

**THE FINANCIAL SERVICES TRIBUNAL**

Case Number: **PFA23/2024**

In the matter between:

**MARSH UMBRELLA PENSION FUND**

Applicant

and

**ALEXANDER FORBES RETIREMENT FUND  
(PROVIDENT SECTION)**

First Respondent

**PENSION FUNDS ADJUDICATOR**

Second Respondent

**TANYA MICHELLE MOROKA**

Third Respondent

For the Applicant:

The Applicant appears on its own behalf.

For the First Respondent:

Thyne Jacobs Attorneys Inc.

Tribunal Panel:

Judge L.T.C Harms (Chair) and Adv M. Holland.

Date of Decision:

04 September 2024

*Summary: Application for reconsideration – Pension Funds Adjudicator ordering Applicant to compensate complainant for the financial loss suffered – negligent act was the dominant cause of the financial loss suffered – application dismissed.*

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**DECISION**

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## INTRODUCTION

1. The Applicant, Marsh Umbrella Pension Fund (“Marsh Fund”) 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 the determination of the Pension Funds Adjudicator dated 19 April 2024.
2. Marsh Fund is a pension fund established and registered in terms of the Pension Funds Act, 24 of 1956 (“the Act”), of which the Third Respondent was a member until her exit from service on 31 March 2022.
3. The First Respondent is Alexander Forbes Retirement Fund (“Alexander Forbes”), a pension fund established and registered in terms of the Act, of which the Third Respondent became a member on 01 April 2022.
4. The Second Respondent is the Pension Funds Adjudicator (“the PFA”), who is mandated to make a determination in terms of section 30M of the Act.
5. The Third respondent is a complainant who lodged a complaint to the PFA with regard to Alexander Forbes’s delay in investing her pension fund benefits upon transfer from Marsh Fund and the financial loss she incurred as a result thereof.
6. The parties have waived their right to a formal hearing and the matter will be decided on the papers and submissions filed of record.

## **BACKGROUND**

7. On 16 May 2022 the complainant completed a claim form instructing Marsh Fund to transfer her pension fund benefits to Alexander Forbes.
8. The complainant's pension fund benefits were only invested by Alexander Forbes on 09 February 2023, as a result of administrative delays.

## **THE DETERMINATION BY THE PFA**

9. The Applicant applies for the reconsideration of a determination by the PFA, who upheld the complaint and ordered Marsh Fund to compensate the complainant for the financial loss that she had suffered, as a result of Marsh Fund's failure to timeously provide the requisite information needed by Alexander Forbes to invest the complainant's pension fund benefits. Accordingly, the PFA determined that:

*“6.1.1 [Alexander Forbes] is ordered to compute the investment growth that would have accumulated on the complainant's transfer value from 04 October 2022 until 09 February 2023, within three weeks of this determination;*

*6.1.2 [Alexander Forbes] is ordered to transmit to Marsh Fund its computation in paragraph 6.1.1 within 3 days of completing same;*

6.1.3 *Marsh Fund is ordered to pay to [Alexander Forbes] the complainant's investment growth, within two weeks of receiving the computations from [Alexander Forbes];*

6.1.4 *The fund is ordered to allocate the investment growth paid Marsh Fund in paragraph 6.1.3 above to the complainant's record, within two weeks of receiving payment from the Marsh Fund; and*

6.1.5 *[Alexander Forbes] is ordered to provide the complainant with a breakdown of the investment growth allocated to her record, within two weeks of allocating same in terms of paragraph 6.1.4 above."*

10. The present reconsideration application is under section 230 of the Financial Sector Regulation Act 9 of 2017, and in terms of section 234(1) this Tribunal may either dismiss the application or set aside the determination of the PFA and remit it to the PFA for reconsideration.

