



4th Floor
Riverwalk Office Park
Block A, 41 Matroosberg Road
Ashlea Gardens, Extension 6
PRETORIA
SOUTH AFRICA
0181

P.O. Box 580, **MENLYN**, 0063
Tel: 012 346 1738 / 748 4000
Fax: 086 693 7472
E-Mail: enquiries@pfa.org.za
Website: www.pfa.org.za

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REGISTERED POST

Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,
24 OF 1956 ("the Act"): B SITHOLE ("complainant") v ABSA PENSION FUND
("fund") AND ABSA INSURANCE COMPANY ("employer")**

[1] INTRODUCTION

- 1.1 This complaint concerns the withholding of the complainant's withdrawal benefit by the fund at the request of the employer pursuant to section 37D(1)(b)(ii) of the Act.
- 1.2 The complaint was received by the Adjudicator on 27 June 2024. On 03 July 2024, a letter acknowledging receipt of the complaint was sent to the complainant. On the same date, the complaint was sent to the respondents affording them until 03 August 2024 to resolve the complaint. A letter acknowledging the complaint was sent to the complainant on 07 August 2024. On the same date, letters were sent to the respondents for their responses to the complaint by 28 August 2024. A response from the fund was received on 05 August 2024. A response was received from the employer on 07 August 2024. On 07 August 2024, the fund's and the employer's responses were sent to

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the complainant for his response by 20 August 2024. A response was received from the complainant on 19 August 2024. On 28 August 2024, the complainant's response was sent to the respondents for their responses by 06 September 2024. A response was received from the fund on 30 August 2024. A further response was received from the complainant on 13 September 2024. No other submissions were received from the parties.

- 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 was employed with the employer from 27 June 2015 to 07 February 2024. He was a member of the fund under the participation of the employer.
- 2.2 Following his exit from service, the complainant became entitled to receive a withdrawal benefit of R630 159.44 as at 03 April 2024.
- 2.3 The fund decided to withhold the complainant's withdrawal benefit at the instance of the employer pursuant to section 37D(1)(b)(ii) of the Act. This is based on allegations of damage to the employer as a result of fraud, theft, dishonesty and/or misconduct by the complainant in the amount of R533 423.97, which is due and owing by the complainant to the employer.
- 2.4 On 03 May 2024, the employer opened a case against the complainant under SAPS case number 95/5/2024 at the Brixton Police Station.

- 2.5 The employer has issued summons against the complainant in the High Court of South Africa, Gauteng Local Division, Johannesburg under case number 086626/2024 on 02 August 2024.

[3] COMPLAINT

- 3.1 The complainant submitted that he was employed with the employer as an Ombudsman Complaints Consultant. He submitted that he was accused by the employer of bribing his friend to appoint a particular service provider in exchange for favours.
- 3.2 He submitted that he was later suspended from his employment after he had blown a whistle on some irregularities within the procurement department.
- 3.3 He submitted that he resigned from his employment on 09 January 2024, and his last day of service was on 09 February 2024. He submitted that on 14 February 2024, he submitted a pension fund withdrawal benefit with the administrator of the fund. He submitted that he was informed by the administrator on 15 April 2024, of the fund's decision to withhold his pension in terms of section 37D(1)(b) of the Act.
- 3.4 He submitted that on 11 April 2024, through his lawyers, he objected to the withholding of the funds. He submitted that he was informed by the administrator that his objection would be discussed at a claims committee meeting on 06 May 2024. He submitted that the administrator informed him that it had decided to withhold his withdrawal benefits.
- 3.5 He requests the Adjudicator to investigate the matter and order the payment of his withdrawal benefit.

Complainant's further response

- 3.6 On 13 September 2024, a response was received from the complainant. He submitted that he had not received any of the alleged summons referenced by the fund.

