

**THE FINANCIAL SERVICES TRIBUNAL**

Case No: PFA49/2024

In the matter between:

**ANTHONY MPHOTHU MAFOLO**

Applicant

and

**UNIVERSITY OF JOHANNESBURG  
PENSION FUND**

First Respondent

**THE PENSION FUNDS ADJUDICATOR**

Second Respondent

**UNIVERSITY OF JOHANNESBURG**

Third Respondent

Summary: Pension Funds Act 24 of 1956 – a registered fund may make certain deductions from pension fund benefits - section 37D(1)(b)(ii) – considering potential prejudice on employee – exercise of discretion by the fund – balancing of competing interests

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**DECISION**

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1. The withholding of the applicant’s withdrawal benefit in terms of section 37D(1)(b)(ii) of the Pension Funds Act 24 of 1956 (“the Act”) by the University of Johannesburg Pension Fund (“the Fund”), the first respondent, is at the heart of his matter.
  
2. The applicant, Mr Anthony Mphotho Mafolo, is aggrieved by the determination of the Pension Funds Adjudicator (“the PFA”) dated 23 August 2024 dismissing his complaint against the Fund’s decision and approached this Tribunal in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 (“the FSR Act”).

3. The parties agreed that this matter be decided on the documents and submissions made on record and for that reason waived their rights to oral hearing.
4. The nub of the issue raised by the applicant is that a civil claim that was instituted by his erstwhile employer, the University of Johannesburg (“the University”), the third respondent, has been continuing since 2022 and is taking unreasonably long to conclude.
5. Further, the applicant stated that he is of the opinion that he is discriminated against as some of the former employees that had been dismissed on same conclusion of negligence, have received their pension funds.
6. The applicant referred to the determination of the PFA and same is challenged on the basis that it is incorrect and has been concluded on false information provided by the University regarding a pre-trial process.
7. The background to this matter is set out in brief. The applicant was employed as a Desktop Support Technician in the Information and Communication Systems Division by the University from 1 June 2009 until his dismissal on 31 May 2023.
8. The applicant was the member of the Fund by virtue of his employment with the University. He became entitled to a withdrawal benefit following his exit from the employment and thus submitted a withdrawal claim to the Fund. According to the Fund, it received the applicant’s withdrawal

claim form on 14 June 2023.

9. The University's version submitted to the PFA regarding the withholding of the withdrawal benefit is summarised as part of the background to this matter. The University preferred charges against the applicant and an internal disciplinary inquiry was held regarding several allegations of gross misconduct, including gross dishonesty. The internal disciplinary inquiry culminated in the dismissal of the applicant.
10. The University initiated, amongst other things, a civil claim in the South Gauteng High Court under case number 2022/048771 against the applicant. The University submitted its amended particulars of claim to the PFA for her consideration.
11. According to the University, the applicant breached his legal duty, by, *inter alia*, unlawfully and intentionally disposing of some of the 434 computer assets to third parties who to his knowledge were not entitled to receive computer assets.<sup>1</sup>
12. The Fund's version submitted before the PFA is also summarised to understand the background to the withholding of the applicant's withdrawal's benefits. On 3 July 2023 the University requested the Fund to withhold the applicant's withdrawal benefit. The University submitted to the Fund the disciplinary hearing documentation, the outcome and report for consideration.

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<sup>1</sup> Record, Part B, at p 130 (Plaintiff's Amended Particular of Claim at par 16A(9).1)

13. The Fund was informed of the civil claim against the applicant and that it is still pending.
14. On 3 July 2023 the Fund requested the applicant to provide his representations to the allegations raised against him. On 14 July 2023 he made his submissions to the Fund. The Fund decided to withhold the withdrawal benefit until the next board meeting on 2 October 2023. According to the Fund, the University provided a report on 28 September 2023 reflecting progress in both civil and criminal cases.
15. On 2 October 2023 the board of trustees considered the matter and agreed to withhold the benefit till the next board meeting on 20 November 2023. According to the Fund, it is its practice to review this matter at each subsequent meeting and consider a progress report on the case.
16. According to the Fund, a letter was sent to the applicant on 9 October 2023 where it stated, amongst other things, that an independent forensic investigation was performed and the investigation indicated that there is a *prima facie* case against the applicant.
17. Further, according to the Fund, the board received updates on a regular basis from the University. On 14 June 2024 the University provided an update for the board of the Fund to consider at its meeting held on 19 June 2024. The stated updates related to the filing of notice of intention to amend the University's particulars of claim and the filing of amended particulars of claim. The updates indicate that the discovery processes have commenced and once the parties have discovered, the University

will call a pre-trial conference.

18. It is noted that the University provided information regarding a criminal investigation and both the University and the Fund made submissions in that regard. This aspect of the case is not considered because of the stance of this Tribunal on criminal cases and section 37D(1)(b)(ii) of the Act.<sup>2</sup>
19. The provisions of section 37D(1)(b)(ii) provide the legal basis for an employer and a registered fund to deal with a withdrawal benefit of a member. It has been quoted more than once in the submissions made by the parties in this matter and it shall not be repeated to for purposes of brevity.
20. Our courts have had opportunities to consider the interpretation and the application section 37D(1)(b)(ii) of the Act. In *Highveld Steel & Vanadium Corporation Ltd v Oosthuizen*<sup>3</sup> the Supreme Court of Appeal stated the following in this regard:

*“[19] 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*

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<sup>2</sup> In the Determination of the PFA at paragraph 5.19 reference is made to number of cases of this Tribunal regarding the withholding of benefits and opening of criminal cases.

<sup>3</sup> 2009 (4) SA 1 (SCA)

*therefore had the discretion to withhold payment of the respondent's pension benefit in the circumstances. ....*

*[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.*” (own emphasis)

21. The rules of the Fund, more specifically rule 11.2, empower the board of trustees to withhold a member's withdrawal benefits subject to certain conditions. One condition relevant to this matter is that the trustees are required to be satisfied that the employer is not at any stage of the proceeding responsible for any undue delay in the prosecution of proceedings.<sup>4</sup>
  
22. It is the contention of the applicant that the civil claim instituted by the University is taking too long to conclude. The University, in response, stated that the civil matter is at the phase of discovery of documents, and it is indicated that on 25 July 2024 correspondence has been addressed to the applicant for purposes of a pre-trial conference meeting. Further, the University indicates that the applicant has no legal representation and, in an effort, to expedite the proceedings, the matter will be referred to case management. The record shows that the University is actively

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<sup>4</sup> Rules of the Fund, at par 11.2(c).

prosecuting the civil claim. We find no basis that there has been undue delay attributable to the University.

23. Further, the applicant contends that he is of the opinion that the University is discriminating against him because some of the employees dismissed on the same basis, received their benefits. The University denied this allegation and stated that the benefits of other two employees are withheld. This contention is, in our view, in any event baseless.

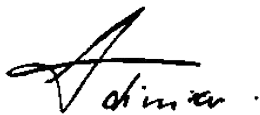
24. The continued recurring updates in the civil claim by the University and the periodic assessment of same by the Fund, in our view, give effect to the consideration of the potential prejudice on the applicant and exercise of its discretion with care.

25. We found no sound basis to interfere with the order of the PFA for the reasons that there is a civil claim against the applicant which is actively prosecuted by the University and that the Fund continues to assess progress made in the civil litigation.

**ORDER:**

The application for reconsideration is dismissed.

Signed on 19 November 2024



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Adv W Ndinisa (Member) and

pp 

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LTC Harms (Chair)