IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/FS/77/99

In the complaint between:

T A Theron                                                  Complainant

and

Price Waterhouse Coopers Directors Provident Fund          Respondent

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT OF 1956

1. This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A of the Pension Funds Act relating to the fund’s withholding of the complainant withdrawal benefit. No hearings were conducted and therefore in determining this matter, I have relied on the documentary evidence and the investigation conducted by my investigator, Lisa Shrosbree.

2. The complainant became a partner of Coopers & Lybrand (now Price Waterhouse Coopers) in September 1990 and simultaneously became a member of the then Coopers & Lybrand Provident Fund which has subsequently changed its name to the Price Waterhouse Coopers Directors Provident Fund (“the fund”), the respondent in this matter.

3. On 30 September 1998, the complainant withdrew from the partnership. He accordingly became entitled to a withdrawal benefit in the sum of R109 216 from the fund.

4. However clause 12.2 of the partnership agreement which the complainant signed on joining the partnership reads:

Should the Borrower die, or retire or withdraw from the Partnership and the consequent payments by the Partnership in terms of 13 below do not fully expunge the Borrower’s liability to the Company under this acknowledgment of debt agreement, the Borrower
irrevocably authorises the trustees of the Coopers & Lybrand Provident Fund to pay and settle the remaining indebtedness of the Borrower to the Company out of the benefits payable in terms of the fund’s rules consequent upon the Borrower’s death, retirement or withdrawal, the Borrower irrevocably accepting that in applying the fund’s rules such indebtedness shall be deemed to be a debt due to the Borrower’s employer.

5. In terms of the above, the partnership may settle any outstanding debts owed by a withdrawing partner to the partnership by applying his withdrawal benefit payable from the fund.

6. According to Coopers & Lybrand, on his resignation, the complainant was indebted to the partnership in the sums of R100 098 and R14 350 respectively. A dispute over these outstanding amounts has subsequently ensued between the complainant and Coopers & Lybrand. The fund contends that it is therefore entitled to withhold the complainant’s withdrawal benefit in terms of clause 12.2 of the partnership agreement pending finalization of this dispute. This forms the basis of the complainant’s complaint who contends that the fund is unlawfully withholding his benefit.

7. On 29 May 2000, I sent a letter to the principal officer of the fund which reads as follows:

Dear Mr Fielding:

Re: Complaint in terms of section 30A of the Pension Funds Act of 1956 – T Theron

1. I have had sight of your letter addressed to my Senior Investigator, Mr Ian McDonald, dated 24 March 2000.

2. It would seem that your defence in this matter is that you are entitled to deduct the complainant’s pension benefits in terms of Clause 12.2 of the acknowledgement of debt signed by the complainant in respect of the amounts owing on his current account.

3. It also appears that you are of the view that the arbitration proceedings may have some impact on this office’s jurisdiction to determine the complaint.
4. I have some difficulty with these defences, and unless you are able to come up with more compelling arguments, it is likely that we shall have to rule in favour of the complainant.

5. First of all, section 37A of the Pension Funds Act generally prohibits the reduction of and execution against pension benefits in respect of debts owed by a pension fund member to his former employer or other persons. However, section 37D makes an exception in that it allows for the pension fund and the employer to deduct amounts owing either in respect of housing loans or as compensation in respect of any damage caused to the employer by reason of the employee’s delict involving specifically theft, dishonesty, fraud or misconduct. In the latter respect, it is also necessary to have a written admission of delictual liability or a judgement in respect of compensation.

6. From the documentation you have submitted to this office, it would appear that you have a written admission of liability for a contractual debt which is not a housing loan, nor is it in respect of delictual damages. Accordingly, as the law currently stands you are not entitled to deduct such amounts from the complainant’s pension benefit and he is entitled to obtain or transfer his withdrawal benefit in terms of the rules.

7. Insofar as the arbitration proceedings are concerned, I have my doubts whether such excludes my jurisdiction to determine a complaint lodged in terms of chapter VA of the Pension Funds Act. However, I would gladly receive further submissions from you on this point. In any event, insofar as the arbitration may seek to provide for the deduction of the pension benefit, such an award would be contrary to the statute and thus would be illegal.

