

## **SPECIFIC CIRCUMSTANCES ARE REQUIRED BEFORE YOUR WITHDRAWAL BENEFIT CAN BE HELD IN LIEU OF DAMAGE CAUSED TO YOUR EMPLOYER – PENSION FUNDS ADJUDICATOR ISSUES 11 RULINGS**

*Johannesburg – Thursday 12 January 2012*

Nine different complaints to the office of the Pension Funds Adjudicator were dismissed this week because the PFA found that the withholding of withdrawal benefits in each case was in line with the requirements of the Pension Funds Act.

Another two complainants, on the other hand, had their complaints upheld and their retirement funds were instructed to calculate and pay out their benefits as soon as possible.

“The Pension Funds Act seeks to protect an employer’s right to recover losses caused by the misconduct of an employee and has a legitimate objective of protecting employers’ rights to recover debts. However, this is not an absolute right,” Dr Elmarie de la Rey, the acting Pension Funds Adjudicator (PFA) said.

The requirements for a deduction by your employer from your retirement fund are:

- An amount must be due by a member of a fund to his or her employer;
- The amount must be due at the date of retirement or the date on which the member ceases to be a member of the fund;
- The amount must be in respect of compensation payable;
- The compensation must be in respect of any damage caused to the employer;
- The damage caused to the employer must be by reason of theft, dishonesty, fraud or misconduct by the member;
- The member must have furnished a written admission of liability to the employer in respect of the compensation in respect of the delictual damages caused to the employer; or
- Alternatively, the employer ought to have obtained a judgment in a court in respect of the compensation.

Two pension funds were ordered to immediately calculate and release withdrawal benefits to two complainants to the Office of the Pension Funds Adjudicator.

In the first case, IN Funeka (the complainant) was employed by SBV Services from 1 September 2005 until 11 July 2008 when he was dismissed, following an incident involving the theft of approximately R188 000. The complainant did not dispute the fairness of the dismissal at the CCMA and criminal charges were laid against him by the employer. However, the case was closed on 13 August 2008 due to insufficient evidence.

Dr De la Rey said in her ruling that there are no facts to show that the employer subsequently attempted to re-open the criminal case against the complainant or that it instituted civil proceedings against him.

“The tribunal accepts that the respondent has a right to withhold a member’s benefit pending the finalisation of legal proceedings that allege theft, fraud, dishonesty or misconduct. But in this complaint, there are no pending legal proceedings,” she said.

The respondent's decision to withhold the complainant's benefit was set aside and the respondent was ordered to pay the complainant's withdrawal benefit within 14 days of the determination.

In the second case, AM Mbele (the complainant) was employed by Coca-Cola Canners of South Africa (third respondent) from 1 January 2003 to 28 February 2007. Eight weeks later, the complainant was informed by the Coca-Cola Canners Provident Fund (first respondent) that the delay in the payment of his withdrawal benefit was due to the fact that his application did not reflect his tax number.

When the complainant made a second enquiry on 23 May 2007, he was informed that the process had been stopped on receipt of instructions from the third respondent.

Liberty Group (the second respondent) said it was advised to withhold the payment of the withdrawal benefit as there was a civil action pending against the complainant. The second respondent said it received a copy of the summons on 23 May 2007 and was instructed on 6 June 2007 to withhold R75 107.76 – this being the amount the third respondent is entitled to deduct pending the outcome of the civil action.

Dr De la Rey found that the complainant had not admitted liability in writing and no court judgment had been obtained by the third respondent. Further, there was no evidence to show that any further steps were taken by the third respondent besides issuing summons in May 2007 against the complainant.

The third respondent was ordered to provide proof of the steps taken to obtain a civil judgment against the complainant within 7 days of the determination. If this proof is not provided within the required time, the first respondent is ordered to pay the complainant his withdrawal benefit together with interest calculated at a rate of 15.5% per annum from 1 March 2007 to date of payment, within 14 days of the determination.

The following complaints were dismissed:

1. B Siliungwe (the complainant) complained that the Tongaat-Hulett Pension Fund (respondent) and his former employer the Tongaat-Hulett Group were delaying payment of his withdrawal benefit to punish him financially. The complainant said the withholding of his withdrawal benefit was based on mere allegations which had not been proven in a court of law nor had he accepted responsibility for the alleged loss of the employer.

