

THE FINANCIAL SERVICES TRIBUNAL

Case Number: **PFA70/2023**

In the matter between:

MACDONALD KIRIMI

Applicant

and

KHANYISA EDUCATION CENTRE

First Respondent

THE PENSION FUNDS ADJUDICATOR

Second Respondent

**INDEPENDENT SCHOOLS ASSOCIATION OF
SOUTHERN AFRICA RETIREMENT FUND**

Third Respondent

OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LTD

Fourth Respondent

For the Applicant:

The Applicant appears in person

For the First Respondent:

Cranko Karp Attorneys

Date of Decision:

22 March 2024

Summary: Application for reconsideration in terms of section 230(1) of the Financial Sector Regulation Act, 9 of 2017 ("the FSR Act") – jurisdiction – time bar – procedure.

DECISION

INTRODUCTION

1. The Applicant is Macdonald Kiriimi who has lodged an application for reconsideration in terms of section 230(1) of the Financial Sector Regulation Act, 9 of 2017 (“the FSR Act”) against a decision of the Second Respondent, dated 06 October 2023.
2. The First Respondent is Khanyisa Education Centre, who is the former employer of the Applicant.
3. The Second Respondent is the Pension Funds Adjudicator (“the Adjudicator”) who is mandated, amongst other things, to make a determination in terms of section 30M of the Pension Funds Act 24 of 1956 (“the Act”).
4. The Third Respondent is the Independent Schools Association of Southern Africa Retirement Fund (“the Fund”) registered in terms of the provisions of the Pension Funds Act 24 of 1956 (“the Act”).
5. The Fourth Respondent is the Old Mutual Life Assurance Company (SA) Ltd who administers the Fund.
6. As a point of clarification, the Third and Fourth Respondents have filed a notice to abide in this matter.

7. The parties have waived their right to a formal hearing and the matter will be decided on the papers and submissions filed.

RELEVANT BACKGROUND FACTS AND CHRONOLOGY OF EVENTS

8. The Applicant was employed by the First Respondent from 17 July 2006 and his employment was terminated on 5 August 2022.
9. The Applicant joined the Fund on 01 January 2017 and on 01 December 2022 the Applicant was paid a withdrawal benefit in the amount of R274 785.58, representing contributions received for February 2017 to August 2022.
10. On 04 February 2023 the Applicant lodged a complaint at the offices of the Adjudicator wherein he took issue with the failure of the First Respondent to timeously register the Applicant as a member of the Fund and pay all contributions on behalf of the Applicant to the Fund.
11. The Applicant submitted that, upon the commencement of his employment contract with the First Respondent, he was told by the then School Principal that due to the fact that he was a foreigner he did not qualify to be registered as a member of the Fund.
12. The Applicant submitted further that only after he had questioned this statement by the School Principal, was he then permitted by the First Respondent to be registered as a member of the Fund.

THE DETERMINATION OF THE ADJUDICATOR

13. In her analysis, the Adjudicator highlighted a few points that appeared to be decisive in her determination wherein she stated that, ***“Section 30I of the Act imposes a three-year time bar on complaints that may be investigated by the Adjudicator... ...The provisions of section 30I preclude the Adjudicator from investigating and adjudicating any complaint if the act or omission to which it relates occurred more than three years prior to receipt of a written complaint in that regard. In terms of section 12(1) of the Prescription Act No 68 of 1969, prescription commences to run as soon as the debt is due. Section 12(3) provides that a debt shall not be deemed to be due until the creditor has acknowledged the identity of the debtor and of the facts from which the debt arises, provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.”***
14. The Adjudicator then stated further that ***“The complaint was received by the Adjudicator on 07 February 2023. The complainant attached copies of his payslip, inter alia, for January 2016 reflecting a pension allowance of R1 568 44. He also attached a copy of his benefit statement as at 28 February 2019 reflecting a fund credit of R92 479.85 and pensionable service date of 01 January 2017. Thereafter, the complainant was all along aware that the employer failed to timeously register him as a member of the fund and pay all provident fund contributions due on his behalf to the fund in accordance with the prescribed rate. Thus, the***

Adjudicator is precluded from investigating the complaint in respect of outstanding contributions prior to February 2020.”

