

PFA orders pension fund to pay former CEO withdrawal benefit

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The Pension Funds Adjudicator, Muvhango Lukhaimane, has ordered a pension fund to pay a complainant who was employed as CEO of the same fund's administrator, his withdrawal benefit although he was being investigated for allegedly defrauding his employer of more than R2,3m.

Lukhaimane also brought to the attention of the Registrar of Pension Funds the pension fund and administrator's dereliction of duties and disregard of rules. The complainant was employed by Salt Employee Benefits (Pty) Ltd from February 2007 until 20 June 2013 and was a member of the Salt Umbrella Provident Fund (first respondent).

The second respondent laid charges of theft and fraud against the complainant with the Commercial Crimes Unit of the South African Police Services and the matter was still under investigation.

Following the termination of his employment with the second respondent, the complainant applied for the payment of his withdrawal benefit which was not paid. The complainant submitted that there was a labour dispute between himself and the second respondent which was referred to the Commission for Conciliation Mediation and Arbitration.

The complainant submitted there was neither a civil nor a criminal judgment against him, as a result of a complaint lodged by the second respondent. He had also not signed an admission of wrong-doing to the second respondent. As a result, the first respondent had no basis to withhold his withdrawal benefit.

Criminal charges

Although the second respondent had apparently laid criminal charges against him, he had not been contacted by the SAPS to be informed of such charges three months after the docket was opened. The complainant also submitted that the attorney who responded to his complaint and who purported to be responding on behalf of the respondents did not have the legal mandate to represent the respondents as he had not been appointed by the board of the first respondent.

Similarly, the attorney had not been legitimately appointed by the board of the second

respondent which had been suspended by the self-appointed CEO.

The two respondents said an investigation had revealed that the affairs of the second respondent had not been conducted in a lawful manner and that the complainant had committed various acts of misconduct, dishonesty, theft and/or fraud. Following the appointment of the joint CEO, the complainant resigned as CEO and director of the second respondent on 3 June 2013 with one month's notice. On 6 June 2013, a suspension hearing was convened in which the complainant was suspended on full pay pending a disciplinary hearing on 13 June 2013. At this hearing the complainant was found guilty of all charges levelled against him and dismissed.

The respondents submitted that they had filed criminal charges against the complainant with the police in which they alleged that the complainant stole an amount of R1,688,726.13 and a further amount of R145,060.83 by paying himself a bonus and a 13th cheque; took two unauthorised loans for R165,031.36 and R142,515.80 which he did not repay; and used company money totalling R155,391.14 to pay for the travel expenses of his family.

Withdrawal benefit

The respondents submitted that as a result of the complainant's dishonesty, misconduct, theft and fraud, the second respondent suffered damages in an amount that far exceeded the withdrawal benefit of R195,967.15. The respondents added that following the dismissal of the complainant as the CEO and the responsible person for the second respondent in its capacity as the administrator, it was practically impossible for the second respondent to determine who on behalf of the second respondent could lawfully communicate with a properly constituted board of the second respondent and for the first and second respondents to have decisions taken, ratified.

Thus the management of the second respondent and the Principal Officer of the first respondent gave instructions to the attorneys to respond to the complaint on their behalf. In her determination, Lukhaimane said since there had been no meeting of the first respondent to decide on a mandate for the attorney to represent the first respondent, the attorney had no legal authority to represent the first respondent.

This effectively means that whatever submissions were purportedly made on behalf of the first respondent cannot be assigned to the first respondent. Lukhaimane also said the reason for the failure of the first respondent to submit its own response was because its board forsake its right to decide on behalf of its members to the second respondent.

This was despite the fact that the two entities had conflicting interests in the issue as regards the complainant. On the one hand, the second respondent was to present its case as to why the complainant's benefit should be withheld to the first respondent and on the other hand, the first respondent was to consider and decide whether or not such a request could be granted.

Investigation endorsed

The principal officer of the first respondent, when informed in June 2013 of the intention by the second respondent to have the complainant's benefit withheld, not only decided on the issue, which she had no right to do, but endorsed the second respondent's intention to investigate.

It is clear that the decision to withhold the complainant's benefit was never taken by the first respondent's board for the simple reason that no formal application was submitted by the second respondent to the first respondent to withhold the complainant's benefit and as such, no decision had been taken eight months after the complainant exited the first respondent.

"In the event, it will be a travesty of justice for this Tribunal to allow the first respondent to continue to withhold his benefit when no formal application to withhold was submitted by the second respondent," said Lukhaimane. She ordered the first respondent to pay the complainant his withdrawal benefit with interest at the rate of 15.5% from 1 July 2013. The respondents were also ordered to pay the complainant's legal costs.

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