## **CHRONOLOGY OF EVENTS**

11. Before discussing the matter further, it would be convenient to set out the relevant chronology of events that are common cause and were detailed by the PFA in her determination:

11.1 on 21 June 2022 the Recognition of Transfer document ("ROT") was received by Alexander Forbes from Marsh Fund;

- 11.2 on 29 June 2022 the password was requested from Marsh Fund to access the ROT document. The password was provided by Marsh Fund on the same day;
- 11.3 on 18 July 2022 Marsh Fund was requested to provide the complainant's transfer in detail as no member record was found using the complainant's identity number, name or surname. On that same day Marsh Fund advised Alexander Forbes that the complainant was transferring her pension fund benefits to Alexander Forbes;
- 11.4 on 19 July 2022 the ROT received was erroneously sent to the Credit Guarantee Standalone Pension Fund central mailbox instead of Alexander Forbes's mailbox ;
- 11.5 on 15 September 2022 this error was corrected and Alexander Forbes received the ROT;
- 11.6 on 20 September 2022 the ROT was completed;
- 11.7 on that same day, Alexander Forbes advised Marsh Fund about its Fund Rules in relation to the minimum information requirements and its requirement that a deposit reference number must be used when depositing the complainant's pension fund benefits;

- 11.8 on 21 September 2022 Marsh Fund requested banking details from Alexander Forbes, which was provided on that same day;
- 11.9 on 04 October 2022 Marsh Fund deposited the complainant's pension fund benefits into the bank account of Alexander Forbes, however, the incorrect reference number was used;
- 11.10 on 02 February 2023 the proof of payment and tax details were sent to the Financial Planner of Alexander, instead of Alexander Forbes's central mailbox, as was required;
- 11.11 on 08 February 2023 the proof of payment and tax details were received by Alexander Forbes, which was required to allocate the monies to the complainant; and
- 11.12 on 09 February 2023 the monies were allocated to the complainant and invested by Alexander Forbes on behalf of the complainant.

## **THE APPLICANT'S GROUNDS FOR RECONSIDERATION**

12. The crux of the Marsh Fund's grounds of complaint in respect of the determination by the PFA is an allegation that:

- 12.1 due to the fact the financial loss suffered by the complainant was as a result of administrative delays on the part of both Marsh Fund and Alexander Forbes, the PFA should have applied the “*laws of mitigation*”;
- 12.2 in so doing, the PFA should have apportioned the blame equally between Marsh Fund and Alexander Forbes; and
- 12.3 accordingly, the PFA should have determined that Marsh Fund and Alexander Forbes are equally liable for the investment growth that would have accumulated on the complainant’s pension fund benefits from 04 October 2022 until 09 February 2023.

Marsh Fund’s version:

13. This averment was premised upon Marsh Fund’s understanding of the “*laws of mitigation*” and an alleged duty of care that Alexander Forbes owed to the complainant which dictated that Alexander Forbes should have mitigated any risk that the complainant may suffer financial loss by following up with Marsh Fund as to the status of the transfer of the complainant’s pension fund benefits.

Alexander Forbes’s version:

14. Alexander Forbes’s submits that:

- 14.1 Alexander Forbes duly advised Marsh Fund about its Fund Rules and procedures in relation to the requirement that a deposit reference number must be used when depositing the complainant's pension fund benefits;
- 14.2 despite such advices, on 04 October 2022 Marsh Fund deposited the transfer value into the bank account of Alexander Forbes using the incorrect reference number.
15. Alexander Forbes submits further that the following considerations militate against any finding that Alexander Forbes should be liable for the investment growth that would have accumulated on the complainant's pension fund benefits from 04 October 2022 until 09 February 2023:
- 15.1 Alexander Forbes deals with many transactions of large values, which requires it to adhere to its Fund Rules and procedures in order to be safe and efficient;
- 15.2 failure to do so would result in Alexander Forbes being exposed to indeterminate liability; and
- 15.3 its Fund Rules and procedures in relation to the requirement that a deposit reference number must be used when third parties deposit funds into its bank account is a means to reduce the risk of fraud being committed against Alexander Forbes.



## LEGAL FRAMEWORK

### THE LEGAL DUTY OF CARE:

16. It is trite that the boards of pension funds have a legal duty towards their members to act with due care, diligence and good faith.<sup>1</sup>

17. The *locus classicus* for a claim for damages based on breach of contract is ***Thoroughbred Breeders' Association of South Africa v Price Waterhouse***<sup>2</sup> wherein it was held, in the context of the present matter, that the issues that need to be determined are:

17.1 whether the loss suffered by the complainant, having regard to the test for causation in a claim for damages for breach of contract, was too remote; and

17.2 whether the dominant cause of the loss by the complainant was the negligence of Marsh Fund.

