complainant submitted a copy of the Old Mutual Money Account Statement the benefit was paid into purporting to be his account. Thus, he requests the Adjudicator to investigate the matter and order the fund to pay his withdrawal benefit as it approved the payment of the benefit to an incorrect person using fraudulent documents.

#### *Complainant's further submissions*

- 3.4 On 22 January 2024, the complainant provided the Adjudicator with a supplementary affidavit confirming that he exited service in February 2016 due to his arrest. He stated that the employer then completed exit forms notifying the fund of his membership termination. The complainant confirmed that the withdrawal claim forms were marked unsigned and sent to the fund on 30 November 2016.
- 3.5 The complainant confirmed that initially, the fund did not process the claim presumably because the withdrawal claim forms were not signed. He stated that, however, on 20 February 2017, the fund contacted the employer's Human Resources officer requesting the complainant's certified copy of his identity document. He confirmed that the HR officer confirmed that it cannot provide the identity document as the complainant was in custody.

- 3.6 The complainant confirmed that on 22 June 2018, the fund made a follow-up enquiry to the employer ascertaining if he, the complainant, was still incarcerated. On the same date, the employer confirmed so. However, the complainant submitted that between June 2018 and August 2018 the fund appeared to have been in communication with an individual who created an electronic mail address using the complainant's name, that is, [mpambanimongezi@gmail.com](mailto:mpambanimongezi@gmail.com).
- 3.7 The complainant indicated that on 30 August 2018, the fund received claim documents from the said electronic mail to the fund using [sanlamumbrellafund@sanlam.co.za](mailto:sanlamumbrellafund@sanlam.co.za). The complainant confirmed that on 04 September 2018, the fund responded to the said correspondence with instructions to the said fraudster. The fraudster then replied accordingly. The complainant provided a copy of the said correspondence.
- 3.8 He indicated that the fund processed the claim while knowing that he was incarcerated and could not have had access to electronic mail facilities. The complainant submitted that a copy of his original identity document was with his daughter. He stated that it was clear that the identity document sent to the fund was fraudulent. The complainant submitted that the fund failed to perform due diligence when dealing with the fraudulent claim.
- 3.9 The complainant submitted that the amount paid out is a lot of money wherein it could not have been paid out using cancelled and amended banking details. He submitted that the fund decided to deal with a faceless individual instead of at least the employer as he was incarcerated. The complainant submitted that the fund in 2019 knew that the claim was fraudulent and to date it has done nothing about it.

- 3.10 The complainant submitted that the fund indicated that it was he who had been defrauded and not the fund. He stated that he could not have been defrauded when he did not take any part in the transaction, but the fund.

#### **[4] RESPONSES**

##### *Fund*

- 4.1 The fund submitted that the complainant became its member on 01 January 2002. It indicated that it last received contributions on behalf of the complainant in February 2016. The fund submitted that in its view, the employer owes a duty of good faith to the fund and its members to inform it of the termination of the employment contract for it to commence with the exit process. It indicated that it can only start with the process after it has been informed either by the employer or the complainant of the exit from service.
- 4.2 The fund confirmed that on 30 November 2016, it received a notification of the complainant's exit from service from the employer due to incarceration. It confirmed and provided the Adjudicator with the incomplete withdrawal claim forms from the employer. The fund submitted that on 30 August 2018, it received the completed withdrawal claim forms from the complainant. It provided the Adjudicator with a copy of the said forms.
- 4.3 The fund submitted that as part of its verification process, a telephonic validation was done with Bidvest Bank to confirm the account status. It indicated that the account was confirmed as open, active, and in the name of the complainant. It confirmed that it acted on the instructions received from the complainant and the claim was finalised on 07 September 2018. The fund confirmed that it made a follow-up surplus payment into the same bank account.

- 4.4 The fund confirmed that in January 2019, it was informed by Bidvest Bank that the withdrawal benefit payment may be part of the syndicate that was involved in identity theft and unlawfully claiming benefits of retirement fund members. It submitted that due diligence was followed by notifying the internal forensic department, which resulted in a formal criminal complaint reported to the South African Police Service (“SAPS”) in Bellville under CAS 839/9/2019. The fund submitted that the criminal complaint is closed as undetected.
- 4.5 The fund submitted that the financial industry, which is not excluded, is being targeted by unknown individuals committing identity theft and causing business electronic mail compromises. It stated that to effectively combat these fraudulent activities, it cannot provide detailed feedback on its investigations.
- 4.6 The fund submitted that due to an ongoing investigation, it is unable to accede to the complainant’s request. It indicated that it would provide an update on its investigations in due course.

