

**THE FINANCIAL SERVICES TRIBUNAL**

CASE NO: PFA71/2024

In the matter between:

**EDWARD SNELL & CO PTY LTD**

Applicant

and

**LP RAHLAO**

First Respondent

**OLD MUTUAL SUPERFUND PENSION FUND**

Second Respondent

**PENSION FUNDS ADJUDICATOR**

Third Respondent

Summary: Reconsideration of a decision of the Pension Funds Adjudicator (30M) in terms of Section 230 of the Financial Sector Regulation Act 9 of 2017- Retention of withdrawal benefit by a Fund in terms of sec 37D(1)(b)(ii) of the Pension Funds Act 24 of 1956 -The member's written admission of liability must be clear and unambiguous and should specifically allow for deductions to be made in respect of a wrongdoing committed by the member against the employer - acknowledgement of debt falls short of the requirements of section 37D(1)(b)(ii)

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**DECISION**

- [1] The applicant, Edward Snell & Company (PTY) LTD, is an employer in the beverage and wine producing industry who applies for reconsideration in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 (“the FSR Act”). The application for reconsideration is against the Pension Funds Adjudicator’s (PFA’s) determination issued in terms of section 30M of the Pensions Funds Act, 24 of 1956 (“the Pension Funds Act”) on 27 September 2024.
- [2] The present application also included an affidavit where the employer applied for the suspension of the determination by the PFA. The application for suspension of the PFA’s determination was granted by this Tribunal in an order dated 27<sup>th</sup> November 2024<sup>1</sup>.
- [3] The first respondent, Mr LP Rahlao, a former employee of the applicant until 31 October 2023, submitted a complaint on 26 March 2024 with the third respondent, the Pension Funds Adjudicator (PFA) because he was dissatisfied with the decision to withhold his pension withdrawal benefit by the Old Mutual Superfund Pension Fund (“the Fund”). The latter is an approved fund where Mr Rahlao’s pension benefit was invested by the applicant.
- [4] In its determination, the PFA identified the issues as largely concerning the withholding of the first respondent’s withdrawal benefit by the fund at the behest of the employer (the applicant in the present case) in terms of section 37D(1)(b)(ii) of the Act.

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<sup>1</sup> Part A, pages 78 – 87 of the record.

- [5] The applicant in this matter brings an application challenging the determination of the PFA in finding that the withdrawal benefit should be paid out to the first respondent if the applicant fails to institute a legal claim against its former employee (first respondent) within the stipulated time in the PFA's determination.
- [6] In its determination, the PFA ordered the employer (applicant) to issue legal proceedings against the first respondent by no later than 30 November 2024 and should the employer fail to institute legal claims against the first respondent, the fund must proceed to pay his withdrawal benefit, within one week following the lapse of the period.
- [7] The PFA in its investigation of the complaint, raised the issue of the two documents submitted by the applicant to the fund when it (the applicant) directed the fund to withhold the benefits. The latter two documents purported to be acknowledgements of debt (AODs) and admission of liability (AOL), respectively, and were signed by the first respondent. In its determination, the PFA raised the concern that even though the documents were purportedly signed by the first respondent, they had two different amounts in respect of the alleged loss incurred by the employer (applicant) as a result of the theft committed by the first respondent (member of the fund). Despite the latter finding, the PFA did not make any order regarding this material aspect of the matter. In what follows, we deal with the significance of the PFA's failure to make an order on the fund's failure to ascertain the amount of compensation that was due to the employer.
- [8] The applicant contests the PFA's decision to order payment of the withdrawal benefit if there is legal claim instituted by the applicant against the first respondent.

[9] The first and second respondents did not appear at the hearing of this matter. However, the applicant was represented by a legal representative who advised that they have since satisfied the PFA's determination and the order and that they have since instituted the legal claim and opened a criminal case against the first respondent. However, this raises the question as to whether the mere institution of legal proceedings is sufficient to accord with the provisions of section 37D?

[10] It is this Tribunal's view that the civil and claim instituted by the applicant against the first respondent does not adequately comply with section 37D. The issue that the PFA had to determine and make a ruling on was whether the fund acted lawfully when it first made the decision to withhold the pension benefits of the first respondent at the request of the employer and what case was put to them by the employer that enabled the board of trustees of the fund to correctly exercise their discretion with care?. Is the fund still justified in its decision to continue to withhold the first respondent's withdrawal benefit? It is our view that a ruling had to be made by the PFA regarding the discrepancies in the AOD and AOL submitted to the fund and whether such acknowledgement of debt and of liability accords with the legal requirements of section 37D.