[4] RESPONSES

Fund

- 4.1 On 28 May 2024, the fund replied on the objection by the complainant regarding its decision to withhold his withdrawal benefit. It submitted that the Forensic Specialist Investigator of the employer requested that the Fund place a hold on the complainant's benefit on 14 February 2024. It stated that the employer has noted that the complainant received payment from vendors for allocating contracts to them. It submitted that the employer confirmed that they are conducting an audit to determine the quantum of the loss as additional claims have come through.
- 4.2 It submitted that the complainant's benefit as well as the estimated amount of the loss being claimed by the employer is as follows:

Fund benefit as at date of suspension	R616, 444.44
Amount claimed by the employer (jointly and severally as per draft summons received 26 July 2024)	R859,164.14

- 4.3 The fund submitted that the employer confirmed that on 3 May 2024, a case was opened under SAPS case (95/5/2024 - Brixton) for further investigation. It indicated that it would receive quarterly updates on the complainant's case from the employer. It submitted that it is its understanding that the investigation is ongoing, and feedback on the matter is expected to be reviewed at the June 2024 Claims Committee meeting.

- 4.4 It submitted that at its meeting, the employer provided a summary of its case. It submitted that based on the information presented, it decided to put a hold on the complainant's withdrawal benefit. It submitted that the employer alleged that the complainant accepted payment to influence the vendor appointment process. It submitted that it is its view that these payments fall within the ambit of 37D(1)(b)(ii) of the Act, namely "any theft, dishonesty, fraud or misconduct".
- 4.5 It stated that the complainant's equitable share in the fund would remain invested in the investment portfolio it was invested in at the date of resignation until it is in a position to release the benefit. It submitted that it is allowed to make a deduction from the complainant's benefit to compensate the employer. It submitted that it must be in possession of an admission liability from the complainant or judgment must have been obtained in court, which judgment or written admission must be in respect of the compensation due to the employer as a result of the damage caused by the complainant.
- 4.6 The fund submitted a further response on 05 August 2024, which was similar to its previous response dated 28 May 2024.
- 4.7 The fund submitted that its decision to withhold the complainant's withdrawal benefit was taken on 04 March 2024, and its decision was communicated to the complainant on 03 April 2024. It submitted that its decision was reviewed at its meeting held on 03 June 2024, wherein the employer submitted that it had instituted criminal proceedings against the complainant and that civil proceedings have been instituted against him as well.

Fund's further submissions

- 4.8 The fund confirmed that the complainant's withdrawal benefit as at 3 April 2024 amounted to R630 159.44, and the employer's claim for compensation amounts to R533 423.97.
- 4.9 It submitted that the complainant's benefit will remain invested in the investment portfolio it was invested in at the date of termination of his service until the fund is in receipt of a valid admission of liability form signed by the complainant or valid court order as required in terms of section 37D of the Act.

Employer

- 4.10 The employer provided a response on 07 August 2024. It submitted that its request to withhold the benefit is not lightly made as it has reasonable grounds (and evidence) to conclude that it will succeed in its action for the recovery of damages caused to it by the complainant as a result of his participation in a scheme of fraud and dishonesty.
- 4.11 It submitted that the fund administrator is afforded the discretion to withhold the complainant's pension benefit pending the outcome of the action by the employer. It submitted that it prays for a declaration in terms of Section 37D(1)(b)(ii) of the Act, thus cementing the fund administrator's *prima facie* right to withhold the benefits. It submitted that the complainant may challenge the fund's decision to withhold his benefit if he can establish that the exercise of its discretion is somehow improper. It submitted that the complainant failed to establish that the discretion of the fund was improper.
- 4.12 It submitted that the complaint is rendered nugatory by the fact that the employer has now issued its court action or will be doing so imminently. It submitted that as the investigation continues the claim may be subject to future amendment to include further claims which are found to be tainted by the fraudulent scheme. It submitted that the employer

received a tip-off from one of its panel-appointed service providers, alleging that it was approached by another panel-appointed service provider to participate in a scheme of fraud. The scheme of fraud involved a number of entities and persons, most notably for present purposes:

- Mr Sithole – being the complainant in this complaint, and a former employee of the employer;
- Ms Puvishka Naidoo (“Naidoo”) – being a co-complainant in her own right, and also a former employee of the employer, who was employed as an insurance Claims Manager;
- Mr Musawenkosi Lebeloane (“Musa”) – a friend and/or associate of Mr Sithole;
- Grit Hub (Pty) Ltd (“Grit Hub”) – being a panel-appointed service provider of the employer, which entity owned and operated by Musa; and
- Kumisi Trading CC (“Kumisi”) – being another entity owned and operated by Musa.

