

**IN THE APPEAL BOARD OF THE FINANCIAL SERVICES TRIBUNAL**

**CASE NUMBER: PFA10/2018**

In the matter between:-

**ROSINA RAISIBE TLEANE** Applicant

and

**THE PENSION FUND ADJUDICATOR** Respondent

**SANLAM UMBRELLA PENSION FUND** Second Respondent

**MUCH ASPHALT (PTY) LTD** Third Respondent

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**DECISION**

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Appeal Panel: AT Ncongwane SC (Chairperson),  
Z. Mabhoza, and  
L. Makhubela (members)

Matter heard: 12 April 2019

Decision delivered: 16 April 2019

**Summary: Withholding of payment of pension benefit is unjust, oppressive and inequitable – where it cannot sustain even a liberal interpretation of s.37D(1)(b)(ii) of the Pension Fund Act 24 of 1956.**

## **INTRODUCTION AND BACKGROUND**

- [1] The decision which is the subject of reconsideration in terms of s 230 of the Financial Sector Regulation Act, No 9 of 2017, concerns the withholding of the applicant's pension benefit by the second respondent from being withdrawn, in terms of s 37D(1) (b)(ii) of the Pension Fund Act, Act No 24 of 1956 ("the Act") following the applicant's exit from the third respondent's employment. The second respondent abides, and as it would ordinarily be the case, no opposition is filed by the first respondent.
- [2] During the period of the 1<sup>st</sup> October 2014 to the 6<sup>th</sup> of March 2018, the applicant was an employee of the third respondent ("the Employer") and was also a member of Sanlam Umbrella Pension Fund ("the Fund") by reason of her employment with the third respondent, who participates in the fund.
- [3] Her membership with the fund spanned from the date of her appointment until the 06<sup>th</sup> of March 2018 when she resigned from her employment with the third respondent
- [4] Invariably, upon resignation, the applicant would be entitled to payment of benefits from the fund. The value of her withdrawal benefit as at the date of the 23<sup>rd</sup> July 2018 under the fund is the sum of R 84 575.08. The

withdrawal benefit became due and payable to the applicant upon resignation. The employer refused to assist the applicant to have the benefits released by the fund, instead, the employer requested the fund to hold the payment of the applicant's withdrawal benefit in terms of s 37D(1)(b)(ii) of the Pension Fund Act.

[5] The grounds placed before the first respondent's board for withholding the withdrawal benefit are that:

- the applicant is alleged to have perpetrated acts of fraud or theft against the employer who unravelled such acts and obtained substantial evidence against the applicant in this regard;
- a criminal case of fraud has been lodged by the employer against the applicant, at Vosman Police Station with Cas. 498/3/2018.

The approach by the Board and purposive interpretation of Section 37 D

[6] S 37 (1)(b)(ii) of the Pension Fund Act provides that a 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 in respect of compensation (including any legal costs recoverable from the member in a matter contemplated in sub (b)) 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 -*

- *the member has in writing admitted to the employer, or*

• *judgment has been obtained against the member in any court, including a Magistrate 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.*"

[7] Axiomatically, s37A of the Pension Fund Act prohibits the reduction, transfer, cession, etc of retirement fund benefits. Section 37D of the Act however, creates exceptions to the general provision contained in s37A. It is self evident that certain deductions can be made from a member's fund benefit in terms of s 37D, e.g. deductions in respect of housing loans, divorce and maintenance orders, as well as compensation due to the employer as a result of fund members' dishonesty.

[8] Therefore, the net effect of s 37D(1)(b)(ii) read with s 37A is to preserve the right of a member of a pension fund against any deduction or reduction of pension benefits, save where:

- the member has in writing admitted that he is liable to the employer for compensation as a result of damage caused to the employer by reason of theft, dishonest, fraud or misconduct by the member, or
- if a court (criminal or civil) ordered the member to pay compensation to the employer as a result of damage caused to the employer by reason of theft, dishonesty, fraud or misconduct by the

member.<sup>1</sup> (*In casu*, we do not have any of those two permitted exceptions.)

[9] The third respondent sought to rely on the same s 37D(1)(b)(ii) in its request to withhold payments to the applicant. The employer contends that the fact that there is a pending criminal case of fraud and/or theft against the applicant, suffices and triggered the exercise of discretion by the board of the second respondent not to pay.

[10] In support of its contention, the third respondent evoked the decision by the Pension Fund Adjudicator in the matter of Appanna v Kelvinator Group Services of SA Provident Fund [2000] 2 BPLR 126 (PFA), where the Pension Fund Adjudicator held that *"the right to make deductions (in terms of s 37D(1)(b)(ii)) from benefits implies that a fund also has the power to withhold benefits pending determination of liability."*

[11] In its submission to the Pension Fund Adjudicator dated the 23<sup>rd</sup> of July 2018<sup>2</sup> the first respondent states that board of the fund decided to withhold the member's benefits pending the finalisation of the criminal case. It is further stated that the criminal case *"is regularly monitored by the board to ensure that the withholding of the benefits remains reasonable under the circumstances noting that the criminal case may take a very long time until conclusion."*

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<sup>1</sup> See Rowan v Standard Bank Staff Retirement Fund and Another (2) [2001] 2 BPLR 1643 (PFA) at 1648 (B – D), on requirement that must be met before a deduction is permissible.

