

THE FINANCIAL SERVICES TRIBUNAL

Case No.: PFA77/2024

In the matter between:

EDWARD SNELL & COMPANY (PTY) LTD

Applicant

and

THE PENSION FUNDS ADJUDICATOR

First Respondent

MMANGALISO BHEKUMUZI SBIYA

Second Respondent

NBC UMBRELLA RETIREMENT FUND

Third Respondent

NBC HOLDINGS (PTY) LTD

Fourth Respondent

NBC FUND ADMINISTRATION SERVICES (PTY) LTD

Fifth Respondent

Tribunal Members: C Woodrow SC (Chair), W Ndinisa and A SaldulkerAppearance for Applicant: Mr. ProudfootAppearance for Second Respondent: NoneAppearance for Third Respondent: Mr Van Zyl

Summary: Application for reconsideration in terms of section 230 of the FSR Act 9 of 2017

DECISION

1. The applicant has brought an application for reconsideration in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 against the decision of the first respondent ("the Adjudicator") dated 18 October 2024.¹

¹ Record, Part A, Annexure "A", pages 37- 49

2. Two main grounds form the applicant's reconsideration request viz (a) material legal errors of the Adjudicator in her determination, and (b) whether or not the Fund exercised a discretion, which the Adjudicator unlawfully usurped.
3. At the hearing held by the Tribunal on 12 May 2025, the applicant was represented by Mr Proudfoot and the third respondent ("the Fund") was represented by Mr Van Zyl.
4. The second respondent ("Mr Sbiya") was not present at the hearing. The Chair placed on record that email notification of the proceedings had been sent to Mr Sbiya. Despite this, the second respondent was not present when the Tribunal heard the matter on 12 May 2025.

RELEVANT BACKGROUND

5. Mr Sbiya was employed with the applicant from 3 May 2010 to 28 November 2023 when he was dismissed. By virtue of his employment, he was a member of the Fund.
6. A case of gross misconduct had been opened against Mr Sbiya for the alleged integral role he played in alleged fraudulent removal and distribution of company stock during the course of 2022 and 2023.
7. A disciplinary hearing was held on 24 November 2024. Mr Sbiya was dismissed as a result of this alleged involvement in fraudulent conduct.

8. After his dismissal, Mr Sbiya approached the Adjudicator to investigate the matter and authorise the payment of his withdrawal benefit from the Fund. Mr Sbiya also provided the Adjudicator with the outcome of his disciplinary hearing.
9. The Fund had informed the Adjudicator of the request made to it by the applicant to withhold Mr Sbiya's benefit held by the Fund on his behalf. Furthermore, the Adjudicator was informed that during the disciplinary proceedings, the applicant had found Mr Sbiya guilty of theft and dishonesty which led to his summary dismissal on 28 November 2023.
10. The applicant had provided the Adjudicator with a forensic expert report from Crowe Forensics SA detailing how Mr Sbiya was involved in fraudulent activity that had resulted in material financial prejudice to the applicant and why it was justified in claiming that Mr Sbiya's provident fund benefits in part recompense for this.
11. Mr Sbiya submitted to the Adjudicator that it would be unreasonable for the Fund to withhold his benefit as he did not benefit from any fraudulent activities conducted by his then manager. Mr Sbiya further submitted that he had volunteered to assist the South African Police Service in the matter.
12. The Adjudicator stated the issue for determination as follows: "*The issue for determination is whether or not the fund acted lawfully when it agreed to withhold [Mr Sbiya's] benefit at the behest of [the applicant].*" (Determination par 5.1). In her determination, the Adjudicator stated that her duty is to consider whether the board of the Fund correctly exercised its discretion with care and whether or not the Fund's decision had been justified at the time when the decision was taken.