4.13 It submitted that the scheme was alleged to operate (in summary) as follows:

- Mr Sithole (the complainant), who had an established relationship with both Musa and Naidoo, would liaise with Naidoo to ensure that Grit Hub was appointed to certain claims. Naidoo had the power to do so given her position as Claims Manager.
- Once appointed to such claims, Grit Hub acted as project manager on the claim and would inflate, and / or cause to inflate, the quotations and invoices of its, and its appointed service provider, for payment by the employer. Again, under the control and supervision of Naidoo.
- The employer would make payment of such invoices, and in instances where undue (inflated) payments are made to the service provider appointed by Grit Hub, such service provider would be instructed to make payment of a

“recommendation fee” to Kumisi. Such fee would be disguised in an invoice from Kumisi to the service provider for, for example, ‘concrete’, in circumstances where no such concrete has been purchased or otherwise utilised. The service provider would make payment of this recommendation fee in exchange for being compensated and potentially appointed to future claims, and thus given the opportunity to earn undue payment from the employer.

- In exchange for the participation of Mr Sithole, Musa and/or Kumisi would pay Mr Sithole, either directly or indirectly. It submitted that it managed to establish a flow of funds from Grit Hub, coinciding with the date on which the scheme operated in respect of claims to which Grit Hub was appointed, into the banking account held in the name of Mr Sithole’s wife (“Nora Kanyane”). Such funds then flowed into the banking account of Mr Sithole, and further flowed into the banking account of Naidoo.
- In exchange for her participation in appointing Grit Hub, Naidoo would receive the payments as referred above, as well as numerous other payments in a disguised fashion. The words disguised fashion is used because, in many instances, Mr Sithole would generate a ‘cash send’ SMS voucher for himself and send the details thereof to Naidoo. It submitted that Naidoo’s receipt of the funds would appear as a mere cash withdrawal by Mr Sithole, thus eliminating (as far as possible) a ‘paper-trail’. It submitted that it managed to ascertain that Naidoo received at least R62 000 from Mr Sithole over the period February 2023 – November 2023 by way of digital payments and payments into Naidoo’s Woolworths credit card.

4.14 It submitted that the evidence to sustain the above allegations is real and direct. It submitted that not only does it have the direct evidence of the whistleblowing service provider to confirm the operation of the fraudulent scheme, but it is furthermore in possession of the text conversation history between Mr Sithole and Naidoo in which it is revealed, *inter alia*:

- Mr Sithole requested Naidoo to add Grit Hub onto the tender list of a claim (a copy of this text message was provided”);

- After sending Naidoo a Cash Send voucher number and pin Mr Sithole stated *“that’s from Musa saying enjoy your weekend”*. (a copy of this text message was provided”);
- Mr Sithole texted Naidoo that *“No my error. I wanted to say you must give Grithub one or two of these claims a month”* (a copy of this text message is annexed hereto marked Annexure “B3”);
- Mr Sithole advised Naidoo that *“Musa will be 50 to 60% done with Sasolburg claim by next week. He will request a 300k interim payment next week and give you the remaining 30k”* (a copy of this text message was provided); and
- Mr Sithole advised Naidoo that *“People are just looting AIC left and right my friend”* and *“So let’s also continue to eat whilst we still can”* and *“corporate is the same as government lately”* (a copy of these text messages was provided).
- The text conversation history was extracted from Naidoo’s cellphone which she provided during an interview with the employer’s forensic investigators on 28 December 2023. (A copy of her consent to share such information was provided).
- Ms Naidoo furthermore provided a written statement in which she admits receiving compensation from Mr Sithole in exchange for appointing Grit Hub to certain claims. (A copy of this statement was provided)

4.15 It submitted in the face of the specific and disturbing allegations, coupled with the evidence available to date, it simply cannot be argued that the fund is improperly exercising its discretion to withhold the pension benefits. It submitted that the only reasonable course of conduct of the fund is to continue withholding the benefits pending the outcome of the action.

