

THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: PFA64/2020

FUNDSATWORK UMBRELLA PROVIDENT FUND

APPLICANT

and

ELVIS ELIAH NGOBENI

FIRST RESPONDENT

THE PENSION FUNDS ADJUDICATOR

SECOND RESPONDENT

Application for reconsideration of determination by PFA – withholding of withdrawal benefits – Fund not a person aggrieved – criminal case not a ground – audi rule – interest on money award

DECISION

[1] The applicant is an umbrella provident fund. The first respondent (hereinafter the complainant) was a member of the fund and his former employer, uBank Ltd, was a participating employer.

[2] The complainant's employment with uBank was terminated and the complainant sought payment of his termination benefit from the Fund. The Fund refused to pay him because the employer had requested it to withhold payment pending an investigation. The employer later informed the Fund that it had determined that the complainant had been involved in fraudulent transactions and that a criminal case had been opened against him. Despite his requests for payment, the Fund steadfastly refused.

[3] The complainant submitted a complaint to the PFA and she, on 23 July 2020, ordered the Fund in terms of sec 30M of the Pension Funds Act, 1956, to pay the complainant's withdrawal benefit inclusive of fund returns earned on such benefit calculated from September 2019 to date of payment within four weeks. She also ordered the Fund to pay interest on the said amount calculated from September 2019 to date of payment (see sec 30N).

[4] The Fund applies for the reconsideration of the decision in terms of sec 230 of the Financial Sector Regulation Act, 2017. The parties have waived their right to a formal hearing and the matter will be decided on the papers and submissions filed.

[5] Much of the argument was directed at the reasons of the PFA. Applications for reconsideration deal with the correctness of the decision or order and not the reasons. A decision may be correct although for the wrong reasons or because it states more than is required for the disposition of a case.

[6] The Fund is not in respect of the withholding of the withdrawal benefits a person aggrieved as required by sec 230(1)(a) of the latter Act and has, accordingly, no legal standing. This Tribunal and its predecessor have repeatedly dealt with the issue of "person aggrieved", and it is unnecessary to repeat what has been said before. The Fund is not the agent of the employer and is not supposed to act in the interests of the employer and as far as issues between employer and member are concerned, it should act independently.

[7] Similarly, although it does not arise, the employer would not have had legal standing to apply for the reconsideration of the order relating to interest.

[8] Because it is relevant for the reconsideration of the order on the Fund to pay interest, I will deal with the exercise of the discretion of the Fund to withhold payment of withdrawal benefits.

[9] The basic rule about withholding of benefits is to be found in sec 37A of the PF Act. It states:

Save to the extent permitted by this Act, . . . no benefit provided for in the rules of a registered fund . . . shall, notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law . . .

[10] Section 37C(1)(b)(ii) contains the following exception. It allows a Fund to 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 compensation (including any legal costs recoverable by virtue of a judgment) in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which the member has in writing admitted liability to the employer; or judgment has been obtained against the member in any court, including a magistrate's court, from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned.

[11] The Fund rules state that the Fund may make any deduction from a benefit that is permitted by the Act and that the Fund may also withhold a portion or the whole of a Member's benefit with the intention of giving effect to such a deduction until the matter has

been finally determined by a court of law or has been settled or formally withdrawn. The rule is obviously subject to the Act.

[12] 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.

[13] 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.

[14] The decision of the Fund was for another reason fatal. As is implicit from the final paragraphs of the *Highveld Steel* judgment, the Fund could not exercise its discretion without complying with the *audi alteram partem* rule. That is also what was held in the unreported judgment (quoted by the PFA) of *SA Metal Group (Pty) Ltd v Deon Jeftha and 2 Others* Case No: 20298/2018 (Western Cape High Court). Steyn J stated at paragraph [62] that:

I agree with the argument of Mr Freund SC, that one can safely assume that the employer's case, as related to the fund, must be put to the employee to afford him an opportunity to respond thereto before the fund should assume the liberty to take a decision impacting on the rights of the employee ... The question remains whether the fund applied their mind appropriately, impartially and in a balanced manner.

[13] The PFA further pointed out that the Court had held that the mere satisfaction by the trustees of a fund that the employer has placed allegations before them which, if true, would show damages arising from dishonest conduct by the employee, would not on its own be sufficient to meet the test set out by the SCA in *Highveld Steel* and that the withholding of an employee's benefit is analogous to that of an anti-dissipation order, which requires a well-grounded apprehension of irreparable harm or loss.

[14] The Fund argues in effect that this decision was in many respects wrong but apart for the fact that (respectfully) it appears to reflect the law correctly, it is not within the province of this Tribunal to ignore or “overrule” it. The Fund also submitted that the case is distinguishable on the facts, but different facts do not make different law – the principles remain the same. The Fund further argued that the judgment ought to apply *ex nunc* and not *ex tunc* and should be ignored because the Fund’s decision predates the judgment. The answer to that is that the judgment stated what the law is and not what it should be for future cases. Finally, it was rather cynical of the Fund to submit that if the complainant had been asked for his view, he would simply have said that he wants his money.

[15] The Fund submits that the interest ordered was punitive and unlawful. The essence of the submission is this:

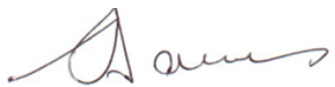
The Adjudicator ordered the Fund to pay interest in addition to fund return. We submit that this is unlawful on the facts of the case. The Adjudicator incorrectly exercised its discretion. While it is so that the Adjudicator is empowered by section 30N of the PFA to order the Fund to pay interest and decide from which date such interest runs, the PFA does not say that the Adjudicator may do so in addition to fund return.

[16] The argument is not understood. Section 30N states that where a determination consists of an obligation to pay an amount of money, the debt “shall bear interest” as from the date and the rate determined by the Adjudicator. This imposes a statutory duty on the PFA to impose interest. It could hardly be said that the rate, which is the ruling statutory rate, is either unlawful or unfair. As to the date, interest as a rule runs from the date on which a liquidated amount becomes payable.

[17] Since the applicant does not dispute that the complainant is entitled to share in the fund return, the amount awarded on which interest must be paid includes the fund return. As to fairness towards other members of the Fund, members always carry the loss of errors of a Board, and this is no different a case.

[18] Order: the application is dismissed.

Signed on behalf of the Tribunal on 3 December 2020

A handwritten signature in dark ink, appearing to read 'LTC Harms', written on a light background.

LTC Harms (deputy chair)