#### *Employer*

- 4.7 The employer did not file a response regarding the matter directly to the Adjudicator. The Adjudicator, however, has a trail of correspondence between the employer and the fund between 31 October 2023 and 18 January 2024 regarding the fraudulent claim.

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

### *Preliminary issues*

### *Time-barring*

5.1 The complaint was received by the Adjudicator on 04 October 2023, regarding the payment of the complainant's withdrawal benefit to an incorrect person on 07 September 2018, while incarcerated. Section 30I of the Act imposes a three-year time limit on complaints that may be investigated by the Adjudicator and states as follows:

“(1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.

(2) The provisions of the Prescription Act, 1969 (Act No. 68 of 1969), relating to a debt apply in respect of the calculation of the three-year period referred to in subsection (1).”

5.2 Section 30I precludes the Adjudicator from investigating and adjudicating any complaint if the act or omission to which it relates occurred more than three years before receipt of a written complaint in that regard. Furthermore, in terms of section 12(1) of the Prescription Act No 68 of 1969, prescription commences to run as soon as the debt is due.

5.3 Section 12(3) of the Prescription Act provides that a debt will be due only when the claimant knows who the offender is and the facts that led to the claim. In addition, section 13(1) of the Prescription Act deals with circumstances upon which the prescription period is considered to be delayed. According to this provision, the period of prescription would be considered to have been delayed if, *inter alia*, a creditor or claimant is prevented by superior force including any law or any order of the court from interrupting the running of prescription as contemplated in section 15(1).

5.4 The facts indicate that the complainant was incarcerated when his withdrawal benefit was fraudulently paid to an incorrect person. He

became aware of the cause of action when he was released in July 2023 and attempted to claim his withdrawal benefit. Further, the fund confirmed that the claim was fraudulently paid out and that the matter is still under investigation. Thus, the complaint is not time-barred in terms of section 30I(1) of the Act.

### *Merits*

5.5 The issue that falls to be determined is whether or not the fund should be held liable for paying out the complainant's fund credit to an incorrect person whilst he was incarcerated.

### *Payment of the complainant's withdrawal benefit*

5.6 In the Supreme Court of Appeal (SCA) matter of *Municipal Employees Pension Fund v Mongwaketse* (969/2019) [2020] ZASCA 181 (23 December 2020) In paragraphs [42] to [44], Wallis JA held that the rules of a fund are its constitution, and that the doctrine of *ultra vires* applies. If the rules of a fund do not afford a fund the legal power or capacity to do something, then such purported act by the fund is *ultra vires* and accordingly null and void. The Constitutional Court affirmed the SCA's findings in *Municipal Employees Pension Fund and Another v Mongwaketse* (CCT34/21) [2022] ZACC 9 at paragraph [39] where it stated that the application of the *ultra vires* doctrine to pension funds is consistent with the constitutional principle of legality.

5.7 The facts indicate that the complainant's fund credit of R810 413.07 was fraudulently paid to an incorrect person on 07 September 2018 while the complainant was in custody. Section 7C(2)(a), (b) and (c) of the Act provides the following in respect of the object of the board:

“(2) In pursuing its object the board shall –



- (a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times, especially in the event of an amalgamation or transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund;
- (b) act with due care, diligence and good faith.”
- (f) have a fiduciary duty to members and beneficiaries in respect of accrued benefits or any amount accrued to provide a benefit, as well as a fiduciary duty to the fund, to ensure that the fund is financially sound and is responsibly managed and governed in accordance with the rules and this Act.”

5.8 Section 7D(1)(a) and (b) of the Act provides the following:

- “(1) The duties of a board shall be to:
- (a) ensure that proper registers, books and records of the operations of the fund are kept, inclusive of proper minutes of all resolutions passed by the board;
  - (b) ensure that proper control systems are employed by or on behalf of the board;”

5.9 The fund has a fiduciary duty to exercise its functions with care, due diligence, and good faith. The fund failed in its duties towards the complainant when it did not seek to further confirm his incarceration status before effecting payment which renders its act and/or omission thereof reckless and puts the complainant in an adverse economic position as already done in this matter. The facts indicate that the fund was informed that the complainant was incarcerated effective 29 February 2016. It initially did not process the claim as the withdrawal claim forms submitted by the employer were incomplete. This was because the complainant was in custody and could not provide all the required documents and sign the withdrawal claim form.

