



PFA hits fund with punitive damages payment

3 February 2017

Pretoria: A provident fund has been ordered by the Pension Funds Adjudicator to pay a withdrawal benefit plus punitive damages for its failure to satisfy itself that withholding the benefit was allowable, thus resulting in the complainant not being paid his benefit.

Muvhango Lukhaimane ordered RFS Umbrella Provident Fund (first respondent) to pay A Pillay of Durban (complainant) the sum of R542 926.48 plus interest as the withholding of the complainant's benefit was not authorised in terms of Section 37D of the Pension Funds Act.

The complainant was employed by Kintetsu World Express South Africa (Pty) Ltd (third respondent) from 1 May 2006 until 11 November 2013. He was a member of the first respondent by virtue of his employment. The first respondent was administered by RFS Administrators (Pty) Ltd (second respondent).

The complainant submitted that he resigned in November 2013 and was advised by the third respondent that he would be paid his benefit. He was subsequently told by the third respondent that he would be charged. He received summons which he was currently defending. He stated that he was being prejudiced by the first and second respondents as they refused to effect payment of his withdrawal benefit.

The first respondent submitted that its procedure entailed that a withdrawal form be completed and signed by the employee and the employer. The third respondent refused to sign and release the withdrawal form.

The second respondent confirmed the third respondent had refused to sign the withdrawal form.

The second respondent had record of court proceedings by means of summons issued against the complainant by the third respondent. It submitted that the civil matter between complainant and the third respondent had been placed on the court roll for 13 to 17 February 2017.

The first respondent submitted that the complainant must be paid what is due to him for the following reasons:

- there was no judgment against the fund or the complainant to withhold any benefit in terms of section 37D;
- enough time was allowed for the third respondent to provide the judgment for damages and the member was now being prejudiced by withholding his payment; and
- the court matters were civil proceedings between the employee and his employer.

The third respondent submitted there was a pending case against the complainant which was set down for trial on 17 February 2017. It provided the Tribunal with a copy of the Notice of Set Down and a copy of the summons. It stated that the case against the complainant was opened in 2014. However, due to the seriousness of the matter, it was still on-going.

In her determination, Ms Lukhaimane said as a general rule, section 37A of the Act provided that pension benefits shall not be reducible, transferable or executable. The object of section 37A was to protect members' pension benefits.

However, she said, there were exceptions to this principle in certain circumstances. A registered fund may 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, as compensation for "any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member and in respect of which the member has in writing admitted liability to the employer; or judgment has been obtained against the member in any court, including a magistrate's court".

She said the third respondent indicated that the complainant committed breach of contract by failing to fulfil his obligations in terms of his employment contract. It stated that the complainant used information obtained during his employment with it for his own benefit, despite his employment contract providing for such restraint.

“The critical issue to be examined and determined by this Tribunal is whether or not the deduction as contemplated by the third respondent is permissible in terms of section 37D of the Act.

“It is common cause that the civil action instituted against the complainant relates to the breach of his employment contract. It is alleged as per the summons that the complainant breached his obligations in his employment contract for his own benefit.

“In the present case, the deduction relating to a breach of contract is not permissible in terms of the categories of section 37D of the Act. Furthermore, the fact that the third respondent has instituted civil action against the complainant does not justify the withholding of the complainant’s withdrawal benefit.

“This Tribunal notes with concern the passive role adopted by the first respondent by failing to request reasons or documentary proof for the withholding of the benefit.

“If the first respondent made this simple request at the onset, it would be in a better position to assess the claim based on the merits, thus preventing the complainant from incurring prejudice,” Ms Lukhaimane said.

She added three years had passed and the complainant had not been paid his withdrawal benefit. Section 7C(2)(a) of the Act provided that the board shall take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and provisions of the Act were protected at all times.

“As a result of the first respondent’s negligent conduct, the complainant suffered prejudice in that he has potentially been denied access to benefits which would have become available upon exit from the third respondent.”

Apart from ordering the first respondent to pay the complainant the withdrawal benefit plus interest, Ms Lukhaimane also ordered the first respondent to pay the complainant punitive damages in the amount of five percent of his benefit for its failure to satisfy itself as to whether or not the contemplated deduction was allowable, thus resulting in the complainant not being paid his benefit timeously.

ABOUT THE PENSION FUNDS ADJUDICATOR

The Office of the Pension Funds Adjudicator (OPFA) is a statutory body established to resolve disputes in a procedurally fair, economical and expeditious manner. The adjudicator's office investigates and determines complaints of abuse of power, maladministration, disputes of fact or law and employer dereliction of duty in respect of pension funds. The OPFA is situated in Pretoria, Gauteng.

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