

THE FINANCIAL SERVICES TRIBUNAL

CASE NO: PFA3/2024

In the matter between:

OBI MUSIYIWA CLAUDE GADZIKWA

Applicant

and

FUNDSATWORK UMBRELLA PENSION FUND

First Respondent

THE PENSION FUNDS ADJUDICATOR

Second Respondent

OXFAM SOUTH AFRICA NPC

Third Respondent

Decision on papers

Date of Decision: 8 August 2024

Summary:

Application for Reconsideration in terms of Section 230 of the Financial Sector Regulation Act, 9 of 2017 (“the FSR Act”) of determination (section 30M) of the Pension Funds Adjudicator (“the PFA”) to dismiss the Applicant’s complaint relating to the withholding of the Applicant’s withdrawal benefit by the First Respondent (“the Fund”) at the request of the Third Respondent pursuant to section 37D(1)(b)(ii) of the Pension Funds Act, 24 of 1956 (“the Act”).

DECISION

A. INTRODUCTION

1. The Applicant applied for reconsideration of a determination of the Pension Funds Adjudicator (“the PFA”), dated 20 October 2023, and allegedly received by the Applicant on 12 December 2023, to dismiss the Applicant’s complaint raised against the withholding of his withdrawal benefit by the **FUNDSATWORK UMBRELLA PENSION FUND** (“the Fund”) at the request of **OXFAM SOUTH AFRICA NPC** (“the employer”) pursuant to section 37D(1)(b)(ii) of the Pension Funds Act, 24 of 1956 (“the Act”).
2. The First Respondent is the **FUNDSATWORK UMBRELLA PENSION FUND** (“the Fund”).
3. The Second Respondent is the **PENSION FUNDS ADJUDICATOR** (“the PFA”).
4. The Third Respondent is **OXFAM SOUTH AFRICA NPC** (“the employer”).
5. The parties waived their rights to a formal hearing.

B. RELEVANT BACKGROUND

6. The Applicant commenced employment with the employer from 2 May 2017 to 23 February 2023 as a Finance and IT Manager. The Applicant was a member of the Fund by virtue of his employment. The employer participates in the Fund.
7. Upon the termination of the Applicant’s employment, he became entitled to receive a withdrawal benefit. The Fund is withholding the Applicant’s entire withdrawal benefit at the instance of the employer pursuant to section 37D(1)(b)(ii) of the Act. This is based on allegations of fraud committed by the Applicant which resulted in a financial loss of R 1 419 859.69 (excluding legal costs) by the employer.
8. A complaint was received by the PFA on 22 March 2023 in which the complainant requested the PFA to determine whether the withholding of his withdrawal benefit by the Fund pursuant to section 37D(1)(b)(ii) of the Act is lawful, and to order payment of his withdrawal benefit.

9. *Responses to the complaint*

Fund

- 9.1 The Fund responded that the complainant exited service on 23 February 2023 and might potentially become entitled to his benefit. However, the employer requested that the payment be withheld due to ongoing legal proceedings. The Fund explained that, according to its rules and the prevailing court rulings, it can withhold a member's benefits if the employer is pursuing legal action.
- 9.2 The employer informed the Fund of a potential claim, alleging that the complainant had committed fraud, resulting in a loss of approximately R854 630.00. A forensic investigation is being conducted, with preliminary findings suggesting misconduct. The auditors are expected to provide a draft report by 30 April 2023, and the employer plans to issue summons after the audit, likely by the end of May 2023.
- 9.3 The Fund submitted that it requested the complainant's response in this regard. The complainant responded that he was unaware of any legal proceedings or investigations and had not seen any report implicating him. The Applicant mentioned that he is unemployed and needs access to his benefits to support his family and defend himself against what he claims is an unfair prosecution.
- 9.4 The Fund concluded that after considering the submissions of the respective parties, the employer had established a prima facie case of dishonest misconduct under section 37D(1)(b)(ii) of the Act. As a result, the Fund decided to withhold the complainant's entire benefit of R673 014.00, as the employer's loss exceeds the available benefit, pending finalization of civil proceedings.

- 9.5 The Fund expected the employer to provide a copy of the summons before 23 May 2023. The employer requested an extension until 2 June 2023 due to the large volume of documents, in-depth discussions with the forensic team, and security breach where files were taken during a vehicle hijacking.
- 9.6 The complainant argued that the extension was unfair and prejudicial, as his withdrawal benefit was delayed due to unsubstantiated allegations. The complainant noted that he had not been interviewed by the forensic auditors, who had previously indicated that a draft report would be submitted by 30 April 2023, with no mention of delays from the security breach.
- 9.7 The Fund further stated that the complainant submitted that the employer had sufficient time to comply with the deadline whilst he had been waiting more than 3 months for his benefit and that if the employer had a legitimate claim against him then lawful procedures must be followed to obtain a court order.
- 9.8 The Fund considered both parties' submissions and granted the employer an extension until 2 June 2023 to provide the summons, noting that the complainant left the employer on 23 February 2023 and an external audit was conducted. This was deemed a reasonable timeframe for the employer to finalize its investigation and issue summons.
- 9.9 The employer provided the summons on 2 June 2023 and confirmed on 5 June 2023 that it was issued from the High Court of South Africa, Gauteng Local Division, Johannesburg. Claims 1 to 8 allege dishonest conduct resulting in a financial loss of R1 464 633.60, exceeding the complainant's net benefit of R673 014.00. The Fund stated it is lawfully withholding the complainant's entire benefit until legal proceedings conclude, keeping the benefit in the default investment portfolio.

