



THE FINANCIAL SERVICES TRIBUNAL

CASE NO. PFA35/2025

In the matter between:

MUNICIPAL EMPLOYEES' PENSION FUND

APPLICANT

And

KHUTSO YUWRAY MAILULA

1ST RESPONDENT

THE DEPUTY PENSION FUND ADJUDICATOR

2ND RESPONDENT

APPEARANCES:

For the Applicant: Adv McNally SC

For the First Respondent: None

For the Second Respondent None

Date of Hearing: 17 October 2025

Date of Decision: 23 October 2025

Summary: Reconsideration application in terms of section 230 of Act 9 of 2017 against the Adjudicator's order for the fund to pay in terms of the two-pot system to the complainant (inactive member who has fallen in arrears regarding her contributions to the fund) - The Adjudicator's decision set aside and matter remitted for reconsideration.

DECISION

Panel members: MF Legodi (Chair), C Woodrow SC and Ms P Maseko

Introduction

1. An order issued on 11 April 2025 by the Pension Funds Adjudicator (Adjudicator) in terms of which Municipal Employees' Pension Fund (the Fund), was ordered to provide the first respondent (the complainant), with adequate information regarding the process of claiming from her savings pot and to provide the complainant with a computation of the accessible amount within two weeks from date of the order, is at the centre of this application for consideration.
2. In addition, the Fund was ordered to pay the complainant a withdrawal benefit in respect of her savings pot within three weeks of receiving the complainant's withdrawal instruction envisaged in paragraph 6.1.2 of the Adjudicator's order.
3. In terms of paragraph 6.1.2 of the order, the complainant was directed to complete a withdrawal claim form and submit same to the Fund, together with a copy of her identity document and a bank statement not older than three months.

Background

4. On 1 September 2024 what is referred to as a two-pot retirement system came into effect. The two-pot retirement divides retirement funds into three components namely, the vested component (pre-August 2024 savings), the savings component

(one third of contributions from September 2024 onwards, accessible annually), and the retirement component (two thirds of contributions from September 2024 onwards), preserved until retirement. The events outlined hereunder preceded the effective date of the two-pot-retirement system.

5. The events relevant to the issues raised in these proceedings are set out hereunder, followed by events post the effective date of the two-pot-retirement system.
6. The complainant was employed by the Ba-Phalaborwa Local Municipality from 1 September 2015 until 31 January 2018 when she resigned to join Polokwane Local Municipality and became an employee of the latter municipality to date.
7. On 17 April 2018, the Fund, in its letter to the complainant, acknowledged receipt of the application for resignation. Furthermore, the Fund informed the complainant that since Polokwane Municipality is a participating employer in the Fund, she will not in terms of rule 24(6) of the Fund's rules, cease to be a member thereof.
8. She was advised to ensure that Polokwane Municipality transmits all her contributions to the Fund by no later than the 7th day of each month as contemplated in section 13A of the Pension Fund Act 24 of 1956.
9. In another letter of 17 April 2018 addressed to Polokwane Municipality, the latter was requested to continue paying contributions for the complainant as her membership with the fund still existed.
10. The Municipality was further warned that its failure to accede to the request will prejudice the complainant by affecting her benefits in the Fund due to the Fund not receiving monthly contributions.
11. On 6 September 2024, the complainant lodged a complaint with the Adjudicator. The complaint related to the Fund's refusal to allow the complainant to withdraw funds from her savings component in terms of the two-pot retirement system referred to in paragraph 4 above.

12. The Fund's refusal to allow the complainant to withdraw the funds as indicated above, was because since the complainant was employed by the Polokwane Municipality, no contributions on behalf of the complainant were received.
13. The Adjudicator delivered her determination on 11 April 2025 and made orders as indicated in paragraphs 1, 2 and 3 above. Unhappy with the orders, on 10 June 2025, the Fund lodged this application for reconsideration.

The issue to be determined

14. The Fund, correctly so in our view, identified the issue to be determined as being whether the complainant is entitled, in terms of the Fund's rules (also having regard to relevant legislation), to access her savings withdrawals benefit in the Fund while her contributions to the Fund are in arrears.
15. The Fund raised what is stated in paragraph 14 above as an issue to be determined. The Adjudicator, in coming to the orders made as indicated in paragraphs 1 to 3 above, concluded that inactive members, meaning those who are no longer employed, and no longer contributing to the Fund, can still access their savings pot for one withdrawal per tax year.
16. The Adjudicator also concluded that members whose contributions are in arrears, are not precluded from the two-pot retirement system by the Income Tax Act, Act 58 of 1962. It is this finding by the Adjudicator that is at the centre of the dispute between the Fund and the complainant.
17. 'Savings component' is defined in section 1 of the Income Tax Act as '*a component established in terms of the rules of a pension fund, pension preservation fund, provident fund, provident preservation fund or retirement annuity fund for a person who is a member of the fund*'. (Emphasis added).
18. What is stated in paragraph 17 above, is important, and raises the question whether there is any rule established in terms of the rules of the fund relevant to

the facts of the present matter. Whilst rule 48A (2) of the Fund deals with “member savings component account”, it must be considered in context.