<sup>2</sup> See letter dated 23<sup>rd</sup> July 2013 from Sanlam, pages 29 to 31, signed by Anna Herholdt.

[12] A further submission is made to the effect that the employer has been advised that the withholding of payment is subject to a condition that the employer should submit monthly updates to the fund regarding the status of the criminal case. Additional to the monthly updates, the employer was also required to provide to the fund a copy of the affidavit that it made to the SA Police Services when it laid the case against the applicant on the 29<sup>th</sup> March 2018. These conditions were imposed in compliance with the general rules of the fund. It was submitted to the Pension Fund Adjudicator that, the Sanlam employee benefit fund acted reasonably in exercising its discretion and withholding the complainant's benefits pending the outcome of the criminal matter.

#### **ANALYSIS OF THE FACTS AND THE LEGAL POSITION APPLICABLE**

[13] There are two critical questions that are most relevant to the issues constituting the gravamen of what this Tribunal is saddled with and required to resolve.

[14] The first question is whether the interpretation on the precise meaning of s 37D(1)(b)(ii), proposes that the fund may withhold the pension benefit for an indefinite period in an absence of the two jurisdictional requirements of subsection (aa) and (bb) of s. 37D, and secondly, whether the fund can withhold the entire pension benefit in extent of what constitutes the employer's claim. The manifest purpose of s 37D (1)(b)(ii) of the Pension Fund Act received the attention of the Supreme Court of

Appeal in the matter of Highveld Steel & Vanadium Corporation Ltd v Oosthuizen 2009 (4) SA 1 (SCA) para 19 to 20, where the Honourable Maya JA stated the following:

*"... 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 fund therefore had the discretion to withhold payment of the respondent's pension benefits in the circumstances. I dare say that such discretion was properly exercised in view of the glaring absence of any serious challenge to the appellant's detailed allegations of dishonesty against the respondent".*

[15] In paragraph 20 the SCA as per Maya JA deals with the issue of prejudice to the employee in the following precepts:

*"[20]...Considering the potential prejudice to an employee who may urgently need to access his pension benefits and who is in due course found innocent, it is necessary that pension funds exercise their discretion with care and in the process balance the competing interests with due regard to the strength of the employer's claim. They may also impose conditions on employees to do justice to the case."*

[16] This paragraph 20 is predicated upon the desire to avoid prejudice to those who may be affected by the decision not to payout the pension benefits.

[17] There is glaring absence in the record placed before us and Mr Horn for the third respondent could not point to us any documents that serve as proof or evidence complying with the conditions imposed by the board of the second respondent when it exercised its discretion to withhold the applicant's withdrawal benefits which conditions were to the effect that the progress made in the criminal case has to be regularly monitored by delivery of monthly updates to the board of the second respondent. In addition thereto, a copy of the affidavit that is made to the SAPS leading to the opening of the criminal case under Cas. 498/3/2018 on the 29<sup>th</sup> of March 2018 by the third respondent has not been included in the record. The absence of the evidence, lead us, in our view to conclude that the third respondent has not complied with the conditions imposed by the second respondent on the withheld funds. What appears on the record is the submission made by the third respondent in its letter dated 24<sup>th</sup> January 2019<sup>3</sup>, which reads:

*"Our case against Ms Tleane is ongoing and current. Mr Shandu, our Branch Manager of Much Asphalt Witbank, visited SAPS Vosman Station at 13:30 on the 14<sup>th</sup> January 2019. He spoke to the investigating officer, Constable Nhlapo, who confirmed that the case remains open. He confirmed that SAPS still need to interview the witness before any arrest could be made. Constable Nhlapo, supplied Mr Shandu with a copy of annexure A and confirmed that the case remains with Vosman Police Station and that it has not been moved to Phola Police Station as alleged by Ms Tleane's legal representative...."*

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<sup>3</sup> See page 77 of the record paragraph 3 of the letter of Much Asphalt, dated 24<sup>th</sup> January 2019.



[18] On the other hand, the applicant made a submission in her “notice to argument”, purportedly; it is the applicant’s heads of argument<sup>4</sup>:

*“(4) We dispute the third respondent’s version that the case against the applicant is ongoing and current – we have visited Vosman Police Station on the 07<sup>th</sup> of February 2019 and the very same Constable Nhlapo confirmed that there was no case opened against the applicant. He further stated that if there was a case opened as it is alleged that it was opened on the 19<sup>th</sup> March 2018, the police detective would have long called, visited and questioned the applicant on the allegations of theft. Constable Nhlapo indicated that their systems or dockets does (sic) not have the name and surname of the applicant. Her physical address and contact numbers are not known as well.”*

[19] The applicant therefore contends that it is evident enough as to why the applicant has not been called or questioned by the police to this date apropos the allegations and this is owing to the reasons that the police do not have any information about the applicant and did not even mention the existence of a Cas 498/3/2018. Significantly, there has been an in-ordinate delay for the procuring of the charges against the applicant, so that she could at least, have her first appearance in the criminal court on the charges alleged by the third respondent.

