

THE FINANCIAL SERVICES TRIBUNAL

Case No: PFA61/2023

In the matter between:

THE MOTUS GROUP LIMITED
t/a MERCEDES BENZ

Applicant

and

DEBRA DINEO MMOTLANA

First respondent

IMPERIAL LOGISTICS LIMITED AND MOTUS

Second respondent

HOLDINGS LIMITED RETIREMENT FUND

THE PENSION FUND ADJUDICATOR

Third respondent

Summary: Reconsideration of a decision of the Pension Fund Adjudicator (PFA) (s 30M) on 31 July 2023 in terms of section 230 (1) of the Financial Sector Regulation Act 9 Of 2017 (“the FSR Act” read with rule 6 of the Consolidated Rules of the Financial Services Tribunal, as well as an application to submit further evidence in terms of section 232(5) of the FSR Act read with Rule 22).

DECISION

The parties waived their right to a formal hearing and the reconsideration will be dealt with on the relevant papers.

THE PARTIES:

1. The applicant is Motus Group Ltd trading as Mercedes Benz, the erstwhile employer of the first respondent. The applicant participates in the Fund, the second respondent.

2. The first respondent is Debra Dineo Mmotlana, who was employed by the applicant from 1 June 2012 to 14 September 2022. She was registered with the second respondent by virtue of her employment.
3. The second respondent is Imperial Logistics Ltd and Motus Holdings Ltd 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 Fund Adjudicator (“the Adjudicator”), the statutory ombud as defined in section 1(1) of the FSRA and established in terms of the Pension Funds Act 24 of 1956 (“the PFA”).

APPLICATION:

5. The Adjudicator had made the following order on 31 July 2023:

“The fund is ordered to pay the complainant’s withdrawal benefit inclusive of fund return earned on such benefit from 16 September to date of payment, within three weeks of this determination.”

6. This application is for reconsideration in terms of section 230 of the FSRA, as well as an application to submit further evidence.

7. The ground of the application is that the alleged conduct by the first respondent falls within the provisions

of section 37 D(1)(b)(ii) of the Act which provides:

“(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)...

(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;"

8. The complaint is that the Adjudicator, according to the applicant, had erroneously found that the decision by the second respondent to withhold the first respondent's benefit, since no civil claim had been instituted against the first respondent, and that the second respondent had not applied the *audi alteram partem*, were reasons to grant the first respondent the order.

9. The first respondent was employed at the third respondent for the period 1 June 2012 to 14 September 2022. She was registered with the Fund by virtue of her employment. On 31 October 2022 she had a fund credit of R271 186.61.

10. The employer had requested the Fund on 16 September 2022 to pay her fund credit. The Fund informed her that her employer had requested the Fund to withhold her fund credit on 16 September 2022.

11. According to the employer she was placed on suspension on 1 September 2022 and on 8 September 2022 she was dismissed after a disciplinary hearing where she was found guilty of misconduct.

12. The alleged quantum of the loss at the time of the first respondent's Dismissal, according to the applicant, was approximately R3 500 000.00 and an amount of R150 000.00 for legal costs.

13. The Fund requested the employer to provide the amount of the first respondent's benefit that had to be withheld and to prove that civil proceedings had been instituted against the first respondent.

14. The fund submitted that as soon as the relevant information was supplied the first respondent would be contacted for her reply to enable the Fund to decide whether to withhold the benefit.

15. In *S A Metal Group (Pty)Ltd v Deon Jeftha and 2 Others* [2020] 1 BPLR 20 (WCC) it was held 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.”

16. The Fund relied on the fact that the employer had opened a criminal case. This is not a requirement and does not solve the problem of not instituting civil proceedings.

17. At the time of the decision by the Fund no civil proceedings had been instituted against the first respondent. Civil proceedings were only instituted on 28 August 2023. It was instituted a month after the Adjudicator had granted the order and almost a year since the first respondent had been dismissed.

18. The applicant had in a letter to the Adjudicator, dated 22 March 2023, declared that the loss the applicant allegedly sustained:

“...stands at a provisional amount of approximately R3,5 million

including R150 000 in legal costs. This means that the employer has not yet provided the exact amount/loss suffered because of the complainant's alleged actions."

There is no information or calculation of the alleged loss. No such information was submitted to the Fund and the first respondent had consequently, not been requested to reply to this allegation of the loss by the applicant.

19. The first respondent was never granted the opportunity to address the Fund, although the Fund had indicated to the first respondent that she would have such an opportunity, as soon as the third respondent had provided the necessary information to the Fund.

20. The Fund had requested the above information from the employer, and without having received it, had nonetheless made the decision to withhold the withdrawal benefit.

21. In *Highveld Steel and Vanadium Corporation Limited v Oosthuizen* [2009] 1 BPLR1 (SCA) in para 20 the Court held that:

"Considering the potential prejudice to an employee who may urgently need to access his pension benefits and who is in due course found innocent, it is necessary that Pension Funds exercise their discretion with care and in the process balance the competing interests with due regard to the strength of the employer's claim."

22. In this instance the Fund knew that it did not have the required information and did not apply its mind appropriately, impartially and in a balanced manner as is expected from Pension Funds and confirmed in the dictum above.

23. The first respondent was never granted an opportunity to address the Fund on these matters and the *audi alteram partem* rule was totally disregarded.

24. This had already been indicated to the parties in the ruling by the Deputy Chairperson of the Tribunal on 3 October 2023 in the application for the suspension of the decision pending the outcome of this application. It was pointed out by him:

“The applicant missed the crux of the PFA’s decision as set out in paras 5.13 to 5.21, and did not make out a sufficient case that the PFA had erred in her assessment of the facts and the law.”

25. It is unnecessary to deal with the application to lead further evidence, as the failure by the Fund to apply the *audi alteram partem* rule in relation to the alleged loss, and the failure to timeously institute civil proceedings are sufficient to confirm the Adjudicator’s decision.

26. The Tribunal can find no reason to interfere with the Adjudicator's decision.

ORDER:

The application is dismissed.

Signed on behalf of the Tribunal on 5 April 2024.

A handwritten signature in black ink, appearing to read 'A. Harm' or similar, written in a cursive style.

pp and for self

C Pretorius

(Member)

L T C Harms

(Chairperson of the Tribunal)