[11] In this regard, a brief summary of the facts is merited:

[11.1] It is common cause that the first respondent commenced employment with the applicant from 01 March 2018 until 03 October 2023 when he resigned from employment. On 31 October 2023 he was subsequently dismissed by the applicant<sup>2</sup>. He was a member of the fund and became entitled to payment of his withdrawal benefit of R 763 258.03.

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<sup>2</sup> Part A, pages 84-85 of the record.

[11.2] The first respondent was accused of fraud and theft of misappropriation of stock of the applicant. On 20 November 2023, the applicant provided the fund with a signed AOD dated 17 November 2023 reflecting the damage amount of R 4 091 392.34 due to the first respondent's alleged misconduct<sup>3</sup>.

[11.3] The record also shows a signed AOD dated the same date of 17 November 2023 reflecting damage to the amount of R 2 142 000.00 due to the first respondent's alleged misconduct.<sup>4</sup>

[11.4] Both AODs which reflected two different amounts were submitted to the fund. During the hearing the applicant's legal representative advised that the difference between the two amounts in the AOD's provided to the fund was R 1 9 00 000.00 (1.9 million).

[11.5] The record indicates that the first respondent is not disputing that he signed an AOD. The first respondent, however, disputes the amount contained in the AODs and says he was compelled to sign some blank pages. He specifically disputes that he signed an AOD with an amount of R 4 091 392.34 that was presented to the fund. The first respondent in his complaint to the PFA submitted to the PFA that the fund had acted unreasonably when withholding his withdrawal benefit and that it should not have relied on the two AODs which reflect two different amounts of indebtedness. In his response to the PFA, the first respondent further submitted that he recalled signing two AODs on different dates and that two different liability amounts were reflected on both AOD's presented to him for his signature. Notably, the AOD's on record are dated the same day.

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<sup>3</sup> Part A of the record, pages 45-47.

<sup>4</sup> Part A of the record, pages 48-49.

- [12] In our view, the fund should have satisfied itself that the loss and compensation to the employer was readily ascertainable and quantified. The fact that there were two different amounts in the two AODs demonstrates that compensation was not ascertainable or quantified. The AODs fell short of the requirements of section 37D of the Act because they failed to stipulate the ascertainable compensation that was due to the employer.
- [13] In terms of s 37D(b)(ii) of the Act, a fund may deduct from the member's benefits payable in terms of the rules of the fund any amount in respect of damages caused to the employer by the member as a result of theft, fraud, dishonesty or misconduct, provided (a) the member has admitted liability in writing, or (b) a judgment by a court of law has been obtained against the member. The member's written admission of liability must be clear and unambiguous and should specifically allow for deductions to be made in respect of a wrongdoing committed by the member against the employer.<sup>5</sup>
- [14] It is clear from the above common cause facts that the damage to the employer was not quantified. That being so, the PFA should have dealt with this issue and made an order which sets out its significance. As appears from the order of the PFA, it merely ordered the applicant to institute legal proceedings and found that failure to do so within a reasonable time would result in the lapse of the order. However, this still did not answer the question of whether the damage to the employer was quantified. In our view, it was not.

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<sup>5</sup> "Breaking the golden egg - the pitfalls of written admissions in section 37D of the Pension Funds Act". De Rebus, October 2015 page 30 [2015] -Article by Ms Zamazulu Nkubungu.

[15] As was held in *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen*<sup>6</sup>, trustees of a pension fund are not entitled to make any deduction in the absence of a written admission of liability by the member concerned or a judgment obtained by the employer against the member. An employer should put in place mechanisms for obtaining proper written admissions from employee.

[16] In its decision to withhold the first respondent's withdrawal benefit, the fund relied on the AOL and AOD submitted to it by the applicant. The difficulty with the AOL and AOD is that they reflect two different amounts, as mentioned above.

## CONCLUSION

[17] The application for reconsideration should succeed on the basis that the damage to the employer was not quantified.

[18] The fund should have satisfied itself of the amount of compensation due to the employer before it withheld the member's benefit. This was not dealt with by the PFA in its order. In our view, the PFA should deal with the issue of payment of the withdrawal benefits. As a result, we are of the view that the matter should be remitted back to the PFA so that it deals with the issue of whether compensation or damage to the employer was quantified and whether the fund is entitled to continue withholding the member's pension benefits.

## ORDER

[19] The application for reconsideration is upheld. The matter is referred back to the PFA so that it can deal properly with the issue of whether the loss to the employer was properly quantified

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<sup>6</sup>*Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* [2009] 2 All SA 225 (SCA)

and whether the fund was justified in its decision to withhold the benefits and the decision to continue withholding the member's pension benefits.

[20] Signed on behalf of the Tribunal on 29 April 2025.

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Zama Nkubungu-Shangisa (MEMBER) with the panel also consisting of

Adv. Michelle Le Roux SC; and

Ms Xolisile Khanyile.

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