[20] This entails a factual enquiry upon which a value judgment is called for in the light of all the facts or relevant circumstances that may be applicable including an explanation that has to be offered for the delay. A material

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<sup>4</sup> See the record page 85 paragraph 4.

fact to be taken into account in making a value judgment is the nature of the decision and its effect on the applicant. In other words if the decision remains extant then on the other hand the prejudice on the applicant persists, as she would not be in the position to access her pension fund. How will the prejudice be ameliorated when the record clearly indicates that the third respondent's claim is poorly made? I deal with these aspects further hereunder.

[21] The record as per the document on page 80, shows that the Cas No 498/3/2018 concerns a case opened at the Vosman Police Station by a certain Mr B. Shandu<sup>5</sup> as a complainant. The applicant's name is not mentioned as a suspect. In the same document, the date of crime committed is the 28/03/2018. Self evidently, it could not be in relation to any alleged criminal offence by the applicant as this date is post the applicant's resignation.

[22] The first page of the Police docket <sup>6</sup> reflecting the Cas No 498/03/2018 and CR No: 99/03/2018 mentions the 16 March 2018, time 9:50 as the date and time when the offence of intimidation was committed and a text message ("threats") was used to commit the crime. Both the dates stated as the dates of the offences for the charges pursued by the third respondent, are post the applicant's employment with the third respondent.

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<sup>5</sup> See record page 80, detail police station enquiry.  
<sup>6</sup> See record pages 14 and 68 of the record.

- [23] In addition to the foregoing, it is worth re-iterating that the employer submitted to the first respondent that a visit was made to Vosman Police Station on 14 January 2019 but established that there was no movement made in the case.
- [24] On the other hand, applicant contends that they visited Vosman Police Station on the 07 February 2019 and could confirm from the same Constable Nhlapo who saw the third respondent on the 14<sup>th</sup> January 2019, that no case was opened against the applicant on the 29 March 2018. If there was such a case the Police would have long visited the applicant and investigated the case.
- [25] The Tribunal is evidently saddled with two contrasting versions by the parties but we are of the view that, the applicant's version, is the most probable version as it is corroborated by other evidence in the record,
- [26] The status quo has been in place for a period of slightly more than a year already. We are also not satisfied about the conditions imposed by the board of the second respondent in so far as it relates to the payment being withheld "*pending the finalisation of the criminal case*". This condition is too broad and it makes no reference as to which criminal case in particular has to be finalised since it appears to be common cause that there are two criminal cases opened against the applicant

under case numbers CAS 498/03/2018 and 99/3/2018, apparently for intimidation<sup>7</sup>.

[27] It is significant to also note that the third respondent contends that it opened a case of "*theft general*" against the applicant under the same case number 489/03/2018 which case number also appears in the first page of the copy of docket forming part of the record. It is also common cause that the total amount of the alleged loss or damage by the third respondent is the sum of R52 000.00 whereas the decision withholding the withdrawal of benefits is against the total amount of the benefits in the tune of R84 575.08.

## **CONCLUSION**

[28] In our view, the decision cannot be justified and is evidentially unjust towards the applicant not only for the reasons that it exceeded the amount of the financial loss allegedly suffered by the third respondent, but also taking into account the balancing of competing interests with specific regard to the strength of the employer's claim against the applicant's prejudice. It is inevitable that the decision has to be interfered with.

[29] The applicant has not been charged criminally for a period of more than a year since her resignation. The applicant has no knowledge of the

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<sup>7</sup> See record page 14, copy of the first page of the case docket, nature and description of the offence "*intimidation*".

precise charges that have been opened against her by the third respondent. The finalisation of the criminal case, as postulated in the decision of the Pension Adjudicator, will, if it eventually proceeds, extend for a long period, which may even suggest, that it will require a final order made by the highest court in the land as provided for by the Constitution. What was intended to be achieved, has in fact led to a direct opposite of what had to be avoided, which is, abuse of the process and the discretionary powers foreshadowed in s 37D(1)(b)(ii) as interpreted by the SCA in the Highveld Steel & Vanadium Corporation's case. The non-payment is unjust, oppressive, inequitable and cannot even sustain the liberal interpretation of s. 37D(1)(b)(ii) of Act 24 of 1956.

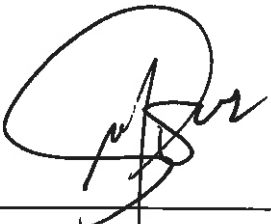
[30] In view of all the foregoing, the following order is made:

[30.1] The application for reconsideration of the decision in terms of s 230 of the FSRA Act is granted.

[30.2] The decision contained in the determination by the first respondent, dated the 16<sup>th</sup> November 2018 is set aside and the matter is remitted to the first respondent for further consideration.

[30.3] There is no order as to costs.

Dated the 16 April 2019.

  
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AT NCONGWANE SC, CHAIRPERSON