

THE FINANCIAL SERVICES TRIBUNAL

Case No: PFA39/2024

In the matter between:

NYATHI SOUTH AFRICA (PTY) LTD

Applicant

and

CARMELIA MNGOMEZULU

First Respondent

THE PENSION FUNDS ADJUDICATOR

Second Respondent

FUNDSATWORK UMBRELLA PROVIDENT FUND

Third Respondent

Tribunal Panel: Judge LTC Harms & Adv. KD Magano

Summary: *Application for reconsideration---retention of withdrawal benefit by Fund in terms of Section 37D(1)(b)(ii)(aa) of the Pensions Funds Act 24 of 1956--- Section 37D(1)(b)(ii)(aa) requires a written admission of liability and informed consent from the member— Section 112(2) statement is construed as a written admission of liability under Section 37D(1)(b)(ii) of the Pensions Fund Act--- application for reconsideration upheld.*

DECISION

INTRODUCTION

1. This Tribunal is called upon to reconsider the Determination made by the second respondent, the Pension Funds Adjudicator (“the Adjudicator”) on 21 May 2024.
2. The applicant (“the Employer”) is aggrieved by the Adjudicator’s Determination of 21 May 2024, which ordered the Fund to pay the first respondent (“the Complainant”) her withdrawal benefit within six weeks from the date of the Determination.
3. The Employer brings this application under section 230 of the Financial Sector Regulation Act 9 of 2017 (*“the FSR Act”*).
4. The parties waived their right to a formal hearing. Consequently, this is the decision of the Tribunal.

FACTUAL BACKGROUND

5. The Complainant was employed by the Employer from 1 March 2008 until 26 April 2019, when she was retrenched. At the time of her retrenchment, she was a member of the Second Respondent, FundsAtWork Umbrella Provident Fund (*“the Fund”*), due to her employment with the Employer. She was also entitled to payment of her accrued pension fund benefit from the Fund.
6. Shortly after her retrenchment, the Employer discovered that the Complainant had made several fraudulent electronic payments from bank accounts of the Employer that she controlled . These payments were made to bank accounts opened in her own name and under her control.
7. In May 2019, the Employer laid criminal charges of fraud, forgery, and money

laundering against the Complainant. During the trial, the Employer repeatedly tried to persuade the Complainant to transfer her withdrawal benefit to the Employer. However, she refused to do so.

8. The Complainant was convicted and sentenced to 15 years of direct imprisonment following her plea bargain agreement with the state in terms of section 105A of the Criminal Procedure Act, 1977.
9. After her conviction and subsequent sentencing, the Complainant attempted to withdraw her benefit through her daughter and queried why the pension withdrawal was not paid six weeks after lodging the claim. The Fund informed her that her pension fund benefit had already been paid to the Employer pursuant to a court order.
10. The Complainant stated that she and her legal representatives were unaware of such court order. She requested a copy of the court order from the fund but did not receive one.
11. On 11 September 2023, the Complainant filed a complaint with the Adjudicator regarding the payment made by the Fund of her withdrawal benefit under section 37D(1)(b)(ii) of the Pension Funds Act to the Employer. Upon receiving the complaint, the Adjudicator forwarded it to the Employer and the Fund, requesting their responses.
12. In response to the Complainant's complaint, the Employer responded that the Complainant had unequivocally admitted guilt in her plea and that her dishonest conduct had caused the Employer significant harm. Additionally, the pre-sentencing agreement documented the Complainant's consent to use

her pension benefit as restitution for the damages incurred by the Employer.

13. The Employer also argued that the requirements of section 37D(1)(b)(ii)(aa) of the Pensions Funds Act had been met and that the Fund, upon receiving the request to pay the Complainant's withdrawal benefit to the Employer, was obliged to comply.
14. The Fund responded by stating that the Employer had informed it of the criminal charges against the Complainant. Following the conviction and sentencing, the Employer requested that the Fund deduct the Complainant's withdrawal benefit and transfer the funds to the Employer as compensation for the R3,743,736.88 loss incurred due to the Complainant's dishonest conduct.
15. The Fund argued that its rules allow for deductions from members' benefits as permitted by the Act. Therefore, the deduction of the Complainant's benefit was made in accordance with its rules and the provisions of section 37D(1)(b)(ii). The Fund further submitted that since the Employer's loss was approximately R3,743,736.88, it paid the entire withdrawal benefit to the Employer.

THE DETERMINATION OF THE ADJUDICATOR

16. After reviewing the parties' submissions, the Adjudicator determined that the primary purpose of the guilty plea entered by the respondent under Section 112(2) of the Criminal Procedure Act was for the criminal court proceedings. It was not intended to provide a written admission of liability that would allow the Employer and the Fund to claim a deduction without the Complainant's

consent or knowledge.

