

IN THE FINANCIAL SERVICES TRIBUNAL

CASE NUMBER: PFA 47/2019

In the matter between:

GERT LODEWIKUS DE LANGE

Applicant

And

PENSION FUND ADJUDICATOR

First Respondent

ABSA GROUP PENSION FUND

Second Respondent

ACA EMPLOYEE BENEFITS (PTY) LTD

Third Respondent

Tribunal: Mr. JM Damons (chair), Mr. E Piyega and Mr. L Makhubela

For the Applicant: In Person

For the First Respondent: No Appearance

For the Second Respondent: Ms. E Wessels

For the Third Respondent: No appearance

Hearing: 05th September 2019

Decision: 25TH September 2019

Summary: Application for reconsideration of a decision in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 ("FSRA") – application to reconsider the determination by the PFA in terms of section 30M of the Pension Fund Act – whether the applicant is entitled to access to his pension as a result of a termination of employment – PFA was not privy to all document prior issuing a determination – introduction of new evidence at reconsideration hearing.

DECISION

1. INTRODUCTION

1.1 This is an application for reconsideration of a decision in terms of section 230(1) of FSRA. The Applicant in this matter is Mr. Gert Lodewikus De Lange (Mr. De Lange). The Mr. Lange is a member of ABSA Group Pension Fund the Second Respondent in this matter ("the Fund"). Mr. Lange was employed by Absa Consultants & Actuaries "ACA" (Pty) Ltd which is a participating employer within the Fund. ACA the Third Respondent in this matter later changed its name to ACA Employee Benefits (Pty) Ltd wherein Mr. Lange is employed.

1.2 Mr. De Lange filed a complaint¹ with the Pension Fund Adjudicator ("PFA"), the First Respondent in this matter, on the 05th July 2018. The Fund and the employer were provided with an opportunity to make representations which they accordingly did².

1.3 On the 28th March 2019 the PFA issued a determination in terms of section 30M of the Pension Fund Act. A determination was issued by the Adjudicator wherein the complaint was dismissed³. Mr. De Lange was not satisfied with the PFA's determination and filed this reconsideration application⁴ hence the current proceedings.

2. FACTUAL BACKGROUND AND COMPLAINT

2.1 The gist of the concern is whether or not Mr. De Lange can be permitted to access his pension fund benefit whilst he still remains employed by ACA. The PFA found that Mr. De Lange cannot be allowed to access his pension as he

¹ See record of the proceedings part B at page 4 - 12

² See record of the proceedings part B at page 26 - 29

³ See record of the proceedings part A at page 6 - 27

⁴ See record of the proceedings para A at page 1 and 5

remained in service with ACA. She stated that the rules of the fund do not permit a member to access the pension benefit while that member remains in service⁵.

2.2 Mr. De Lange's argument was in the main that his employment with ACA had terminated when Salam acquired ACA's shares. He stated that he was provided with new terms of employment. His date of engagement was changed, and he did not carry over his leave days. Mr. De Lange relied on **Telkom SA Ltd and Others v Blom and Others [2003] 3 All SA 130 (SCA)** wherein the court stated that "*where a division of Telkom SA had been sold to new owners in terms of section 197 of the Labour Relations Act, members were entitled to their pension benefits as their employment with Telkom SA had terminated and assumed new employment with the new employer*"⁶.

2.3 After Sanlam acquired the shares, it opposed Mr. Lange's reconsideration application. At the main Sanlam argued that there was never a break in Mr. De Lange's service. It submitted that Mr. De Lange cannot be allowed to access his pension fund while he was still in service. The PFA agreed with Sanlam's argument that Mr. De Lange could not be allowed access to his pension fund while he remained in service. The PFA consequently dismissed Mr. De Lange's complaint.

2.4 Mr. De Lange later approached the PFA's office. He submitted new documents in a bid to show the PFA that his service with ACA had been terminated and thus on the basis of the termination, he was entitled to access his pension fund. Mr. De Lange applied to the PFA to introduce new evidence⁷. The application included as supporting documents a Sanlam's employment contract⁸ and an amended contract from Sanlam⁹. The PFA stated the following after receiving the additional evidence from Mr. De Lange

⁵ See record of the proceedings para A at page 26 para 5.9

⁶ See record of the proceedings part A page 25 para 5.7

⁷ See record of the proceedings part A page 33 - 34

⁸ See record of the proceedings part A page 35 - 43

⁹ See record of the proceedings part A page 44 - 45

"3 Discussion and analysis

3.1 *The issue raised by the applicant were canvassed at great length in the determination. Secondly, the OPFA took a decision on the basis of the information, that was made available to it at the time and the complainant seeks to amplify his argument on basis of new information that we were not privy to. Therefore, the OPFA does not see the need to make any further submissions as the determination fully covers all the issues raised by the applicant¹⁰.*"

2.5 The PFA found that Mr. De Lange was still in service and thus he was not allowed to have access to his pension fund in accordance with the rules¹¹. The issue to determine is whether based on the new information, Mr. De Lange would be entitled to access his pension fund.

3. SUBMISSIONS AND ARGUMENTS BEFORE THE APPEALS TRIBUNAL

3.1 Mr. De Lange submitted that his employment relationship with ACA terminated and based on the termination he was entitled to access his pension fund. Mr. De Lange relied on the decision of the Supreme Court of Appeals in **Telkom SA Ltd and Others v Blom and Others [2003] 3 All SA 130 (SCA)**.