9.10 The Fund is monitoring the employer's progress and will reconsider withholding the benefit if the legal proceedings are unduly delayed. The Fund requested the PFA to dismiss the complainant's complaint.

Employer

9.11 The employer stated that it suspended the complainant on 12 September 2022 and began investigating alleged fraudulent activities. Following a disciplinary hearing, the complainant was found guilty of breaching of his fiduciary duty gross negligence, dishonesty, and breach of his employment contract.

9.12 On 23 February 2023, the employer dismissed the complainant with immediate effect and plans to file a criminal case of fraud and corruption against him.

9.13 The investigation revealed the complainant's actions caused damages, which amounts the employer confirmed. The employer also requested an extension to submit proof of service for its summons, citing the case's complexity, the volume of documents, and a security breach involving a hijacking. A criminal case was open with the South African Police Service ("SAPS") under case number 352/3/2023.

10. The PFA's dismissed the complainant's complaint for the following reasons:

10.1 The Fund's right to withhold the complainant's benefit was justified based on section 37D(1)(b)(ii) of the Act, the Fund's rules, and the Supreme Court of Appeal's interpretation of section 37D(1)(b)(ii) of the Act in *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen [2009] 1 BPLR 1 (SCA) at para 19*.

10.2 The Fund acted on the employer's request to withhold the benefit due to a pending civil action against the complainant for damages. The PFA confirmed that a copy of the summons was electronically provided to it, and that the

summons was issued in the Gauteng Local Division, Johannesburg, on 5 June 2023 (Case No: 2023-053228).

- 10.3 The PFA evaluated whether the Fund's board properly exercised its discretion, considering the strength of the employer's claim, the potential prejudice to the complainant, and whether the complainant was afforded an opportunity to place his case before the board, if the benefit were withheld.
 - 10.4 The employer claims R1 419 859.69 (excluding legal costs) due to alleged fraud by the complainant, who allegedly misrepresented unlawful transactions as authentic. The complainant's withdrawal benefit is R673 014.00, less than the alleged loss.
 - 10.5 A criminal case was reported against the complainant under case number 352/3/2023. The PFA noted that civil proceedings must be instituted to trigger section 37D(1)(b)(ii) of the Act (Referenced : *Fundsatwork Umbrella Provident Fund v EE Ngobeni and Another (PFA64/2020)*), which the employer has done.
 - 10.6 The PFA indicated that the evidence shows that the complainant was provided with an opportunity to present his case before the Fund. The PFA noted that the employer has a *prima facie* case, and that the complainant had not provided a substantive response.
 - 10.7 Based on the above, the PFA was satisfied that the board applied itself appropriately, impartially and in a balanced manner, and that the board's decision to withhold the complainant's withdrawal benefit was based on a proper exercise of its discretion and was in accordance with its rules and the prevailing case law pertaining to this matter. Thus, the PFA dismissed the complainant's complaint.
11. The Applicant is aggrieved by the fact that the PFA dismissed his complaint on 20 October 2023, which was filed against the Fund's failure to pay his withdrawal benefit.

12. On 9 February 2024, the Applicant submitted his application for reconsideration of the PFA's determination. On the same day, an employee of the Financial Services Tribunal informed the Applicant that the decision he sought to reconsider was dated 20 October 2023, making the application for reconsideration out of time. The Applicant was provided with a copy of the tribunal's rules, specifically referring to paragraphs 30 and 33, which address condonation. In response, the Applicant stated that he had not received the notice from the PFA dated 20 October 2023 and was only notified of the PFA's determination on 12 December 2023. However, the Applicant did not file an application for condonation.
13. In terms of section 230(2) of the FSR Act, an aggrieved person may apply to the Tribunal for a reconsideration of a decision taken against it, which application must be made-
 - “(a) if the applicant requested reasons in terms of section 229, within 30 days after the statement of reasons was given to the person; or*
 - (b) in all other cases, within 60 days after the applicant was notified of the decision, or such longer period as may on good cause be allowed.”*
14. The Applicant did not request reasons for the PFA's determination in terms of section 229 of the FSR Act and therefore he does not meet the requirements in terms of section 230(2)(a) of the FSR Act.
15. Subsequently, the Applicant had 60 days after notification of the PFA's determination of 20 October 2023. On the Applicant's version he was notified of the PFA's determination for the first time on 12 December 2023.
16. Although the PFA's determination references that it was sent via registered post and email (ogadzikwa@gmail.com) to the Applicant, there is no proof of dispatch. The only evidence of dispatching the PFA's determination to the Applicant is an email dated 12 December 2023, indicating that the '*signed statement of reasons*' was sent to the

Applicant on that date. Therefore, for purposes of this application, the Tribunal accepts that the Applicant received the determination on 12 December 2023.