8. Accordingly, as I have stated, unless you provide compelling reasons to the contrary, it is our intention to hand down a determination in this matter directing the fund to make payment of the benefit or to transfer it in accordance with the wishes of the complainant.

9. Please let us have any further submissions which you wish to make within 10 days of the date of this fax. Should we not receive any additional submissions within the time period, we shall determine the matter without any further reference to yourselves along the lines set out above.

10. Should you have any queries, please do not hesitate to contact me telephonically.

8. I did not receive any further submissions from the respondent within the prescribed 10 day period. My office manager then telephoned the principal officer, Mr Fielding, who confirmed that the fund did not wish to make any additional submissions in response to my letter.
9. I accordingly reiterate the contents of my letter dated 29 May 2000 as follows:

Section 37A(1) of the Pension Funds Act provides:

Save to the extent permitted by this Act, the Income Tax Act, 1962 (Act No. 58 of 1962), and the Maintenance Act, 1963 (Act No. 23 of 1963), no benefit provided for in the rules of a registered fund (including an annuity purchased or to be purchased by the said fund from an insurer for a member), or right to such benefit, or right in respect of contributions made by or on behalf of a member, shall notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law, or to the extent of not more than three thousand rand per annum, be capable of being taken into account in a determination of a judgment debtor’s financial position in terms of section 65 of the Magistrates’ Courts Act, 1944 (Act No. 32 of 1944), and in the event of the member or beneficiary concerned attempting to transfer or otherwise cede, or to pledge or hypothecate, such benefit or right, the fund concerned may withhold or suspend payment thereof: Provided that the fund may pay any such benefit or any benefit in pursuance of such contributions, or part thereof, to any one or more of the dependants of the member or beneficiary or to a guardian or trustee for the benefit of such dependant or dependants during such period as it may determine.

Section 37A(2)(b) provides:

The set-off of any debt against a benefit shall for the purposes of subsection (1) be construed as a reduction of the benefit.

10. Therefore section 37A expressly prohibits the set-off of a debt against a benefit payable by a fund.

11. However a fund may make deductions from a benefit to recover housing loans and compensation for certain losses caused to the employer by wrongful conduct of the member in terms of section 37D of the Act which reads:
A registered fund may —

(a) deduct any amount due to the fund in respect of—
   (i) a loan granted to a member in terms of section 19 (5) (a); or
   (ii) any amount for which the fund is liable under a guarantee furnished in respect of a loan by some other person to a member for any purpose referred to in section 19 (5) (a),

from the benefit to which the member or a beneficiary is entitled in terms of the rules of the fund, to an amount not exceeding the amount which in terms of the Income Tax Act, 1962 (Act No. 58 of 1962), may be taken by a member or beneficiary as a lump sum benefit as defined in the Second Schedule to that Act;

(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) (aa) a loan granted by the employer to the member for any purpose referred to in section 19 (5) (a); or
   (bb) any amount for which the employer is liable under a guarantee furnished in respect of a loan by some other person to the member for any purpose referred to in section 19 (5) (a),

   to an amount not exceeding the amount which in terms of the Income Tax Act, 1962, may be taken by a member or beneficiary as a lump sum benefit as defined in the Second Schedule to that Act; or

   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—

(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.

12. The respondent in this instance only has a written admission from the complainant for a contractual debt which is not a housing loan nor is it in respect of delictual damages as required by section 37D. Therefore the fund’s withholding of the complainant’s withdrawal benefit is unlawful.

13. I accordingly make the following order:

The respondent is directed to pay the complainant his withdrawal benefit of R109 216 within 14 days of this determination plus interest at the rate prescribed by section 2 of the Prescribed Rate of Interest Act from 1 October 1998 to date of payment.

DATED at CAPE TOWN this 13th day of SEPTEMBER 2000.

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JOHN MURPHY
PENSION FUNDS ADJUDICATOR