19. The context is found in rule 27(2)(b) of the Fund which provides that in the event that a member and or the Local Authority fails to pay contributions as contemplated in rules 26 and 31 and remain in default seven days after receipt of the written notice requiring such failure to be remedied, the member, his estate or his dependants shall only be entitled to benefits in terms of rule 37.

20. Section 13 of the Pension Funds Act, Act 24 of 1956, deals with the binding force of rules. It provides that subject to the provisions of this Act, the rules of a registered fund shall be binding on the fund, the members, shareholders and officers thereof, and any person who claims under the rules or whose claim is derived from a person so claiming. (Emphasis added).

21. Section 13A(1) of the Pension Funds Act referred to earlier in paragraph 8, which deals with payment of contributions and certain benefits to pension funds, provides as follows:

“(1) Notwithstanding any provision in the rules of a registered fund to the contrary, the employer of any member of such a fund shall pay the following to the fund in full, namely-

(a) any contribution which, in terms of the rules of the fund, is to be deducted from the member’s remuneration; and

(b) any contribution for which the employer is liable in terms of those rules.

22. The Adjudicator in paragraph 5.2 of its determination referred to paragraph [39] of the Constitutional Court decision in the matter of **Municipal Employees Pension Fund v Mongwaketse (CCT34/21) [2022] ZACC9**. The Adjudicator did so, without stating its relevance to the complaint that was placed before him.

23. It was indicated by both the Supreme Court of Appeal and the Constitutional Court, that the rules of the fund are its constitution, and that the doctrine of *ultra vires* applies. It was further held that if the rules of a fund do not afford a fund the legal

power or capacity to do something, then such purported act by the fund is *ultra vires* and accordingly null and void.

24. It is not clear why the Adjudicator referred to the case law mentioned above. The facts in the case aforesaid has no relevance to the facts of the present case. In that case, it was found that the complainant was not entitled to be a member of the fund because she was employed by the Municipality on contract for five years and that the rules of the fund are only applicable to those who are employed on permanent basis by any local municipality.

25. It was therefore, concluded by both the Supreme Court of Appeal and the Constitutional Court *inter alia* that the Fund was obliged to pay the complainant in that case, based not only on her contributions but also on those made by the Municipality as her employer at the time. The point made was that the fund could not act as if any of its rules was applicable to the complainant, when they did not.

26. The Adjudicator in paragraph 5.8 of the determination concluded that the complainant does not fall under the category mentioned in paragraph 5.5 of the determination and that the complainant was therefore entitled to a savings withdrawal in terms of the two-pot-component retirement system.

27. Paragraph 5.5 of the Adjudicator's determination reads as follows:

"The two-pot retirement system does not apply to the following categories of funds and members:

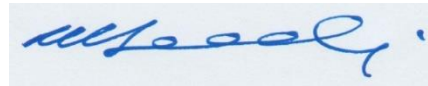
- *Provident fund members 55 and older on 1 March 2021 are excluded unless they opt in.*
- *unclaimed benefit members,*
- *pensioners,*
- *beneficiary funds,*
- *closed/dormant fund and legacy retirement annuity policies".*

28. It appears that in coming to this conclusion, the Adjudicator relied on rule 48A(2) quoted in full in paragraph 5.3 of the determination. As indicated in paragraph 18 above, rule 48A(2) deals with the “*withdrawal from the savings component*”.
29. However, the Adjudicator in the determination did not refer to rule 27(2)(b), paraphrased in paragraph 19 above, read with rules 13 and 13A referred to in paragraphs 20 and 21 above.
30. Rule 27(2)(b) deals with payment of contributions and recovery of arrears contributions and other amounts. The facts of the present case fall within the ambit of rule 27(2)(b). The member (the complainant) and Local Authority (Municipality), have since the complainant started working for Polokwane Municipality, failed to pay contributions to the Fund. They are significantly in arrears.
31. As indicated in paragraphs 7, 8, 9 and 10 above, both the complainant and the Municipality were informed of the provisions of rule 27(2)(b) and section 13A of the Pension Funds Act and the prejudicial consequences of failure to make contributions.
32. On 22 April 2025 the Fund advised both the complainant and municipality that they were in arrears with contributions, which amounted to R553 675.31 including interest as at the end of March 2025. One would have expected that both the municipality and the complainant, will ensure that the contributions in arrears were paid for proper compliance with the Fund’s rules before any consideration could be made to pay as per the complainant’s request.
33. As things are, payment as per the complainant’s request, will be contrary to the provisions of rule 27(2)(b) and by so doing undermining the binding effect thereof in terms of section 13 of the Pension Funds Act. This will be *ultra vires*. In the circumstances, the determination and order by the Adjudicator must be set aside.

Order

34. The order of the Adjudicator dated 11 April 2025 is hereby set aside and the matter is remitted to the Adjudicator for reconsideration.

Signed on 23 October 2025 on behalf of the panel members.

A handwritten signature in blue ink, appearing to read 'M F Legodi J', is shown on a light blue background.

M F LEGODI J (CHAIR)