

**THE FINANCIAL SERVICES TRIBUNAL**

Case No. PFA59/2023

In the matter between:

**MOTUS GROUP LIMITED t/a MERCEDES BENZ**

**APPLICANT**

and

**EDITH MTHEMBU**

**FIRST RESPONDENT**

**IMPERIAL LOGISTICS LIMITED  
AND MOTUS HOLDINGS LIMITED  
RETIREMENT FUND**

**SECOND RESPONDENT**

**THE PENSION FUNDS ADJUDICATOR**

**THIRD RESPONDENT**

*Summary: Reconsideration of a decision of the Pension Funds Adjudicator (30M) in terms of Section 230 of the Financial Sector Regulation Act 9 of 2017 ("the FSRA").*

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**DECISION**

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**INTRODUCTION**

1. The Applicant is the Motus Group Limited trading as Mercedes Benz, the erstwhile employer of the First Respondent.
2. The First Respondent is Edith Mthembu, who the Applicant employed from 8 September 2011 to 14 September 2022.
3. The Second Respondent is Imperial Logistics Limited and Motus Holdings Limited Retirement Fund ("the Fund"). The Fund is registered and approved and is subject to the provisions of the PFA.
4. The Third Respondent is the Pension Funds Adjudicator ("the Adjudicator"), the statutory ombud as defined in section 1(1) of the FSRA and is established in terms of the Pension Funds Act 24 of 1956 ("the

PFA”)

5. This is an application in terms of Section 230 of the Financial Sector Regulation Act 9 of 2017 against the decision taken by the Adjudicator in terms of Section 30M of the PFA.
6. The parties have waived their right to a formal hearing, and this is the Tribunal's decision.
7. Section 230 of the Financial Sector Regulation Act 9 of 2017 ("the FSR Act") provides the basis for an appropriate Applicant to lodge an application for reconsideration and seek appropriate relief.

## **THE FACTS**

8. This is an application for the reconsideration of the Adjudicator's decision relating to the Fund's refusal to make payment of the First Respondent's withdrawal benefit.
9. The Fund submitted that it was entitled to withhold payment to the Applicant in terms of the discretion afforded to it by Section 37D(1)(b)(ii) of the PFA.
10. As of 31 October 2022, the First Respondent's credit in the Fund stood at R369,1777.98.
11. Pursuant to a formally convened disciplinary hearing, the First Respondent was found guilty of misconduct and dismissed. The quantum of the losses alleged by the Applicant at the time of the First Respondent's

dismissal was approximately three and a half million rand plus legal costs. This amount is almost ten times the amount held by the Fund.

12. The Fund submitted to the Adjudicator while it had not received all the relevant information it required from the Applicant it would seek the First Respondent's input on receipt thereof. The First Respondent submitted to the Adjudicator that she has not been asked for input and that the Fund continues to withhold her withdrawal benefit. These facts were not challenged in the proceedings before the Adjudicator nor does the Applicant challenge them in this reconsideration.
13. At the time that the Adjudicator made her Determination, the Applicant had not yet instituted civil proceedings.
14. The Applicant applied to this Tribunal for a suspension in terms of section 231 of the FSRA and in terms of rule 22 of the Tribunal Rules read with Section 232(5) of the FSRA to lead further evidence. The Deputy Chairperson refused the Suspension Application.

## **LEGAL PRINCIPLES AND APPLICATION TO THE FACTS**

15. Section 37(D)(1)(b)(ii) provides that a registered Fund may 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:

*(ii) compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb)) 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—*

- (aa) the member has in writing admitted liability to the employer;*
- or*
- (bb) 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;*

16. Section 37(D)(1)(b)(ii) read with the Supreme Court of Appeal Judgment in **Highveld Steel and Vanadium Corporation Limited v Oosthuizen [2009] 1 BPLR (SCA)** (“Highveld”), it appears that the purposive interpretation of the provision is to be preferred, namely that a fund is permitted to withhold payment of benefits pending the determination or acknowledgement of a member's liability under certain circumstances. It is a matter of discretion.
17. Highveld went further and requires the Fund to:
- 17.1 balance the competing interests of the employer and the member;
- and
- 17.2 have due regard to the strength of the employer's case.
18. The Adjudicator referred to Highveld and to the SA Metal Group (Pty) Ltd v Jefta and others [2020] JOL 46715 (WCC) (“SA Metal”), where the discretion to be exercised by a Fund was discussed. SA Metal held the test to be whether the Fund applied its mind appropriately, impartially and in a balanced manner and thereafter decided to withhold the benefit.
19. Put differently, it is not satisfactory for a Fund to simply rely on the employer's allegations or even the outcome of disciplinary proceedings without more. The Fund must carefully scrutinise an employer's claim and

the employee's explanation and weigh the parties' competing interests. This can obviously only be achieved by permitting both the employer and the member, whose benefits are sought to be withheld, an equal opportunity to present their case to the Fund. In this case, it is quite clear that the First Respondent was never given an opportunity to present her case to the Fund, and accordingly, on this basis alone, the Adjudicator's determination should be upheld. It would be impossible for Fund to have exercised the discretion afforded to it, hearing only one side of the story.

20. For the reasons above, it is unnecessary to deal with the application to file further evidence, which does not appear to take the matter further, in any event, and the decision of the Adjudicator must stand.

## **CONCLUSION**

21. The Applicant has failed to make out a case for interfering with the Adjudicator's determination.

## **ORDER**

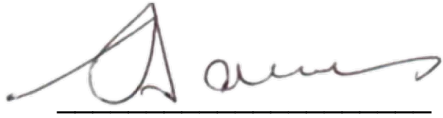
- (a) The application is dismissed.

Signed on behalf of the Tribunal on 6 March 2024.



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**PJ Veldhuizen**  
**(Member)**



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**LTC Harms**  
**(Chairperson)**