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<sup>1</sup> ***Ferguson v Sapref Pension Fund*** Case No PFA/WE/673/99/SM para 9, where it was held that "The duty to act in good faith therefore does not equate to a duty to act reasonably ..., and it is not a fiduciary duty..." The duty of the board of trustees to act in good faith towards stakeholders in the fund such as members emanates from s2(a) *Financial Institutions (Protection of Funds) Act 28 of 2001*, which provides that "a director, member, partner, official, employee or agent of a financial institution or of a nominee company who invests, holds, keeps in safe custody, controls, administers or alienates any funds of the financial institution or any trust property- must, with regard to such funds, observe the utmost good faith and exercise proper care and diligence; ..." In order to discharge its duty of good faith to the members of the fund, the board of trustees might among other things be required to provide members with information which is necessary to safeguard their interests in the fund. See ***Caffin v African Oxygen Limited Pension Fund*** Case No PFA/WE/14/98 & PFA/WE/26/98 para 14, where it was held that "it would seem to be just and equitable, therefore, that boards of trustees be obliged in terms of their duty to act in good faith to disclose such information as would reasonably enable members of pension funds to consider the consequences that the information held for them in the realisation of their rights, interests and expectations. The failure to furnish such information, without appropriate justification, will constitute an improper exercise of the board's powers and will amount to maladministration of the fund as contemplated in the definition of a complaint in section 1 of the Pension Funds Act".

<sup>2</sup> [2001] 4 All SA 161 (A)

## **ANALYSIS AND FINDINGS**

18. This Tribunal must thus establish whether the PFA considered all the relevant facts and applied such facts to the law, in arriving at her determination dated 19 April 2024.
  
19. Applying the above legal principles, and premised upon the documents filed of record, this Tribunal is in agreement with the findings of the PFA that:
  - 19.1 Marsh Fund had a legal duty to transfer the complainant's pension fund benefits to Alexander Forbes, as elected by the complainant, and provide Alexander Forbes with the necessary information it required to process the monies and invest such monies on the complainant's behalf;
  
  - 19.2 Marsh Fund did not dispute the fact that Alexander Forbes did advise Marsh Fund about its Fund Rules and procedures in relation to the requirement that a deposit reference number must be used when depositing the complainant's pension fund benefits, and failed to provide any explanation as to why Marsh Fund did not comply thereto;
  
  - 19.3 a reasonable administrator would have foreseen that the failure to provide the necessary information would lead to a delay in investing the complainant's pension fund benefits; and

- 19.4 had it not been for the negligent conduct of Marsh Fund, the complainant's financial loss would not have occurred, and Alexander Forbes would have invested the complainant's pension fund benefits timeously.
20. The Tribunal finds that Marsh Fund has misconstrued the law in respect of the "*laws of mitigation*" as the provisions of the Apportionment of Damages Act 34 of 1956 and concomitantly the defence of contributory negligence do not find application in a claim for damages based on breach of contract, where the breach consists of the negligent performance of a professional duty.<sup>3</sup>
21. It therefore follows that it is not open to this Tribunal to seek to determine whether and to what extent the liability of Marsh Fund should be apportioned.
22. The Tribunal is thus in agreement with the findings of the PFA and does not find a basis for the aforementioned grounds for reconsideration, which grounds cannot be sustained.
23. Marsh Fund's failure to use a deposit reference number when depositing the complainant's pension fund benefits into the bank account of Alexander Forbes was a negligent act linked sufficiently closely or directly to the loss suffered by the complainant and was thus not too remote. Furthermore, this negligent act was the dominant cause of the financial loss suffered by the complaint.

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<sup>3</sup> *Thoroughbred supra*

24. Accordingly, Marsh Fund is liable for the investment growth that would have accumulated on the complainant's pension fund benefits from 04 October 2022 until 09 February 2023.

## **CONCLUSION**

25. In the circumstances, the Tribunal can find no grounds to interfere with the PFA's determination dated 19 April 2024.

## **ORDER:**

(a) The application is dismissed.

Signed on behalf of the Tribunal on 04 September 2024.



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Adv M. Holland & LTC Harms (Chair)