15. The Adjudicator, after having considered the submissions of the parties, found that the complaint about non-payment of the contributions for the periods preceding January 2017 fell beyond the jurisdiction of the Second Respondent and dismissed the complaint.
16. In the circumstances, the Adjudicator found that the First Respondent had paid all contributions on behalf of the Applicant to the Fund and the Applicant was paid his full benefit entitlement in the Fund in terms of the rules of the Fund and the Act. The Adjudicator held further that the Applicant had failed to establish that he was entitled to the relief which he had sought.

THE APPLICANT’S GROUNDS FOR RECONSIDERATION

17. The Applicant approached this Tribunal essentially on two grounds which are in the main falling within procedural and substantive aspects. The grounds for reconsideration may be summarised briefly as follows:-

- 17.1 The Adjudicator failed to consider the failure of the First Respondent to timeously register the Applicant as a member of the Fund and pay all contributions on behalf of the Applicant to the Fund; and

17.2 The Adjudicator misconstrued the date upon which prescription (or the time bar) began to run in terms of section 12(3) of the Prescription Act, therefore the complaint was not time-barred and the Second Respondent had the necessary jurisdiction to deal with the complaint about non-payment of the contributions for the periods preceding January 2017.

LEGAL FRAMEWORK

18. Section 30I of the Act, which is at the heart of this matter reads as follows:

“30I. Time limit for lodging of complaints

(1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.

(2) The provisions of the Prescription Act, 1969 (Act 68 of 1969), relating to a debt apply in respect of the calculation of the three-year period referred to in subsection (1).”

19. This Tribunal has previously expressed its view that the reference to the Prescription Act in section 30I relates to the calculation of the three-year period and nothing else.¹

¹ *R S Gurney N.O. and Others v Mkhize and Others* (PFA53/2022) [2023] ZAFST 19 (20 February 2023)

20. The Second Respondent deals with “complaints” as defined in section 1, and not necessarily “debts”, which are the subject of the Prescription Act with a specific meaning, accordingly there is a difference between a time bar and prescription.²

21. The time bar mentioned in the Act relates to “complaints”, and complaints are not necessarily debts. A “complaint” is defined in the Act as follows:

21.1 “complaint” means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging—

- (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;
- (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
- (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund; but shall not include a complaint which does not relate to a specific complainant.

² *Investec Employee Benefits Limited v Marais and Others* (580/2011) [2012] ZASCA 99; [2012] 3 All SA 622 (SCA) (1 June 2012)

ANALYSIS AND FINDINGS

22. The Applicant is a compliant as defined in the Act and his complaint fell under (d), namely that the employer, the First Respondent, had not fulfilled its duties in terms of the rules of the Fund. The failure to fulfil those duties relate to a period prior to three years before the filing of his complaint. The complaint did not relate to a failure of the Fund to pay him his full entitlement.
23. The Applicant's complaint about non-payment of the contributions for the periods preceding January 2017 accordingly fell beyond the jurisdiction of the Second Respondent and was correct when stating that she was precluded from investigating the complaint in respect of outstanding contributions prior to February 2020.

CONCLUSION

24. The Tribunal is therefore in agreement with the findings of the Adjudicator and does not find a basis for the aforementioned grounds for reconsideration, which grounds cannot be sustained.
25. In the circumstances, the Tribunal can find no grounds to interfere with the Adjudicator's determination dated 06 October 2023.

ORDER:

(a) The application is dismissed.

Signed on behalf of the Tribunal on 22 March 2024.

ADV. MUSTAQUE HOLLAND

A handwritten signature in black ink, appearing to read 'LTC Harms', is positioned above a horizontal line. The signature is written in a cursive style with a large initial 'L'.

LTC Harms (chair)