

THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: PFA100/2020

ENON BRICK (PTY) LTD

APPLICANT

and

GERALD NOVEMBER

1st Respondent

THE PENSION FUNDS ADJUDICATOR

2nd respondent

OLD MUTUAL SUPERFUND PROVIDENT FUND

3rd respondent

OLD MUTUAL LIFE ASSURANCE COMPANY SA LIMITED

4th respondent

Application for reconsideration of a PFA determination – audi rule – knowledge of complaint sufficient.

DECISION

[1] The applicant applies for the reconsideration of a decision by the PFA under sec 30M of the Pension Funds Act 1956.

[2] This application is in terms of sec 230 of the Financial Sector Regulation Act and the parties have waived their rights to a formal hearing.

[3] The applicant was the employer of the complaint, the first respondent, Mr November. He was by virtue of his employment a member of the Fund, which is administered by the fourth respondent.

[4] The complaint concerned the non-payment of the complainant's withdrawal benefits.

[5] As the PFA said, the complainant said that he was employed with the applicant until he was dismissed for reasons of theft. The complainant alleged that the matter went to court and after a few sittings, the charges against him were dropped. The complainant complained that it had been almost a year and no payment had been made by the Fund.

[6] The PFA made an order for payment in the usual form and the applicant seeks a reconsideration of that determination.

[7] The applicant states that it did not receive any notification of the complaint and that, accordingly, the determination must be set aside. The PFA states that the applicant was sent two letters, namely on 31 August and 30 September 2020. In the second letter the applicant was given until 13 October to respond. (By the way, a screen shot does not prove posting of a letter.) The PFA had been provided with the email address of the applicant but did not use it for a reason that does not appear from the record.

[8] The problem of the lack of a proper postal service, of which by now one take "judicial" cognizance can be illustrated by my personal experience: I received on 24 May a Christmas card which was posted before Christmas. A registered letter posted at Church Square, Pretoria, reached me at the Menlo Park post office nine months later. Absent evidence to the contrary, it is therefore reasonable to accept that the letters did not reach the applicant, which would have meant that the application had to succeed on a formal ground. It is, in any event, unrealistic to assume that a letter will be delivered within two weeks.

[9] The position in this matter is different. As the PFA said in the determination, the administrator had said that upon receipt of the complaint it enquired of the applicant regarding the complainant's employment status. However, the third respondent did not provide feedback

on the matter for processing to commence. The administrator accordingly submitted that it was, therefore, unable to comment on the allegation raised by the complainant and awaited the PFA's determination to proceed with benefit payment.

[10] It is not disputed that the administrator had sent the applicant a copy of the complaint as filed with the PFA on 5 October and pointed out that a reply was required by 13 October. The email stated:

According to our records Mr November has been placed on temporary absences. Please assist with confirming his exit and if valid, kindly request the employer to submit his withdrawal. Please note the Member has noted that he has caused the Employer damages but was released of the charges.

[11] The email was dealt with internally at the offices of the applicant on 6 October and "Stefan" said that he would respond after obtaining legal advice. This was transmitted to the administrator on 7 October. The applicant did nothing, and the determination followed on 22 October 2020. The applicant says that the determination only "came to light" on 7 December, but how it did not say.

[12] The lackadaisical attitude of the applicant appears from the following statement of 28 January 2021 by the administrator, which was not disputed:

The [PFA] stated that the facts indicate that the Applicant did not provide any feedback regarding the First Respondents employments status, which was required by the Third and Fourth Respondents in order to process the First Respondent's benefit payment. This fact remains and forms the basis of these submissions.

[13] Since the applicant had notice of the complaint and the return date and neglected to do anything, the ground for reconsideration based on a failure to comply with the audi alteram partem rule fails.

[14] The applicant apparently objects to payment of the benefit to the complainant because of sec 37C(1)(b)(ii) of the Pension Funds Act, 1956. It says that the criminal case is still pending and the complainant's statement that the criminal case had been withdrawn is false.

[15] This Tribunal held in *Fundsatwork Umbrella Pension Fund v EE Ngobeni* case PFA 64/2020¹ that:

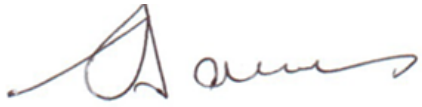
The section deals with two situations, namely an admission of liability (which does not apply to the facts) and a civil judgment. *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* (103/2008) [2008] ZASCA 164; 2009 (4) SA 1 (SCA) ;[2009] 2 All SA 225 (SCA); (2009) 30 ILJ 1533 (SCA) dealt with the withholding of payment pending the finalisation of civil proceedings. It did not hold that a Fund is entitled to withhold payment because a criminal case has been opened or even upon conviction. A conviction is not a judgment against a member that quantifies compensation in respect of damage caused, and costs are not awarded against persons convicted.

Since the employer did not inform the Fund of a civil action or even an intention to claim, a jurisdictional fact for the exercise of its discretion by the Fund was absent.

[16] The application is dismissed.

Signed on behalf of the Tribunal on 26 May 2021.

¹ <https://www.fsca.co.za/Enforcement-Matters/Publications%20and%20Documents/Decision%20-%20Fundsatwork%20Umbrella%20Pension%20Fund%20and%20E%20E%20Ngobeni%20and%20PFA.pdf>.

A handwritten signature in black ink, appearing to read "A Harms". The signature is fluid and cursive, with a large initial "A" and a long, sweeping tail.

LTC Harms (deputy chair)