

THE FINANCIAL SERVICES TRIBUNAL

Case No. PFA78/2023

In the matter between:

FIDELITY SECURITY SERVICES (PTY)LTD Applicant

And

CORNELIUS KHOZA 1st Respondent

PENSION FUNDS ADJUDICATOR 2nd Respondent

PRIVATE SECURITY SECTOR PROVIDENT FUND 3rd Respondent

Tribunal Panel: LTC Harms (Chairperson) and KD Magano

Summary: *Application for reconsideration - Duty to comply with the provisions of section 30F of the Pensions Funds Act- Pension Fund Adjudicator's Determination set aside and referred back for reconsideration.*

DECISION

INTRODUCTION

1. This application for reconsideration is made in terms of section 230 of the Financial Sector Regulations Act 9 of 2017 (*the FSR Act*). The applicant, Fidelity Security Services (Pty) Ltd, seeks an order reconsidering the determination made by the second respondent, the Pension Funds

Adjudicator (*“the Adjudicator”*), on 13 April 2021 (*“The Determination”*).

2. The Determination was made pursuant to a complaint lodged by the applicant to the PFA in terms of section 30M of the Pension Funds Act 24 of 1956 (*“the Pension Funds Act”*).
3. The applicant also seeks condonation for the late filing of this application.

FACTUAL BACKGROUND AND CHRONOLOGY OF EVENTS

4. The first respondent, Mr Cornelius Khoza (*“Mr Khoza”*), was employed by the applicant from 19 October 2010 to 31 December 2019. Mr Khoza was a member of the third respondent, Private Security Sector Provident (*“the Fund”*).
5. The applicant and Mr Khoza's employment terminated in December 2019 when the applicant dismissed Mr Khoza. Following Mr Khoza's dismissal, the Fund paid him a withdrawal benefit of R22,808.55 on 18 January 2021.
6. On 10 December 2020, Mr Khoza lodged a complaint with the Adjudicator. In his complaint, Mr Khoza stated that the applicant deducted pension funds from his salary but failed to pay it to the administrator.
7. On 15 January 2021, the Adjudicator acknowledged receipt of Mr Khoza's complaint. In this acknowledgment letter, the Adjudicator pointed out to Mr Khoza that, in terms of section 30A of the Pension Funds Act, he was required to lodge the complaint with the Fund and the applicant for consideration before lodging a complaint with the Adjudicator. The Adjudicator further informed Mr Khoza that his complaint was transmitted to the Fund and the

applicant on his behalf.

8. On 15 January 2021, the Adjudicator forwarded a copy of Mr Khoza's complaint to the applicant and the Fund. The Adjudicator gave the applicant and the Fund an opportunity to reply to the complaint on or before the close of business on 15 February 2021.

9. On 18 January 2021, the Fund responded as follows to the Adjudicator:

- "a) Our records indicate that the complainant was a member of the first respondent by virtue of his employment with the second respondent from 30 September 2015 until 30 November 2019, when he resigned.*
- b) The second respondent is a participating employer of the first respondent, with a start date of 01 November 2002, and is compliant in terms of Section 13A of the Act. The first respondent last received a contribution payment from the second respondent on 31 December 2020.*
- c) The complainant's record indicates that the first respondent started receiving contributions from the second respondent on behalf of the complainant on 30 September 2015, with the last contribution received on 30 November 2019. Contributions received and allocated are reflected on the complainant's contribution schedule attached herein.*
- d) Our records show that the complainant was paid a withdrawal benefit of R22 808.55 on 18 January 2021 via electronic funds transfer. Please see the attached proof of payment herein.*
- e) We, therefore, request that the second respondent submit contribution schedules and proof of payment for the outstanding contributions owing to the first respondent. Once payment has been received, the first respondent will be in a position to allocate the contributions received."*

10. According to the Adjudicator, the applicant did not make any representations.

Following the applicant's alleged failure to make representations, the Adjudicator made a preliminary Determination and invited the applicant to

make submissions as to why the preliminary Determination should not be made final. The Adjudicator stated in his Determination that the applicant still did not make any submissions, so she made a final Determination.

THE DETERMINATION

11. Following an analysis of Mr Khoza's complaint, the Adjudicator made the following order:

- “12.1.1 The first respondent is ordered to register the complainant as its member with effect from 19 October 2010 to 31 December 2019 within four weeks of this determination;*
- 12.1.2 The first respondent is ordered to reconcile its record with the second respondent in respect of contributions paid on behalf of the complainant for the periods of September 2015 to June 2019 and August 2019 to November 2019 and advise the second respondent of the outstanding amount, within four weeks of this determination;*
- 12.1.3 The second respondent is ordered to submit all outstanding contributions scheduled in respect of employer contributions for the period March 2011 to August 2015 and December 2019 to the first respondent to facilitate the computation of his outstanding contributions, within three weeks of this determination;*
- 12.1.4 Should the second respondent fail to comply with paragraph 6.1.3 above, the first respondent is ordered to reconstruct the complainant's contribution schedules based on the information already in its possession within two weeks of the second respondent's failure to submit the schedules;*
- 12.1.5 The first respondent is ordered to compute the arrear contributions due by the second respondent, together with late payment interest owed by it in terms of section 13A(7) of the Act, within one week of receiving the contribution schedules in terms of either paragraph 6.1.3 or 6.1.4 (whichever is applicable);*
- 12.1.6 The first respondent is ordered to transmit to the second respondent its computations in paragraph 6.1.5, within three days of completing them;*