17. The Adjudicator further concluded that the guilty plea was not made to the Employer or the Fund, but rather to the criminal court. The Adjudicator also determined that the Complainant's consent that her pension benefit be paid to the Employer was lacking and that Section 37D(1)(b)(ii) of the Pensions Fund Act requires the member's informed consent for a deduction to be made.
18. The Adjudicator ordered the Fund to pay the benefit within six weeks of the Determination.

GROUNDS FOR RECONSIDERATION

19. The Employer approached this Tribunal on the grounds that the Adjudicator misinterpreted section 37(D)(1)(b)(ii)(aa). In particular, the Employer contends that:
 - 19.1 The Complainant's liability to the Employer was explicitly acknowledged in a written guilty plea.
 - 19.2 The requirements outlined in the section were fulfilled.
 - 19.3 The Fund acted diligently in fulfilling its fiduciary duties. It exercised its discretion carefully and balanced the competing interests with due regard for the strength of the Employer's claim.
 - 19.4 In essence, the Complainant's competing interests amount to nothing more than a claim for the Employer to receive no restitution for the exorbitant amount defrauded by the Complainant.

- 19.5 The strength of the Employer's claim significantly outweighs the competing interests of the Complainant.
20. The Employer further submits that the Adjudicator's finding, if not overturned, will result in an absurd situation in that: an individual will be allowed to receive her full pension benefit, including the amounts contributed by the defrauded Employer over time, despite:
- 20.1.1 Defrauding her Employer of over R3 million.
 - 20.1.2 Admitting her guilt and the damages suffered by her Employer in writing.
 - 20.1.3 Agreeing in her plea agreement that her pension benefit may be paid to the Employer.
 - 20.1.4 Being convicted and imprisoned by a competent court.
21. The Employer seeks the setting aside of the Determination.

ISSUES FOR RECONSIDERATION

22. Based on the above, the crux of the matter before the Adjudicator was the interpretation of Section 37D(1)(b)(ii). In essence, the Adjudicator had to determine whether the Complainant's guilty plea as set out in the plea agreement meant that the Complainant had "in writing admitted liability to the employer".

ANALYSIS AND FINDINGS

23. A pension fund may deduct any money a member owes to the fund when the member retires or leaves the fund. This includes money owed to compensate the fund for any harm caused by the member's theft, dishonesty, fraud, or misconduct. The member must have "in writing admitted liability to the employer" to enable the fund to make this deduction.¹
24. In **Highveld Steel & Vanadium Corporation Limited v Oosthuizen**² ("Highveld Steel"), the Supreme Court of Appeal determined that the primary purpose of Section 37D(1)(b) and the relevant fund's rules is to safeguard the employer's right to recover funds misappropriated by its employees.
25. Accordingly, the Court interpreted the provision purposively to include the authority to withhold payment of an employee's pension benefits until the employee's liability is determined or acknowledged. It found that the relevant fund had the discretion to withhold a benefit and, when exercising this discretion, should consider potential prejudice. Furthermore, the fund was obliged to exercise this discretion carefully and balance the competing interests with due regard for the strength of the employer's claim. The fund could also impose conditions on employers to ensure a fair outcome.
26. While the Court did not address whether the pending proceedings included civil and criminal proceedings, the dispute involved civil proceedings in that case.
27. Based on the Fund's responses, it does not appear that it acted upon a court judgment, but it is fair to assume that it regarded the conviction based on the

¹ Section 37D(1)(b)(ii) of the Pensions Fund Act

² 2009 (4) SA 1 (SCA)

plea agreement as a “judgment” as intended in sub-par (bb), which it was not. The Employer also does not before us rely on a judgement and the Tribunal will proceed on the assumption that the Fund did not pay the Complainant's pension benefit to the Employer based on a judgment.

28. It is undisputed that during her employment with the Employer, the Complainant caused harm to the Employer due to her theft, dishonesty, fraud, or misconduct. It is also undisputed that the Employer pleaded guilty and was convicted of theft and fraud perpetrated against the Employer. The dispute is whether she admitted her liability to her former employer in writing.
29. In **Consol Ltd t/a Consol Glass v Momentum FundsAtWork Umbrella Provident Fund**³, the Adjudicator held that a written acknowledgment of debt should be explicit and amount to an unequivocal admission of guilt addressed to the Employer. It must also be signed by the member concerned. It should specifically allow for a deduction regarding wrongdoing committed by the member against their Employer.
30. In this case, there is no written acknowledgment of liability addressed to the Employer by the Complainant. The only signed document in our possession is the admission of guilt statement made under Section 112(2) of the Criminal Procedure Act.
31. Given the **Consol Ltd** judgment, the central question in this matter is whether either the signed statement under Section 112(2) or the Fund's reliance on the Complainant's guilty plea and the contents of her pre-sentencing report constituted a sufficient basis for withholding her pension benefit and paying it over to the Employer.

