

THE FINANCIAL SERVICES TRIBUNAL

Case No: **PFA29/2019**

In the matter between:

DAVID JOHANNES MALHERBE

Applicant

and

PENSION FUND ADJUDICATOR

First Respondent

ESKOM PENSION AND PROVIDENT FUND

Second Respondent

ESKOM HOLDINGS SOC LIMITED

Third Respondent

Tribunal: H Kooverjie (chair), W Ndinisa, Mr G Madlanga

Hearing: 7 August 2019

Decision: 19 August 2019

Summary: Whether a “deferred pensioner” constitutes a member as envisaged in section 37(1)(b)(ii) of the Pension Fund Act?

DECISION

1. The applicant instituted this application requesting the Tribunal to reconsider the determination of the Pension Fund Adjudicator (“**PFA**”) dated February 2019.
2. Mr Malherbe (the applicant) lodged a complaint with the office of the PFA

concerning a deduction of his withdrawal benefit in terms of section 37D(1)(b)(ii) of the Pension Fund Act (“**the Act**”). Mr Malherbe also challenged the rule 40 amendment and the applicability thereof to his benefits.

3. For the purposes of this decision, Eskom Pension and Provident Fund will be referred to as the “**Fund**”, the third respondent will be referred as “**Eskom**” and Mr Malherbe will be referred to as ‘Malherbe’. The Rules referred to herein are The Eskom Pension and Provident Fund Rules

A ISSUES

4. Malherbe’s core argument remains firstly that he is considered to be a “deferred pensioner” by virtue of the definitions in the Act and the Rules. Eskom was therefore not entitled to deduct any amount from his deferred pension.
5. Secondly, he objected to the applicability of the amended Rules of the Fund specifically rule 40, which he argued was registered without his prior consent. As a member of the Fund, his input was necessary before the amendments were effected. He therefore sought an order setting aside the amendments to rule 40, and an order restraining the Fund from making a deduction from his benefits in terms of section 37D of the Pension Funds Act.

B BACKGROUND

6. Malherbe was employed from 31 December 1977 to 28 February 2009. He elected to leave his resignation benefit with the first respondent as a “deferred

pensioner". On leaving Eskom a withdrawal benefit became payable to him.

7. Malherbe was previously a managing director of an entity PN Energy Services SOC Limited ("**PNES**"). In 2007, PNES became a wholly subsidiary of Eskom. During that time Malherbe devised a scheme, where he unlawfully defrauded Eskom. After a contentious legal battle in the High Court, the Supreme Court of Appeal, and eventually the Constitutional Court civil judgment against Malherbe stands. For the purposes of the decision the details are not necessary and the findings of the courts are not challenged herein.
8. Criminal proceedings were also instituted against Malherbe who was prosecuted in the Magistrate's Court in Belville for fraud and money laundering and he was found guilty on both charges. However, we note this matter is pending in the Supreme Court of Appeal, and has been set down in August 2019.
9. The Fund was directed by the Court to effect a deduction from Malherbe's withdrawal benefit in favour of Eskom in terms of Section 37D(1)(b)(ii) of the Pension Funds Act.
10. The central argument pertains to the applicability section 37D(1)(b)(ii) of the Act. Section 37D states:

"(i) a registered fund may

(b) 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 – ...

(ii) compensation (including any legal cost recoverable from the member in a matter contemplated in sub-paragraph (bb) in respect of any damage

caused to the employer by reason of any theft, dishonesty, fraud or employer; or misconduct by the member and in respect of which –

(aa) the member has in writing admitted liability to the

(bb) judgment has been obtained against a member in any court including a Magistrate's Court;

(iii) from any benefit payable in respect of a member or a beneficiary in terms of the rules of the fund and pay such amount to the employer concern."

(own emphasis)

11. Malherbe contended that he does not fall within the definition of "member" as envisaged in section 37D of the Act and therefore the deduction is not competent. He particularly contended that his membership from the Fund ceased when he resigned from Eskom in 2009.

12. The definition of "member" in section 1 of the Act reads as follows:

"Member in relation to

(a) A fund referred to in paragraph (a) or (c) of the definition of pension fund organisation means any member or former member of the association by which such fund has been established;

(b) A fund referred to in paragraph (b) of the definition, means a person or belong to a class of persons for whose benefit that fund has been establish;

(c) But does not include any person who has received all the benefits which may be due to that person from the fund and whose membership has thereafter been terminated in accordance with the rules of the fund.

