

THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: PFA31/2020

BRYAN DHLUDHLU

APPLICANT

and

THE MUNICIPAL COUNCILLORS PENSION FUND

FIRST RESPONDENT

KOUGA LOCAL MUNICIPALITY

SECOND RESPONDENT

THE PENSION FUNDS ADJUDICATOR

THIRD RESPONDENT

Application for reconsideration of a PFA determination – unilateral error – equitable jurisdiction – application dismissed

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[1] The applicant, Mr Bryan Dhludhlu, applies in terms of sec 230 of the Financial Sector Regulation Act, 2017, for the reconsideration of a determination by the Pension Funds Adjudicator (“the PFA”) consequent upon a complaint laid by him against the Municipal Councillors Pension Fund (“the Fund”). The Kouga Local Municipality, against whom the determination was made, does not apply for reconsideration of the order.

[2] The parties waived their right to a hearing and agreed that the application be decided on the papers, which include heads of argument by the applicant and the Fund.

[3] The applicant has been a councillor of the Municipality since 5 August 2016, but only joined the Fund on 1 January 2017. On 9 May 2018, he informed the Municipality that he was not happy

with the management of the Fund as well as the returns on investment of his total contributions to date and instructed the Municipality to start paying the pension deductions to another fund that he had since joined and to transfer all the funds residing with the Fund to his new pension fund as soon as possible.

[4] Acting on his instructions, the Municipality then stopped paying his pension contribution to the Fund. The Fund did not find this acceptable because in terms of its rules the applicant could not withdraw from the Fund as long as he remained a councillor of the Municipality which meant that the Municipality was obliged to pay the full pension contribution to the Fund.

[5] The applicant then laid a complaint with the PFA, alleging that he had been misled by the Fund in joining it and that he was entitled therefore to “cancel” his membership of the Fund. His case was set out in counsel’s heads of argument in these terms:

**“The Applicant says that his decision to join the Municipal Councillors Pension Fund was based on a material misrepresentation made by it, in that he was advised that his contributions would be paid in equal part by him and the Kouga Municipality, when in fact correct position is that he pays the whole contribution, and nothing is paid by the Municipality. The misrepresentation is in writing and confirms that both the Applicant and the Municipality contributes. This also urged him to take up the higher contribution rate. The Applicant says he would not have joined the Municipal Councillors Pension Fund, had the true facts been known to him at the time, and would not have taken up the higher rate. It is clear that in terms of s 13(1)(b) of the Determination of Upper Limits of Salaries, Allowances and Benefits of Different Members of Municipal Councils, read with the Municipal Councillors Pension Fund Rule 28.1(a) and s 5(a) of the Remuneration of Public Office Bearers Act, 1998, the Kouga Municipality contribution to the Municipal Councillors**

**Pension Fund in respect of the Applicant's contribution, is part of his total remuneration package and not additional thereto, as he understood from the Municipal Councillors Pension Fund presentation, as the time that he joined, when he became a Municipal Councillor.**

**The Applicant's mistaken understanding of the position, was premised on a written presentation of the Municipal Councillors Pension Fund, which indicates the contributions and ratios thereof, but makes no mention of, and does not explain, the difference between the Applicant's total remuneration package and basic remuneration package. This, Applicant submits, was a misrepresentation by the Municipal Councillors Pension Fund.**

**The Municipal Councillors Pension Fund Rules similarly makes no mention of, and does not explain, the concepts of the Applicant's total remuneration package and basic remuneration package; it simply states that the Municipality must contribute to the pension fund. The Applicant's mistaken view could not have been altered by reading the Rules."**

[6] It is apparent from this that the applicant's mistaken view was not caused by the Fund's presentation. It was not the duty of the Fund to explain to him what the Act and regulations say or to inform him of the relationship between him and the Municipality. This is a clear case of unilateral error – if there was an error – and not of misrepresentation.

[7] It is doubtful that there was an error because the applicant received for more than a year his payslips which indicated the correct position and when he sought to withdraw from the Fund he had other reasons, namely the management of the Fund and its performance. It was only after he had learnt that he could not withdraw from the Fund that he alleged misrepresentation.

[8] The allegation that the PFA failed to address this issue is without merit, but since this is a reconsideration application the fact that the PFA may not have addressed the complaint does not affect the applicant's rights. This Tribunal has considered it and rejects it.

[9] The applicant in addition submitted that the PFA should have disregarded the "contractual" relationship between the applicant and the Fund and exercise her equitable jurisdiction and allow the applicant to withdraw from the Fund with repayment of his contributions.

[10] Section 30D(2) of the Pension Funds Act, 1956, states that:

**In disposing of complaints in terms of [subsection \(1\)](#) the Adjudicator must—**

**(a) apply, where appropriate, principles of equity;**

**(b) have regard to the contractual arrangement or other legal relationship between the complainant and any financial institution;**

**(c) have regard to the provisions of this Act.**

[11] This Tribunal has held that the principles of equity cannot override the provisions of the Act by permitting a Fund to act in contravention of the Act. Furthermore, this is hardly an appropriate case. If persons wish to occupy public offices they ought to acquaint themselves with the laws that apply to them.

[12] The second ground for reconsideration is that the PFA did not comply with the *audi* rule. The submission is made by counsel as follows:

**"It appears that the Pension Funds Adjudicator forwarded the Municipal Councillors Pension Fund to the Applicant on 24 February 2020 at his email address**

[brdhludhlu@kouga.gov.za](mailto:brdhludhlu@kouga.gov.za) to file his reply by 9 March 2020, but this did not reach him, perhaps as his email address is [bdhludhlu@kouga.gov.za](mailto:bdhludhlu@kouga.gov.za).”

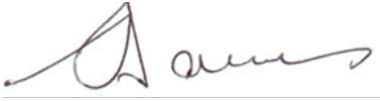
[13] The submission is based on a false premise. The complaint (Record A20-21) by the applicant gave as his email address the first one, and not the second one. That was also the email address given by the applicant to this Tribunal (Record A82 and 86). The fact that the applicant may also have a second address is beside the point: he chose the first.

[11] In any event, as said, this is a reconsideration application and not a review. The applicant had and used the opportunity to set out his case and to deal with the Fund’s submissions before this Tribunal, which are legal and not factual. The applicant also had the opportunity to apply for the admission of new facts but did not.

[12] Finally, the applicant submits that the PFA should not have ordered the Municipality to comply with its statutory duty to account for and pay the outstanding contributions with interest to the Fund because that was not his complaint. Assuming for the sake of argument only that the PFA ordered more than she was supposed to order, the Municipality did not apply for reconsideration and, one may add, the applicant has no legal interest (in contradistinction to an indirect financial interest) in the order. The failure by the Municipality to pay is criminalised and the excuse of the Municipality that it acted on the applicant’s instructions is no longer an excuse on which it can rely. In other words, the determination did not add to the Municipality’s statutory obligations. It is not the concern of the PFA if any accounting will take place between the applicant and the Municipality.

The application for reconsideration is dismissed.

Signed on behalf of the Tribunal on 5 October 2020

A handwritten signature in black ink, appearing to read 'LTC Harms', enclosed within a thin black rectangular border.

LTC Harms (deputy chair)