- 12.1.7 *The second respondent is ordered to pay to the first respondent the arrear contributions together with late payments interest as computed in accordance with paragraph 6.1.2 above, within one week of receiving the computations from the first respondent;*
- 12.1.8 *The first respondent is ordered to pay the complainant a withdrawal benefit, less any deductions permitted by the Act, within two weeks from receipt of payment from the second respondent; and*
- 12.1.9 *The first respondent is ordered to provide the complainant with a breakdown of payment together with the payment made in paragraph 6.1.8 above.”*

THE RECONSIDERATION APPLICATION

12. The applicant is unhappy with the Determination and seeks to have it reconsidered. The grounds for reconsideration are summarised as follows:

- 12.1. The applicant did not receive the complaint from which the Determination originates;
- 12.2. The Adjudicator did not afford the applicant an opportunity to resist the complaint before making the Determination;
- 12.3. The Determination is dated 3 May 2021 but it came to the applicant's attention on 28 November 2023 when the Sheriff of the Court served same;
- 12.4. The contact details, ostensibly for the applicant, as they appear on the Adjudicator's letter dated 15 January 2021, are incorrect. Therefore, the applicant did not receive any notice calling for submissions before the Adjudicator made his Determination.
- 12.5. The applicant has made all the necessary deductions and paid same to Mr Khoza.

13. This application is not opposed by any of the respondents.
14. The applicant has waived its right to an oral hearing. Therefore, this application will be decided on the record before the Tribunal.

a) Issues for Reconsideration

15. In this application, we are required to determine the following:
 - 15.1. Whether the later filing of the reconsideration application should be condoned;
 - 15.2. Whether the Adjudicator infringed the applicant's rights to procedural fairness during the investigation of the complaint; and
 - 15.3. Whether there is any basis for this Tribunal to interfere with the Determination.
16. We deal with these issues in the paragraphs below.

b) Application for Condonation

17. Section 230(2)(b) of the FSR Act regulates the position relating to the condonation for the late filing of reconsideration applications. It provides that an application for reconsideration must be made "within 60 days after the applicant was notified of the decision, *or such longer period as may on good cause be allowed.*"
18. The Adjudicator issued a Determination on 13 April 2023, and this application was launched on 11 December 2023.

19. The applicant's grounds for condonation are that it became aware of the Determination for the first time when the Sheriff of the Court served it on 28 November 2023.
20. There is no indication on the record that the Adjudicator notified the applicant of the Determination.
21. If one calculates the 60-day period from 28 November 2023, the applicant had until 27 February 2024 to file this application for reconsideration. The applicant filed its application on 11 December 2023.
22. The applicant did not need to bring this application for condonation because it launched the reconsideration application within the required time frame as set out in section 230(2)(b) of the FSR Act, and no objection has been raised in this regard.
23. We now proceed to consider the merits of the reconsideration application.

c) Procedural Fairness

24. Section 30D of the Pension Funds Act provides that the main object of the Adjudicator is to dispose of complaints lodged in terms of section 30A(3) of the Pension Funds Act in a procedurally fair, economical, and expeditious manner. Thus, section 30D states the obvious, namely that proceedings must be procedurally fair, including *Audi Alteram Partem's* principles.
25. Section 30F provides that when the Adjudicator intends to investigate a complaint, he or she shall afford the fund or person against whom the allegations are made the opportunity to comment on them.

26. In paragraph 4.5 of the Determination, the Adjudicator states that she granted the applicant an opportunity to respond to the complaint, but the applicant failed to do so, so she adjudicated the matter based on the information before her.
27. On behalf of the applicant, it was submitted that the procedure adopted by the Adjudicator in determining Mr Khoza's complaint was grossly irregular. The applicant complains that it was not afforded an opportunity to present its case. For this reason, the applicant submits that the *audi alteram partem* principle was not observed.
28. The applicant denies that it received the Adjudicator's letter requesting it to make submissions to the complaint lodged by the applicant because the applicant's details appearing on the Determination are incorrect.
29. There is no proof on the record that the details appearing on the Determination are correct and that the applicant was aware of the complaint and the Determination. The Adjudicator did not include proof that she notified the applicant of Mr Khoza's decision and the determination.
30. There is no evidence that the applicant was afforded an opportunity to present its case.

CONCLUSION

31. For the reasons stated above, the Adjudicator infringed the applicant's rights to procedural fairness during the investigation of the complaint.
32. The reconsideration application must succeed, and the Determination ought

to be set aside and referred back to the Adjudicator for reconsideration.

33. There is no need for this Tribunal to deal with the substantive grounds of the reconsideration application.


ORDER

34. We accordingly grant the following order:

- 34.1. The Adjudicator's determination, dated 13 April 2021, is set aside and referred back to the Adjudicator for reconsideration.

SIGNED at PRETORIA on this the 25th day of APRIL 2024

Signed on behalf of the Tribunal panel.



KD Magano