13. The Adjudicator considered the submissions of Mr Sbiya, the Fund and the applicant in order to make a determination as to whether the continued withholding of the benefit would be lawful and justifiable.
14. The Adjudicator found as follows in her determination *inter alia*:
 - 14.1. Laying a criminal charge has no legal consequence. It does not begin legal proceedings. Legal proceedings may or may not follow depending on the decision of the prosecutor.
 - 14.2. The new amendment to section 37D(1)(b)(ii) of the Pension Funds Act 24 of 1956 (as amended) now states that a judgment obtained against a member includes a compensation order in terms of section 300 of the Criminal Procedure Act 51 of 1977. This means that when an employer has instituted criminal proceedings, the Fund must allow the employer time to pursue the recovery of the misappropriated funds through a section 300 compensation order. The amendments to the Act were, however, not retrospective. Therefore, claims dealt with prior to the amendment coming into place on 1 September 2024 will be dealt with in accordance with the law at the time.
 - 14.3. The Adjudicator received the complaint on 27 March 2024, before the amendment took effect, thus the law that was applied was before the amendment.
 - 14.4. The Adjudicator accordingly found that the Fund must pay Mr Sbiya's withdrawal benefit.

BASIS FOR RECONSIDERATION

15. The applicant seeks an order that the decision of the Adjudicator be set aside and the matter be referred back to the Adjudicator.
16. The main premise of the applicant's grounds for reconsideration are two-fold:
 - 16.1. Firstly, the applicant raises certain legal grounds upon which it contends the Adjudicator's determination ought to be reconsidered; and
 - 16.2. Secondly, the applicant raises what it refers to in argument as a factual or procedural error by the Adjudicator and submits that the Adjudicator cannot exercise a discretion that must be exercised by the Trustees of the Fund. The Applicant in its application for reconsideration summarises the second ground as follows:

“By ordering the Fund to make payment to Mr Sbiya, the Adjudicator has - respectfully - usurped the discretion that can only be exercised by the trustees of the Fund exclusively. The Fund has not been placed in possession of Mr Sbiya's response to Edward Snell & Co's request to withhold payment of his benefits in the Fund yet. As such the trustees of the Fund have not yet been able to exercise their discretion whether to withhold Mr Sbiya's benefit or not either. By ordering the Fund to not withhold Mr Sbiya's benefit in terms of section 37D(1)(b)(ii) of the Act, the Adjudicator has effectively usurped this function of the trustees of the Fund, which is impermissible in law.”

17. This Tribunal is of the view that the second ground for reconsideration needs to be considered first. A finding in favour of the applicant in regard to the second ground is dispositive of this matter. If the Adjudicator erred insofar as the second ground is concerned, then there is no need for this Tribunal to make any determination as to the merits of the first ground for reconsideration (i.e. the legal grounds).
18. In essence, the second ground for reconsideration is whether or not the Fund exercised its discretion to withhold payment of the benefit to Mr Sbiya.
19. In the Adjudicator's determination, mention is made of the correspondence addressed by the Fund to Mr Sbiya dated 17 May 2024². The Fund indicated in this correspondence that the applicant had requested it to withhold the benefit due to Mr Sbiya. In paragraph 5 of the letter, Mr Sbiya was given 14 days to respond to the Fund's letter. The Adjudicator indicated in her determination at paragraph 4.10, that a response was received from Mr Sbiya. This response appears to have been received on 04 July 2024.³
20. Both the applicant and the Fund reiterated in the record of proceedings and at the hearing of the matter before the Tribunal that the 04 July 2024 response from Mr Sbiya was never received by them. The applicant stated in its heads of argument that it was only after it received the Adjudicator's records (i.e. part B of the record) on 16 January 2025, that it first saw the letter Mr Sbiya sent to the Adjudicator on 04 July 2024.

² Record, Part A, Annexure "F", pages 61-65

³ Record, Part B, pages 61-64

21. The 04 July 2024 letter by Mr Sbiya's attorneys appears to be a response to the letter that the Fund had written to him on 17 May 2024. The letter of 17 May 2024 by the Fund to Mr Sbiya was the Fund granting Mr Sbiya an opportunity to respond to the factual allegations by the applicant against him and provide reasons why his benefit should not be withheld by the Fund.
22. Furthermore, the Adjudicator also received a letter from the Fund also dated 17 May 2024⁴, wherein the Fund responded to the letter of complaint. In this correspondence, the Fund specifically states as follows:

" ...