3.2 Salam submitted that Mr. De Lange's employment was never terminated. Sanlam submitted that there was just an arrangement made with the employees including Mr. De Lange. According to the Sanlam, SARS even approved that the pension fund would be ring-fenced and employees will not be allowed access to the benefits unit they leave employment or retire.

¹⁰ See record of the proceedings part B at page 2 para 3.1

¹¹ See record of the proceedings page A at page 25 at para 5.7

4. ANALYSIS OF THE ARGUMENTS

4.1 For this tribunal to reconsider this matter, its powers are set out in section 234 of the FSR Act. A proper approach in dealing with these types of matters will be a comprehensive revisit of the circumstances as they were presented before the PFA¹². The grounds for reconsideration filed by the Applicant and the response thereto are additional matters which have to be considered. In this matter, it is important to note that there is new evidence that was not before the PFA when the determination was issued. The question that follows is whether the introduction of new evidence would have had an impact on the PFA's determination.

4.2 It must be noted that both parties conceded at the hearing of this matter before this Tribunal that they have no issue with the determination by the First Respondent based on the information that served before it. Mr De Lange argues that this new evidence will in all probability convince the PFA to come to a different decision. Sanlam disagrees.

4.3 Mr. De Lange submitted new evidence which were amongst others a new employment contracted provided to him by Sanlam¹³ and an amended contracted provided to other employees¹⁴, which according to him, differs with his. Mr. De Lange also provide a notice of termination of service from ABSA¹⁵, a nomination of beneficiary form¹⁶ and a long service recognition award¹⁷. According to Mr. De Lange these documents shows that his employment with ABSA had been terminated and he assumed a new position with Sanlam hence he is entitled to access his pension fund. It is clear that some of the documents he relies on were not placed before the PFA when she issued her

¹² South Africa Airways Soc v BDFM Publishers (Pty) Ltd 2016(2) SA 561 (GJ) at Fn 1 and the authorities cited there.

¹³ See record of the proceedings part A page 35 - 43

¹⁴ See record of the proceedings part A page 44 - 45

¹⁵ See record of proceedings part B (unnumbered)

¹⁶ See record of proceedings part B (unnumbered)

¹⁷ See record of proceedings part B (unnumbered)

determination. These documents are only being presented at this appeal tribunal.

4.4 The question of whether new evidence can be presented at an appeal was dealt with in **Tofa v The State (20133/14) [2015] ZASCA 26 (20 March 2015)** at **par 4 and 5**. In that matter Majiedt JA stated the following which is very relevant to this matter:

[4] The test for the hearing of further evidence on appeal is well established. The requirements are:

- (a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial;*
- (b) There should be a prima facie likelihood of the truth of the evidence;*
- (c) The evidence should be materially relevant to the outcome of the trial.*

See: S v de Jager 1965 (2) SA 612 (A) at 613C-D; S v Ndweni & others 1999 (4) SA 877 (SCA) at 880D.

[5] The power to receive further evidence on appeal is sparingly exercised; further evidence will only be allowed in exceptional circumstances so that there can be finality in cases – De Jager at 613A.”

4.5 This tribunal is of the view that the new evidence presented by Mr. De Lange is not only relevant but same is very material to this matter. Mr. De Lange in some instances only received the new evidence after the matter was dealt with by the PFA, hence the information was not before the PFA. If Mr. De Lange can show that his employment was terminated and he was offered new employment, then in view of the Telkom SA¹⁸ decision he would be entitled to access his pension fund. However, if he cannot show that his employment was terminated and had remained in service, then he will not be entitled to access the pension fund.

4.6 This Tribunal has noted that the evidence Mr. Lange relies on to show that his services with ACA was terminated were not presented before the PFA when

¹⁸ Telkom SA Ltd and Others v Blom and Others [2003] 3 All SA 130 (SCA)

she issued her determination. Mr. De Lange did advise that he did not have access to those documents at the time. He only got them later hence he even approached the PFA to present those documents. In view of the fact that the determination by the PFA was issued prior the PFA having full documents before her, it will only be proper for this Tribunal to remit this matter back to the PFA for re-consideration.

4.7 The PFA should consider the new evidence submitted by Mr. De Lange as these documents may have a bearing on the determination. It will be crucial to also consider that if Mr. De Lange remained in service, why was he offered a new employment contract. Moreover, it should be considered whether there was a transfer in terms of section 197 of the Labour Relations Act.

5. On the basis of the findings and reasoning above, this Tribunal is of the view that this matter should be referred back to the PFA for reconsideration. In this regard the following orders are made

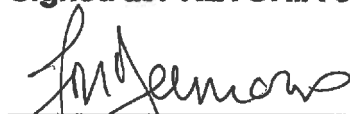
5.1 The new evidence is admitted;

5.2 The determination issued by the PFA dated 28th March 2019 is set-aside;

5.3 The matter is remitted back to the PFA for re-consideration; and

5.4 No order as to costs

Signed at PRETORIA on the 25th day of September 2019 on behalf of the Tribunal


CHAIRPERSON
JM DAMONS