(own emphasis)

13. Consequently, he relies on **(c)** on the basis that his membership has been terminated in accordance with the rules of the Fund. The explanation proffered by Malherbe was set out in detail in his heads of argument. The Tribunal assured him that his submissions therein would be carefully considered. However, for the purposes of this decision we summarize the salient points of his argument below.
14. Malherbe considers himself to be a “deferred pensioner” as defined in the Act namely:

“a member who has not yet retired but has left the service of the employer concerned prior to normal retirement date, as defined in the Rules, leaving in the Fund the member’s rights to such benefits as may be defined in the Rules.”
15. Having regard to the aforesaid provision Malherbe, contended that guidance has to be sought from the Rules. By virtue of the Rules then, he falls in the category of a “deferred pensioner”. The definition in the Rules of a “deferred pensioner” is a ***“former member who has elected to refer the payment of his benefits in terms of rules 28, 29 or 30 to a future date which falls between his fifty fifth and sixty fifth birthdays”.***
16. Secondly “member” as defined in the Rules does not refer to those who have ceased to be members in terms of the Rules. By virtue of the Rules a “member” is defined as a

“person who has remained or become a member of the Fund in terms of rule 11 or rule 16 and who has not ceased to be a member under the provisions of these Rules.”

17. He persisted with the arguments that he became a “deferred pensioner” since the date of his resignation, being 28 February 2009. On resignation he opted for a limited withdrawal benefit for tax purposes.
18. The balance of the benefit is deemed to be a “voluntary contribution” made by him for retirement. His “withdrawal benefits” in the Fund thus became a “voluntary contribution” from the date of leaving the service. At that point also the “member” becomes a “deferred pensioner” by virtue of the Fund Rules.
19. Moreover, with reference to rule 13(2), Malherbe contends that he ceased to be a member upon resigning from Eskom. Rule 13 deals with the cessation of membership and particularly rule 13(2) stipulates that

“A member who for any reason leaves the service or who attains a pensionable age shall forthwith cease to be a member.”

20. In further argument the applicant pointed out that he had resigned on 28 February 2009 and the Court proceedings were only instituted on 16 January 2012 with a civil judgment granted against him on 27 July 2017. The initiation of the outcome of the civil judgments could not have “retroactive” (sic) (retrospective) effect.

21. In considering the issues in this matter, the starting point is to determine the intention of the Legislature with regard to section 37 D(1)(b)(ii). The PFA determined that Malherbe is still considered a “member” in terms of section 1 of the Act. A “member” in terms of section 1 aforesaid remains such until he has received all his benefits and his membership is terminated. In this instance Malherbe is a “deferred member” and as he has not received his full benefits.
22. The office of the PFA in its determination took cognisance of the civil judgment against Malherbe. Malherbe was ordered by the Court to make a deduction from his benefit to compensate the second respondent for the loss suffered. The PFA viewed the deduction as one in terms of section 37D(1)(b)(ii) in that the ***“employer obtained a judgment in Court in respect of compensation.”***
23. Having also considered argument proffered on behalf of Eskom, the following submissions have relevance to the extent that Malherbe is a “member” as envisaged in the Act.
- 23.1 A fund member for the purposes of section 37D includes both active and former members. Former members are those who have not received all their benefits from the Fund.
- 23.2 “Deferred pensioners” who have not yet received their full benefits in the Fund are considered to fall within the definition of “member” in terms of the Act.
- 23.3 The definitions in the Act takes precedence to the Rules. The Tribunal was directed to section 13 of the Act, which stipulates that the Rules of

a registered fund are binding on the Fund and the members, but subject to the provisions of the Act.

23.4 Section 37D(1)(b)(ii) finds application in Malherbe's case. Eskom suffered loss as a result of such fraud and misconduct by Malherbe. Eskom obtained a civil judgment against Malherbe and, by virtue of the court order, the Fund was directed to make a deduction from his benefit to compensate Eskom for the loss suffered.

24. It is trite that the Rules of the Fund are binding on its officials and members. However, the Rules are required to be consistent with the provisions and definitions of the Act. The Fund and its Rules are registered in terms of the Act.¹ It can therefore not be gainsaid that the Rules should not be contrary to the provisions and definitions in the Act.

25. Clause 3.2(e) of the Revised Rules stipulate that:

“the duty of the Board is to inter alia “ensure that the Rules and the operation and administration of the Fund comply with Act, the Financial Institutions Act, 2001, and all other applicable laws, and any other duties imposed by the Rules.”

26. By virtue of the Act, the definition of “member” is wide which includes a former member. If one has regard to the definition of “deferred pensioner” in the Act, it defines such “deferred pensioner” as a “member”.