3.11. *The employer's case, as related to the fund, has been put to the employee to afford him an opportunity to respond thereto. A copy of the letter is attached hereto for your ease of reference, marked as annexure "C".*

3.12. *The Fund **will consider** the submission of the complainant and provide employer with a final decision on whether the continued withholding of his benefits in the Fund will be lawful and justifiable.*

...

4.1. *We confirm that the Fund **will exercise its discretion** to determine whether it may reasonably allow the withholding considering the circumstances of the member and employer in line with the Act and the Fund's Rules.*

⁴ Record, Part A, Annexure "G", pages 66-71

...” (our emphasis)

23. The applicant argues that as a result of the 04 July 2024 letter having not been received by it or the Fund, the consequence is that the Fund has in actual fact not exercised its discretion in the matter by weighing up either the interests of Mr Sbiya or the applicant.
24. The applicant argues that it is on this basis that the determination of the Adjudicator should be set aside and the matter should be referred back to the Adjudicator.
25. The applicant referred to the decision of **SA Metal Group (Pty) Ltd v Jefftha 2020 JDR 2379 WCC**, wherein it was decided that the board of a fund must conduct a separate hearing to allow an implicated fund member to present his case in opposition to an employer’s request to withhold payment of benefits in terms of section 37D(1)(b)(ii) of the Pension Funds Act.
26. This Tribunal must agree with the applicant’s submissions on the second ground for reconsideration. The discretion to be exercised is the discretion of the Fund. (**Highveld Steel and Vanadium Corporation Ltd v Oosthuizen 2009 (4) SA 1 (SCA)** par [19]: “... *The Funds therefore had the discretion to withhold payment of the respondent’s pension benefit in the circumstances. ...*”)
27. It is clear from the record of proceedings and from the submissions made by the applicant and the Fund that the 04 July 2024 letter addressed by Mr Sbiya’s attorney was not received by the applicant or the Fund until early January 2025 when the record in this matter was collated.

28. The Adjudicator should have been aware of the fact that the Fund had not yet exercised its discretion in the matter, as it clearly was not in receipt of Mr Sbiya's July 2024 letter. The letter of the Fund addressed to Mr Sbiya is part of the record of proceedings that was before the Adjudicator.⁵
29. The duty of the Adjudicator was, amongst other things, to determine whether the Fund exercised its discretion correctly, yet it could not have made this determination when no such discretion had yet been exercised by the Fund.
30. The Tribunal finds that the Fund did in fact set out in detail in its letter addressed to Mr Sbiya on 17 May 2024 its intention to exercise its discretion, and it also afforded Mr Sbiya the opportunity to be heard and for him to make out his own case. The fact that Mr Sbiya did in fact respond to this request (which response the Fund and the applicant did not receive), means that the Fund is still yet to fully consider the matter and provide its final decision. *Ergo*, it has not yet exercised its discretion or applied the principles of *audi alteram partem* by hearing both sides of the story.⁶
31. It is this Tribunal's view that the second ground for reconsideration must therefore be upheld, in that the determination made by the Adjudicator that the withholding of Mr Sbiya's benefit is not justified is a premature determination and one that cannot be made until the Fund has considered the matter and properly exercised its discretion.

⁵ Record, Part B, pages 51 - 55

⁶ Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture [1980] 3 All SA 1, 1980 (3) SA 476 (T)

32. In light of the Tribunal's finding above, there is no need for it to adjudicate the merits of the further legal grounds for reconsideration. For the sake of clarity, we emphasize that nothing contained in this decision ought to be construed as determining the merits of the matter as such. Our decision is based on a procedural issue as addressed above.
33. This Tribunal must accordingly find in favour of the applicant and the determination of the Adjudicator cannot stand.

In the premise the following order is made:

34. The application for reconsideration is upheld.
35. The determination dated 18 October 2024 is set aside and the matter is remitted to the Pension Funds Adjudicator.

SIGNED on behalf of the Tribunal on 23 JUNE 2025.

A Saldulker

A Saldulker

With the Panel consisting also of:

C Woodrow SC (Chair) and W Ndinisa