32. Section 112 of the Criminal Procedure Act provides a procedure for an accused to admit guilt without needing a full trial. This procedure applies when the accused clearly understands the charges against them and admits to all elements.
33. The process involves the accused submitting a written statement detailing the admitted facts. The court then assesses if these facts are sufficient to support a conviction. If so, the court can convict the accused based on the statement without further questioning. However, the court has the discretion to ask questions for clarification.
34. In her statement under section 112(2) of the Criminal Procedure Act, the Complainant indicated that she fully comprehends the charges against her and has made a voluntary decision to plead guilty. She acknowledges her right to be presumed innocent until proven guilty and her right to remain silent throughout the proceedings. Additionally, she understands that she cannot be compelled to provide evidence that could incriminate her.
35. She also acknowledged, *inter alia*, that while working for the Employer, she failed to maintain accurate accounting records for various owners and used her personal bank account for business transactions. Notably, she confessed that her actions resulted in the Employer's actual financial loss of R3,743,736.88.
36. While the primary purpose of Section 112 of the Criminal Procedure Act is to streamline criminal proceedings, its implications, particularly in the context of pension fund benefits, are significant. In this case, the Complainant has admitted to committing theft and fraud against her employer and to causing

her employer actual financial loss of R3,743,736.88.

37. The Complainant's admission of guilt in Section 112(2) statement, coupled with her acknowledgment of causing actual financial loss to the employer, and her undertaking to the court (clearly accepted by the Employer) that the pension benefit may be used to compensate the Employer amounts to an acknowledgment of liability to the employer as contemplated in section 37D(1)(b)(ii).
38. Such a detailed admission of wrongdoing by its very nature amounts to an acknowledgment of civil liability. Theft is not only a crime, it is also a delict.
39. The section 112(2) statement, to the extent that it amounts to a formal admission of liability to the Employer, aligns with the objectives of section 37D(1)(b)(ii) and be a sufficient basis for withholding pension benefits.
40. The potential consequences of not considering a section 112(2) statement may amount to a written admission of liability to the Employer would lead to an absurd situation. It would be akin to allowing the Complainant who defrauded their employer of over R3 million, admitted guilt, agreed to a sentence on the assumption and undertaking that her pension benefit may be utilised to recompense the Employer and was convicted to receive their full pension benefit, including the amounts contributed by the defrauded employer. Such an outcome would undermine the principles of justice and fairness, as it would effectively reward the wrongdoer and punish the victim.
41. In **FundsAtWork Umbrella Provident Fund v Elvis Elish Ngobeni and**

Another³, the Tribunal analysed the applicability of Section 37D(1)(b)(ii) and the Fund's authority to withhold pension benefits. The Tribunal concluded that a guilty plea alone cannot justify withholding pension benefits.

42. The Tribunal considered the case of **Highveld Steel** and found that it only addressed the withholding of payment pending the resolution of civil proceedings. The Tribunal did not interpret the case as granting funds the right to withhold payments solely due to the initiation of a criminal case or even upon a conviction. According to the Tribunal, *“a conviction is not a judgment against a member that quantifies compensation in respect of damage caused, and costs are not awarded against persons convicted”*. This case is different. We are not concerned with the meaning of “judgment” but with the phrase “in writing admitted liability to the employer” contained in a plea agreement. In her plea she admitted her liability to the Employer.
43. As established in **SA Metal Group (Pty) Ltd v Jeftha and Others**⁴, **Tape Aids for the Blind v Ashwin Anadh Palhad and Others**⁵, and **Funds at Work v Ngobeni**⁷, both parties must have a fair opportunity to present their case before a decision is made. It is common cause in this case that the Complainant was not given an opportunity to respond to the Fund’s intention to pay the Employer her withdrawal benefit.
44. While the principle of *audi alteram partem* is a fundamental tenet of

³ Case No.: PFA64/202; see also **Tape Aids for the Blind v Ashwin Anadh Palhad and Others** Case No.: PFA3/2022

⁴ [2020] 1 BPLR 20 (WCC) at paragraph [24]

⁵ FN3 *Supra*

administrative law, its application depends on the facts. The Complainant did not before the Adjudicator or before us, where we are dealing with a reconsideration, raise any facts that would have entitled her to payment of payment of her termination benefit. The fact that the audi rule was not complied with does not mean that the decision of the Fund was void and could not be rectified. The Adjudicator ought to have considered whether the matter should be remitted to the Fund to hear the Complainant, or the Adjudicator could have asked the Complainant for reasons why she should be paid the stolen money.

CONCLUSION

45. Based on the foregoing, the Tribunal concludes that the Complainant's Section 112(2) statement amounts to a written admission of liability to the Employer under Section 37D(1)(b)(ii)(aa) of the Pension Fund Act. The Adjudicator is also requested to consider whether the complaint was time barred. The Complainant, all matters being equal, became entitled to payment during the first half of 2019, and her complaint was lodged during September 2023.

ORDER

46. The following order is made:
 - 46.1 The application for reconsideration is upheld.
 - 46.2 The matter is remitted to the Adjudicator for reconsideration.

Signed on behalf of the Tribunal



KD MAGANO