IN THE FINANCIAL SERVICES TRIBUNAL

CASE NUMBER: **PFA45/2019**

In the matter between:-

G4S CMS SA RETIREMENT FUND Applicant

and

B Z HLATSHWAYO First Respondent

PENSION FUND ADJUDICATOR Second Respondent

DECISION

Appeal Panel: AT Ncongwane SC (Chairperson),
J. Pema, and
L. Makhubela (members)

Summary: **The obligation to pay by the Fund, referred to in Section 30N of the Pension Fund Act No 24 of 1956 and the date upon which the obligation arise, is to be established from applying the Fund rules and available evidence.**

INTRODUCTION

[1] This is an application for re-consideration of the decision in terms of S. 230 of the Financial Sector Regulation Act, Act 9 of 2017 ("The FSR Act 9 of 2017"), made by the second respondent and dated 19th February

2019. The primary issue in this application for reconsideration is the 10% penalty interest that has been levied by the Pension Fund Adjudicator on the G4S CMS SA Retirement Fund ("the Applicant" or "the Fund").

[2] The first respondent had been employed by G4S Cash Solutions (Pty) Ltd ("the Employer") for the period 08 February 2012 until 12 June 2017. It is his employment with the employer that enabled him to acquire membership with the Fund. Due to a criminal case of fraud and theft instituted against the first respondent, the employer terminated his services and emailed to the Fund requesting it to withhold the first respondent's benefits from the Fund.

[3] The first respondent lodged a complain with the Pension Fund Adjudicator in terms of S. 30A of the Pension Fund's Act No 24 of 1956 ("The Act"), in terms whereof, he contended that he is aggrieved with the non-payment of his withdrawal benefit from the Fund. After the criminal charges against him were withdrawn, he asserted to the Pension Fund Adjudicator that the Fund be ordered to pay his withdrawal benefits.

[4] In her interpretation of S. 37D (1) (b) (ii) of the Act, the PFA states that on the plain reading of the provision, the section does not authorise withholding of a member's benefit where he/she is potentially liable for fraud or misconduct against the employer. The PFA further referred to the SCA's decision of Highveld Steel and Vanadium Corporation Ltd vs Oosthuizen [2009] 1 BPLR 1 (SCA), where the court gave the section a

purposive interpretation and found that, to give it efficacy, S. 37D (1)(b)(ii) must be read to confer a discretion on the Fund to withhold the members withdrawal benefit pending the finalisation of the proceedings against him/her.

[4.1] A reference was also made to Rule 11.12 of the Fund which provides for a benefit to be withheld pending the outcome of the legal proceedings against the member.[1] We agree in that regard, that the Rules of the Fund correlate with the provisions of S. 37D (1)(b)(ii) in that they allow deductions from benefits due or payable to a member.

[5] After PFA's verification whether the criminal charges against the member were still in force or have been quashed, the PFA accepted the evidence that the issue of the criminal investigation was referred back to the National Prosecuting Authority ("NPA") and the first respondent may be arraigned again on the same charges. In the event the NPA decides that there is no case to answer by the first respondent, applicant would be required to release the rest of the benefit.

[6] According to the available evidence, the value of the damage that the first respondent is alleged to have causes to the employer amounts to R78 570.00 and the Fund value as at the 31st January 2013 amounted to R123 152.18. The determination by the PFA was that the amount withheld

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1 Rule 11.12. 3 provides that *"the Board of Management will have the right to withhold payment of benefits to which a member or beneficiary is entitled in terms of the Rules pending the determination of acknowledgement of liability in terms of Rule 11.12.1.2, subject to the withholding period being reasonable taking into account the relevant circumstances ..."*

by the Fund should not be in excess of the amount attached in terms of the provision of Rule 11.2.3.2 and the applicant could only withhold the amount that is equivalent to the alleged damage, pending the finalisation of the criminal case. The applicant was ordered to pay the difference to the first respondent together with interest at a rate of 10% per annum calculated from July 2017 to date of payment, within 3 weeks of the determination. There is no explanation or reasons furnished by the PFA in her determination as to the imposing of the penalty interest on the Fund.