¹ Section 13 of Act and Orion Money Purchase Pension Fund SA v PFA *supra* at p3834

27. The only instance when is no longer a member is if such person had received his full benefits and consequently terminates his membership.
28. In the premises the definitions in the Rules must be aligned to the definitions in the Act. We find the determination of the PFA not to be incorrect. Malherbe is a member as envisaged in the Act as a “deferred pensioner”. Malherbe’s argument that upon resignation he ceased to be a member cannot be sustained of one has regard to the definition “member” in the Act.
29. In considering whether the deduction was in accordance with Section 37(D)(1)(b) of the Act, we find guidance from our authorities which recognised that the object of the said Section 37D(1)(b) is to protect the employer’s right to pursue the recovery of money misappropriated by its employer.²
30. Our courts had previously pronounced on the interpretation of section 37D(1)(b). In the **Highveld Steel and Vanadium** matter, the court held that section 37D(1)(b) is to be interpreted purposively which gives the Fund a discretion to withhold payment pending the determination or acknowledgement of such members’ liability.³
31. The Court therein took cognisance of instances where employers only establish

² Highveld Steel and Vanadium Corporation Ltd v Oosthuizen 2009 (4) SA SCA at para 16
Twigg v Orion Money Purchase Pension Fund (1) [2001] 12 BPLR 2870 (PFA) at para 21

³ Charlton v Tongaat Hulett Pension Fund [2006] (2) BLLR 94 D at 97 I – 98 B
Highveld Steel and Vanadium Corporation *supra* at para 17 - 19

that their employees were dishonest after the termination of their employment. In such instances the court found that it could not have been the intention of the Legislature to apply a strict interpretation. It could serve no purpose to employers who make the discovery after the termination of their employees' employment. In the real world there are only a few cases where the employer would have managed to obtain a judgment against its employee before termination of the employment.

C RULE AMENDMENTS

32. Malherbe's second primary contention was that the PFA had erred in its finding in that it had no jurisdiction to consider the validity of the rule amendments. Malherbe in this application sought the Tribunal's guidance on the way forward in respect of this issue.
33. We note that the Rule 40 amendment is in accordance with the wording of Section 37(D)(1)(b)(ii) which has a bearing on Malherbe's circumstances.
34. In further argument, the respondent submitted that rule amendments were registered with the Registrar of Pension Funds in terms of section 12 of the Act. These rule amendments are binding and effective unless set aside in court proceedings and where the relevant parties, like the Financial Sector Conduct Authority is a party to the proceedings. This is a complaint under section 30A and under these circumstances the PFA did not have the authority to consider this argument.

35. By virtue of the provisions of the Act it is necessary to have regard to the definition of the word “complaint” which specifies circumstances under which a complaint will be one as envisaged in the Act

(a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;

(b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;

(c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or

(d) that that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund; but shall not include a complaint which does not relate to a specific complainant.

(own emphasis)

36. In this regard we further find the authority **Joint Municipal Fund and Another v Grobler & Others (2007) 4 ALL SA 855 SCA para 25**, to be instructive, where the Court held that the PFA did not have jurisdiction to investigate complaints relating to the making or validity of rule amendments. It does not constitute a ‘complaint’ as defined in the Pension Funds Act.

37. Howie, J stated the following in paragraph 25:

“With respect, although a decision to amend the fund’s rules would indeed be a decision “in terms of the rules”, if its rules did empower amendments, the question whether a complainant’s case is a complaint as defined, is not limited determining whether it fits any of the instances in paragraph (a) to (d). To be a complaint as defined, it has also to conform to what is stated in the preamble to the definition. It must, in other words, while alleging one or more matters described in paragraphs (a) to (d), nevertheless also concern one of the three subjects stated in the preamble;


Administration of the fund investment of its funds; or interpretation and application of its rules. None of those three subjects entails the making or validity of rule amendments. It follows that an adjudicator had no power to consider Mr Grobler’s complaint insofar as it involved an amendment or its validity. In taking the view that the adjudicator had that power, the court below with respect, erred.”

(own emphasis)

38. On the second ground we find therefore that the PFA that it had no jurisdiction to determine the validity of rule amendments was not incorrect.

39. In the premises this application is dismissed.

SIGNED at **PRETORIA** on this **19th** day of **AUGUST 2019** on behalf of the Panel.

A handwritten signature in blue ink, appearing to read 'H Koooverjie', written in a cursive style.

H KOOVERJIE

With the Panel consisting also of:

W Ndinisa

G Madlanga