The complainant was dismissed by his employer on 31 January 2011 for fraud in the amount of R1 158 391.80. Following his dismissal, the employer instituted criminal proceedings and simultaneously advised the respondent to withhold the complainant's withdrawal benefit of R570 000 pending the finalisation of the criminal proceedings.

Dr De la Rey found that a pension fund has discretion to withhold a member's benefit in instances like this but the benefit may only be withheld for a reasonable time period. "It cannot be said that an inordinate period had lapsed since the

complainant's withdrawal from the respondent. It is a well-known fact that court proceedings, both civil and criminal, take time to be finalised," she said.

Dr De la Rey said that the withholding is necessary to protect the employer's right to compensation in the event that the complainant is found guilty and there is a compensation order from the Court. "However, the respondent must monitor the matter so that the withholding does not become unreasonable," she said. The complaint was dismissed.

2. B Nomdee (the complainant) complained that the misconduct for which he was dismissed did not include dishonesty and the alleged loss was a result of the dishonesty of his former colleagues. The complainant said that his misconduct was also a result of his employer's, Equipment Spare Parts, Africa (third respondent), lack of internal controls, inadequate segregation of duties and a very busy schedule.

The complainant was dismissed by the third respondent at the beginning of March 2010 for fraud. Criminal and civil proceedings were instituted and the third respondent advised the Alexander Forbes Retirement Fund, Pension Section (first respondent) to withhold the complainant's withdrawal benefit of R1 429 079.87 pending the finalisation of the civil claim.

The loss suffered by the third respondent is alleged to be in the amounts of R765 821.74, R121 604.38 and R357 985.56 respectively. The complainant had an outstanding housing loan of R46 170.38, the estimated tax on his remaining benefit would be R325 776.56 and the estimated legal fees in respect of the matter would be R150 000, according to the third respondent so the amounts claimed against the complainant would be greater than his final withdrawal benefit.

Alexander Forbes Financial Services (second respondent) and administrator of the first respondent said the complainant had completed and submitted a withdrawal notification. However, this was not processed due to the withholding instruction from the third respondent.

Dr De la Rey found that a case of fraud had been opened against the complainant and, therefore, the third respondent deserves the protection offered by the Pension Funds Act. The third respondent served summons on the complainant in August 2010 and is awaiting the date of a hearing.

Dr De la Rey said that where proceedings had been instituted within days of dismissal of the employee and where the delay in prosecution of the employee was beyond the control of an employer, a two-year delay was not unreasonable – as per a previous PFA ruling in 2009 (Sayed –Essop vs Non Ferrous Metal Works Pension Fund). Given that the first respondent has undertaken to monitor the progress of the matter so that the withholding does not become unreasonable, the complaint was dismissed.

3. K Dlamini (the complainant) was employed by Suncoast Casino from 2 April 2003 to 20 August 2010 when she was dismissed. Her employer then notified the Tsogo Sun Group Pension Fund (first respondent) to withhold her withdrawal benefit of

R84 425.64 pending the finalisation of legal proceedings in the Durban Magistrate's Court. The employer has estimated the loss it intends to recover from the complainant to be approximately R119 620.00.

"Payment of a benefit to a member while awaiting the outcome of a criminal charge might render that outcome futile, in particular if it is in favour of the employer," Dr De la Rey said. She ruled that an inordinate amount of time had not yet lapsed and withholding of the benefit was in line with the Pension Funds Act. The complaint was dismissed.

4. N Stephens (the complainant) complained that the Corporate Selection Retirement Fund: Participating Employer – N Maratos and Company (first respondent) paid an incorrect withdrawal benefit when he was dismissed in March 2009, after it was found that he had stolen cigarettes from the company. However, the complainant disputed the compensation amount deducted from his withdrawal benefit, claiming that he owed the employer far less than the R10 000 that was deducted from his withdrawal benefit. The complainant also claimed that his benefit statement reflected his fund credit as R30 000.

Dr De la Rey ruled that the dispute regarding the compensation amount is an issue between the complainant and the employer. "This part of the complaint does not relate to a pension fund, the administration of a fund or the application of its rules. Accordingly, this Tribunal lacks the jurisdiction to adjudicate this part of the complaint," she says.

Dr De la Rey referred this part of the complaint to the Commission for Conciliation, Mediation and Arbitration (CCMA). She noted that the benefit statement the complainant produced, reflected a withdrawal benefit of R3 155.03. The insured benefit payable on disability was reflected as R33 914.40, but this amount is not payable in the complainant's case because he is not disabled. The complaint was dismissed.