[7] The Fund acknowledges the PFA's determination that the Fund should pay the member's benefit less the amount of alleged damage to the employer, however the fund appeals that the 10% interest payment is an unfair determination in the light of the fact that the member's benefit remained invested as per the member's investment / disinvestment decision. S. 30N of the Act regulates payment of interest and provides that interest is only payable in instances where the party to make payment is *in mora* or in wilful default.[2] It therefore follows that the Fund can only be ordered to pay interest if it is *in mora* or in wilful default of the payment. The Fund contends that it is neither *in mora* nor in wilful default.[3]

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2 Section 30N Interest on amount awarded where a determination consists of an obligation to pay an amount of money the debt shall bear interests as from the date at the rate determined by the adjudicator.

3 *Mora* is a wrongful delay or default in making payment and arises the moment the debtor becomes obliged to pay. The obligation to pay interest on the amount owing likewise arises from the moment the debtor is *in mora. Mora* is generally divided in two categories, i.e *mora ex persona* and *mora ex lege. Mora ex persona* arises out of conduct of the debtor and occurs when the due demand *(intaparlatio)* has been made upon the debtor, who has failed to satisfy such demands. Mora ex re on the other hand arises out of the tractions itself and it is not dependent upon prior demand. These occurs, for example where there for payment is fixed by agreement between the parties. See **C & T Products (Pty) Ltd v MH Gold Smich (Pty) Ltd 1981 (3) SA 619 at 631 G-H.**

[8] To be *in mora* would therefore be established by the presence of evidence of wrongful delay or default in making payment and on the other hand, wilful default is when there is evidence that the party who has committed a wrongful act or conduct, has done so in bad faith. Accordingly, where there is wilful default, there will usually not be good and sufficient cause.

[9] In terms of the Rules of the Fund, a cessation of membership, apart from the member's death, occurs upon the member's ceasing to be an employee of the employer unless the other entitlements to remain in the benefit of the Fund remain applicable after termination of employment. As stated above, the first respondent's employment was terminated on the 12th of June 2017 and the Fund contends that it only became aware of the withholding of the complainant's benefit on the 6th of July 2017 when the copy of the first respondent's complaint was received from the office of the PFA.

[10] The Fund has raised disputes regarding procedural irregularities that occurred after the lodgement of the complaint by the first respondent and leading to the determination made by the PFA. The Fund contends that the PFA failed to observe due process in the handling of the complaint and decided to put the blame on the Fund, without giving the Fund all the rights and the contention simply boils down to the fact that PFA did not apply proper process of equity and made the penalty determination after receiving a verbal submission, unbeknown to the Fund, from the employer

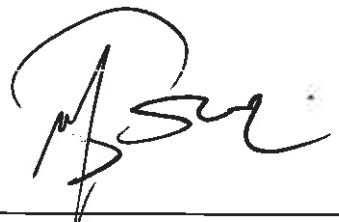
on the 15th February 2015. The record does not assist in so far as any submissions made by the employer regarding its communication to the Fund as well as why it cannot be a guilty party obtaining to the delay in making the payment to the employer (whether the difference between the benefit value and the S. 37D claim).

[11] In the light of the fact that there is no evidence that suggests that there was any wilful default on the part of the Fund and that the Fund was *in mora* as from the date of July 2017, we are unable to justify that the Fund should be held accountable for anything more than the earnings on benefit from July 2017, in particular, there is paucity of evidence as to when the employer informed the Fund about the termination of the first respondent's employment with the employer. The record only shows that the Fund became aware of the cessation of employment of the first respondent from the employer on the 6th of July 2018 when a copy of the complaint was received by the office of the PFA. It is evident from the record that it is from the date of the 6th of July 2018 that the obligation to pay by the Fund arose in terms of its own rules. There are no cogent reasons made in the record and from the Fund's case as to why payment of the amount in excess of the amount of the alleged damage could not be paid from that date. It is the date that may justify imposing of interest on the said amount of payment rather than the date of July 2017.

[12] Under the circumstances, the following order is made;

[12.1] The appeal succeeds only partially. The decision of the second respondent to levy a 10% penalty interest on the Fund is hereby set aside and the matter is remitted to the second respondent for reconsideration.

Signed at Pretoria on the day of the 11th December 2019 on behalf of the panel.



AT NCONGWANE SC, CHAIRPERSON

With the panel consisting of:

J. PEMA and

L. MAKHUBELA