4.16 It submitted that the complainant and Ms Naidoo immediately resigned from their employment. It submitted that the total amount of the damages it sustained as a result of the complainant’s fraudulent and dishonest actions is still under investigation. It submitted that at this

stage, it is claiming the sum of R859 164.14 from the complainant, Naidoo and Grit Hub, jointly and severally, the one paying the others to be absolved. It submitted that the fund is justified in withholding the full extent of the benefits.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

- 5.1 The issue which falls for determination is whether or not the withholding of the complainant's withdrawal benefit is lawful in terms of section 37D(1)(b)(ii) of the Act. In this regard, it is not the function of the Adjudicator to determine whether there is merit to the employer's claim against the complainant but to determine whether the fund complied with its duties before taking a decision to withhold the complainant's benefit.

Fund rules and the complainant's benefit entitlement

- 5.2 In the Supreme Court of Appeal (SCA) matter of *Municipal Employees Pension Fund v Mongwaketse* (969/2019) [2020] ZASCA 181 (23 December 2020) at 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.
- 5.3 Rule 8.11 of the fund, which deals with the withholding of benefits, read as follows:

“8.11 MONIES DUE TO THE EMPLOYER THE FUND A BENEFICIARY OR ANY OTHER PERSON

8.11.1 Subject to the provisions of the ACT, the ADMINISTRATOR will, at the request of the EMPLOYER, the FUND, the MEMBER or the BENEFICIARY, as the case may be, recover the following amounts from the benefits payable in terms of the RULES and where necessary, pay the amounts to the person or body to whom the amounts are due :

8.11.1.2 compensation for any loss suffered by the EMPLOYER as a result of theft, misconduct, fraud, or dishonesty by the MEMBER and in respect of which the MEMBER has admitted liability in writing or in respect of which a court judgment sounding in money against the MEMBER has been obtained.

5.4 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. Section 37D(1) provides 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;"

5.5 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.

5.6 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."

- 5.7 The process of balancing the competing interests can be achieved by assessing the potential harm that will be suffered by the employee if the remedy (provided in section 37D(1)(b)(ii)) is granted as compared with, or balanced against, the potential harm to the employer if the remedy is not granted (see *Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and Another; Maphanga v Officer Commanding, South African Police Murder and Robbery Unit, Pietermaritzburg, and Others* [1995] 2 All SA 300 (A) which dealt with the issue of granting an Anton Piller order and cited with approval in *Non-Detonating Solutions (Pty) Ltd v Durie and another* [2015] 4 All SA 630 (SCA) at paragraph [20]).
- 5.8 It is accordingly permissible for a board of a fund to deduct or withhold a benefit in terms of section 37D(1)(b)(ii) of the Act.
- 5.9 The High Court in *SA Metal Group (Pty) Ltd v Deon Jeftha and 2 Others* Case [2020] 1 BPLR 20 (WCC), held that:
- The withholding of an employee's benefit is analogous to that of an anti-dissipation order, which requires a well-grounded apprehension of irreparable harm or loss and because of its Draconian nature, invasiveness, and conceivably inequitable consequences, the courts have been reluctant to grant it except in the clearest of cases (citing *DS v DS and Others* (43425/11) [2012]ZAGPJHC 227, at para 17 – 18).
 - The duties placed on a board of fund in section 7C of the Act envisages scrutiny of claims made against benefits by employers, and a weighing of the competing interests of the parties after affording the member an opportunity to place his case properly

before the fund. The failure by the board to comply with its duties constitutes an inability by the board of the fund to comply with their legally prescribed fiduciary duties.

5.10 In *casu*, the complainant resigned on 07 February 2024 and the employer laid a criminal charge with the South African Police Services on 03 May 2024 and issued summons against the complainant for recovery of the damage allegedly caused by the complainant's theft, fraud or misconduct.

5.11 In respect of the interpretation of section 37D(1)(b)(ii) of the Act, the Supreme Court of Appeal has provided guidelines on how this provision is to be understood and applied. The *Highveld Steel* case considered the wording of the section stated, amongst other things that:

“..to give effect to the manifest purpose of the section, its wording must be interpreted purposefully to include the power to withhold payment of a member's pension benefits pending the determination or acknowledgement of such liability. The funds therefore had a discretion not withhold payment of the Respondent's pension benefit under the circumstances.”

5.12 Further, the Supreme Court of Appeal states that it is necessary that pension funds exercise their discretion with the care and, in the process, balance the competing interest with due regard to the strength of the employer's case. The fund could not have done either of the aforementioned without hearing from the member about:

- (i) What prejudice will the member suffer if the benefit is withheld; and
- (ii) What response did the member have to the employer's case.