- 5.10 The fund must first liaise with its members and their employers upon receiving exit documents to confirm the veracity and authenticity of the claim documentation. It appears that in this matter, upon receipt of the claim documents the fund enquired with the employer and was informed of the complainant's incarceration, hence it could not be provided with all the required documents, and why the form was not signed by the complainant. However, following this, the fund between June 2018 and August 2018 appeared to have communicated directly with an individual purporting to be the complainant. It is not clear why the fund did not further confirm if the complainant was released or not. This is also because persons in custody have limited access to communication facilities and everything they send out or receive must first go through the accountable Correctional Services personnel.
- 5.11 The fund could not have communicated with the complainant electronically without the correctional facility knowing, let alone being able to open a new bank account, and subsequently submit all the documents that were submitted fraudulently. This on its own indicates that the fund did not exercise due care and diligence during the second part of processing the claim from June 2018 until the payment was made.
- 5.12 The fund's failure to comply with section 7D(1) of the Act amounts to an improper exercise of its powers and maladministration as contemplated in the definition of a complaint (see *Joshua v Dunlop Africa Pension Fund* [2001] 4 BPLR 1852 at 1857F-G (PFA)). Therefore, it must ensure that proper mechanisms, checks, and balances are implemented to combat corrupt and fraudulent activities.
- 5.13 It was held in *Johannesburg Municipality Pension Fund v NCB Employee Benefits (Pty) Ltd (Unpublished case) Case No 74/01* that what is plain from the above-mentioned provisions of the Act is that

the board occupies a position of trust and has a fiduciary duty towards the members of the fund on whose behalf the assets of the pension funds are administered. The fund has failed to execute this duty. In *Baloyi v Dichawu National Provident Fund and Others PFA/GA/4141/2005/RM* the Adjudicator held that where the complainant suffers loss due to the fund's maladministration, the latter must place the complainant in a position he would have been in had the maladministration not occurred.

- 5.14 The complainant confirmed that it was not he who was defrauded but the fund as he was at no stage involved in the process. Thus, it would be prejudicial to place any responsibility on the complainant. The fund confirmed that it may have been targeted by a syndicate committing identity theft. As indicated above, the fund has a fiduciary duty towards the complainant and must safeguard his fund credit. The fund confirmed that it opened a criminal complaint which was closed as undetected. It also confirmed that it is conducting internal forensic investigations. Thus, it is the fund that has been defrauded and not the complainant. Further, if the fund's system was compromised which led to the communication between itself and the fraudster, still the complainant cannot be blamed for such. He justifiably knew that his funds were still with the fund and under its protection as required in terms of the Act. Hence, he immediately proceeded to claim same when he was released from custody.
- 5.15 It is not clear how long the investigations would take and the outcome thereof, therefore, it would be unfair to put the complainant's benefit on hold pending the outcome. The complainant is the victim of the circumstances, and the fund had a fiduciary duty to protect his benefit. Thus, there will be no legal justification to hold the complainant accountable for the fraud. Therefore, the complainant is entitled to his withdrawal benefit.

5.16 The appropriate relief is that which has the effect of placing the complainant in the position he would have been had the fund not paid his fund credit (see *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator and Others* [2002] 9 BPLR 3880 (C) at 3839F-G and *Mabale v Feedmix Provident Fund and Others* [2008] 1 BPLR 29 at 37E-F). The fund must reinstate the complainant's fund credit together with the investment returns earned and pursue legal action on the fraud committed against it without further prejudicing him.

**[6] ORDER**

6.1 In the instance, the order of the Adjudicator is as follows:-

6.1.1 The fund is ordered to reinstate the complainant's fund credit in the amount of R810 413.07 together with fund interest up to date of payment, within two weeks from the date of this determination;

6.1.2 The fund is ordered to pay the complainant his withdrawal benefit which consists of his reinstated fund credit in paragraph 6.1.1 above, within one week of reinstating the fund credit; and

6.1.3 The fund is ordered to provide the complainant with a breakdown of the withdrawal benefit paid in paragraph 6.1.2 above, within one week of making such payment.

**DATED AT PRETORIA ON THIS 11<sup>TH</sup> DAY OF APRIL 2024**

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**MA LUKHAIMANE**

## **PENSION FUNDS ADJUDICATOR**

**Section 30M Filing: High Court**

*No legal representation*