5. MA Sijula (the complainant) complained to the office of the PFA when he failed to receive his withdrawal benefit after he was dismissed by his employer, Civil and General Contractors in October 2009. The complainant was a member of the Old Mutual Superfund Provident Fund (first respondent) from November 2002 to October 2009. The complainant was dismissed following a disciplinary hearing in October 2009 where he was found guilty of causing damage to his employer's vehicle and causing the death of a fellow employee.

The disciplinary committee found that the damage was caused after the complainant drove the employer's vehicle recklessly, failed to obey road signs and exceeded prescribed speed limits. The complainant signed an admission of liability form in October 2009 and acknowledged that he was guilty of causing damages to the employer in the amount of R228 946.95 and that the damage caused was as a result of his misconduct, dishonesty, theft or fraud. The admission of liability also authorised the first respondent to pay his benefit to the employer. Dr De la Rey dismissed the complaint.

6. SE Tsheke (complainant) was employed by Pioneer Foods (third respondent) but was dismissed on 19 January 2009 for dishonesty, fraud and gross negligence. The third respondent opened both a criminal and a civil case against the complainant to recover its losses in the amount of R259 197.12. The third respondent then instructed the Pioneer Foods Provident Fund (first respondent) to withhold the complainant's withdrawal benefit of R111 870.04, pending the court determination of her liability. On 9 July 2010 a default judgment was granted against the complainant by the North Gauteng High Court in the amount of R259 197.12, plus interest and sheriff's costs of R151, 34.

The complainant told Dr De la Rey that she had pleaded not guilty to the allegations against her and that she was unable to defend herself in court because she did not receive any summons regarding the default judgment. However, Metropolitan Retirement Administrators (second respondent) was able to provide Dr De la Rey with copies of the summons, the default judgment and the court order.

In her ruling, Dr De la Rey said the Pension Funds Act seeks to protect an employer's right to recover the losses caused by the theft, dishonesty, fraud or misconduct of an employee. "What is implicit is that the employer has the right to request a retirement fund to withhold the member's withdrawal benefit until such time that legal proceedings have been finalised. In this case, a default judgment was granted against the complainant and no application was made by the complainant to rescind the judgment, so the first respondent acted correctly by paying over the complainant's withdrawal benefit to the third respondent," she said.

7. JC Tshabalala (the complainant) was employed by Standard Bank (the employer) from 1 October 2004 till she was dismissed on 13 July 2011. The complainant was found guilty of charges that she allegedly misappropriated funds from a client's bank account, resulting in financial loss to her employer at a disciplinary hearing on 13 July 2011. The employer has instituted legal proceedings against the complainant.
8. TC Buthelezi (the complainant) was employed by Standard Bank from 1 July 2010 till he was dismissed on 6 July 2011 following allegations of fraud and dishonesty. The employer has instituted legal proceedings against the complainant for the amount of R404 097.11 and the Standard Bank Group Retirement Fund (respondent) is withholding his withdrawal benefit of R22 360.12 until the legal proceedings are finalised.
9. NP Mncube (the complainant) was employed by Investec Bank (the employer) from 10 January 2000 to 15 December 2010, when he resigned after receiving a letter informing him of a disciplinary hearing related to "gross misconduct". The employer thereafter opened a criminal case against the complainant for losses estimated at R654 535.40. The employer's total loss will be verified once an audit has been completed .

In several of the above rulings, Dr De la Rey said that where proceedings had been instituted within days of dismissal of the employee and where the delay in prosecution of the employee was beyond the control of an employer, a two-year delay was not

unreasonable – as per a previous PFA ruling in 2009 (Sayed –Essop vs Non Ferrous Metal Works Pension Fund).

Dr De la Rey found that a pension fund has discretion to withhold a member's benefit in instances like this but the benefit may only be withheld for a reasonable time period.

“It cannot be said that an inordinate period had lapsed since the complainants' withdrawal from the respondent. It is a well-known fact that court proceedings, both civil and criminal, take time to be finalised,” she said.

Dr De la Rey said that the withholding is necessary to protect the employer's right to compensation in the event that the complainant is found guilty and there is a compensation order from the Court.

“However, the responsibility rests with the retirement fund trustees to monitor the matter so that the withholding does not become unreasonable,” she said.

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