5.13 Section 7C also requires the board to act with impartiality in respect of all members and beneficiaries and to act independently.

5.14 The common cause facts are summarised as follows:

- The complainant became a member of the fund by virtue of his employment with the employer and resigned on 09 January 2024 and with his last day of service on 09 February 2024.
- On 03 May 2024, the employer laid a criminal charge against the complainant under case number 95\5\2024, and the matter is under investigation.
- The employer issued summons against the complainant in the High Court of South Africa, Gauteng Local Division, Johannesburg under case number 086626/2024 on 02 August 2024.
- The fund decided to withhold the complainant's benefit on 04 March 2024 and communicated its decision to the complainant on 03 April 2024. On 09 April 2024, the complainant replied to the fund decision, and subsequent to the fund meeting on 03 June 2024, the fund still withheld the complainant's benefit.

Analysis

5.15 In this matter, the fund avers that it acted in terms of section 37D(1)(b)(ii) of the Act when it made a decision to withhold the complainant's benefit. Accordingly, it is appropriate to consider whether the board of the fund correctly exercised its discretion with care and in the process balanced the competing interests with due regard to the strength of the employer's claim.

5.16 The fund submitted that it decided to withhold the complainant's benefit on 04 March 2024 and communicated its decision to the complainant on 03 April 2024. On 09 April 2024, the complainant replied to the fund's decision, and subsequent to the fund meeting on 03 June 2024, the fund still withheld the complainant's benefit.

5.17 There is no submission from the fund that the employer's case was put to the complainant for his response. Furthermore, the complainant objected to the fund's decision to withhold his benefit. According to the submissions, the fund met at its meeting on 03 June 2024 and

confirmed its decision to withhold the complainant's withdrawal benefit. There is no indication that the complainant was requested by the fund to place his case before a decision to withhold his benefit was finalised.

- 5.18 In the matter of *Jephtha* the court held that the employer's case, as related to the fund, must be put to the employee to afford him the opportunity to respond thereto. It appears that the fund failed to do so. Instead, the fund made a decision based on the instruction it received from the employer. It did not give the complainant an opportunity to respond to the request by the employer to withhold his withdrawal benefit. As a result, the complainant was deprived of the opportunity to respond to the allegations that the fund considered.
- 5.19 The complainant's last day of service was on 09 February 2024, and the employer instituted a criminal case on 03 May 2024, which is under investigation. The employer has issued summons against the complainant, which were issued on 02 August 2024. However, on 13 September 2024, the complainant submitted that he had not received a copy of the summons.
- 5.20 Therefore, the Adjudicator is of the view that it would be reasonable for the fund to afford the complainant an opportunity to respond to the allegations against him in order to make an informed decision regarding the withholding of the benefit, especially because the employer acted within the bounds of the law and cannot be faulted for the fund's failure to act in terms of its rules and the act.

[6] ORDER

- 6.1 In the result, the order by the Adjudicator is as follows:

- 6.1.1 The fund is directed to place the employer's version to the complainant for a reply in writing, within four weeks of this determination;
- 6.1.2 The fund is directed to continue withholding the complainant's withdrawal benefit for an initial period for eight (8) weeks from the date of this determination pending:
 - 6.1.2.1 the employer's service of the civil summons on the complainant;
 - 6.1.2.2 the complainant providing his response to the fund on the employer's case;
- 6.1.3 The fund is ordered to consider the complainant's representations and re-exercise its discretion regarding the withholding of his withdrawal upon the expiry of the period in paragraphs 6.1.1 and 6.1.2 above; and
- 6.1.4 Should the employer fail to serve the summons on the complainant, and/or should the fund find that the employer has no cause to request that the benefit be withheld, the fund is ordered to proceed with the payment of the complainant's withdrawal benefit inclusive of the return earned on such benefit calculated from 07 February 2024 to the date of payment, within four weeks from the lapse of the period in paragraph 6.1.2.

DATED AT PRETORIA ON THIS 04TH DAY OF OCTOBER 2024

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M filing: High Court

Parties: Complainant represented by Ledwaba Moabelo Attorneys

Employer unrepresented