17. The Applicant's application for reconsideration was filed on 9 February 2024, which is within the stipulated timeframe, and therefore there is no need for condonation.

C. APPLICANT'S GROUNDS FOR RECONSIDERATION

18. The Applicant argues that the PFA's decision favouring the Third Respondent, allowing them to withhold his provident fund benefit due to an ongoing lawsuit, is unjust and caused significant financial and emotional hardship for him and his family.

19. The Applicant's contentions are based on equity and fairness, as follows:

- 19.1 **The Third Respondent's conduct is dilatory.** Their claims and the extended lawsuit duration are unreasonable, ignoring findings from other legal proceedings between the parties.

- 19.2 The lawsuit is a pretext to unjustly withhold the provident fund benefit after the Applicant exposed the Third Respondent's irregularities as a whistleblower.

- 19.3 **The Third Respondent has not provided *prima facie* evidence** or an independent forensic audit report to substantiate its claims, only a vague lawsuit and an opinion letter from their compensated auditor.

- 19.4 The Applicant was not interviewed during the investigation or before his dismissal, **violating the *Audi alteram partem* principle.**

- 19.5 **The Applicant argues that further delays will cause irreparable harm,** as he needs the provident fund benefit to support his family during his

unemployment. The Third Respondent, with financial reserves and donor funding, will not suffer irreparable harm from releasing the benefit.

- 19.6 The frivolous lawsuit and delays violate the Applicant's right to his provident fund and constitute **an abuse of the legal process**.
20. On 25 March 2024, the Applicant filed augmented grounds for reconsideration of the PFA's determination, as follows:
- 20.1 Supplementing the ground that the Third Respondent's **conduct was dilatory**:
- 20.1.1 The Applicant was dismissed on 23 February 2023 and submitted his withdrawal application to the Fund on 9 March 2023.
- 20.1.2 The summons was served on 8 June 2023, 3 (three) months after dismissal. The Applicant served his plea on 8 August 2023. The Third Respondent did not deliver a replication.
- 20.1.3 The civil action in the High Court had been ongoing for almost 9 (nine) and a half month, with minimal action taken by the Third Respondent since serving their discovery notices on 26 January 2024.
- 20.1.4 The Third Respondent and/or its attorneys are deliberately applying a delayed style of litigation.
- 20.2 The Third Respondent has not allowed the Applicant to present his version of events, except in limited Commission of Conciliation, Mediation and Arbitration ("CCMA") proceedings initiated by the Applicant.
- 20.3 The Applicant contests PFA's determination, arguing:

- 20.3.1 The PFA misrepresented facts by stating the Applicant had an opportunity to present his case. The Applicant had submitted his plea on 8 August 2023.
 - 20.3.2 The PFA did not consider the Applicant's plea in the High Court, which is an irregularity.
- 20.4 Supplementing the ground that the **Third Respondent failed to provide *prima facie* evidence:**
- 20.4.1 The PFA based its determination solely on written submissions without oral arguments.
 - 20.4.2 The Third Respondent did not provide a final investigation report, only a letter from 17 March 2023, which lacks credible evidence.
 - 20.4.3 The letter is not a finding of fact and does not attach the referenced final investigation report.
 - 20.4.4 The Fund incorrectly relied on this letter as *prima facie* evidence.
 - 20.4.5 The Third Respondent failed to meet the threshold of a valid *prima facie* case before the PFA, and the PFA committed a gross irregularity by relying on the letter without considering the Applicant's plea.
 - 20.4.6 The PFA failed to properly consider all documents and the timeline of events.
 - 20.4.7 The Fund unlawfully froze the Applicant's benefits without affording him an adequate opportunity to respond.

- 20.5 In support of the Applicant's grounds for reconsideration of the determination of the PFA related to **irreparable harm**, the following:
- 20.5.1 The Applicant, a registered and chartered accountant, is currently reviewing an unsuccessful CCMA arbitration outcome in the Johannesburg Labour Court (case number JR218/2024).
 - 20.5.2 Allegations of negligence and dishonesty have damaged the Applicant's professional reputation, which can only be restored by a favourable Labour Court review.
 - 20.5.3 The Applicant believes there is a strong chance of overturning the adverse CCMA award through the review application.
 - 20.5.4 Until the Labour Court proceedings conclude, the Applicant is unlikely to secure similar employment, leading to financial prejudice if his benefits remain withheld.
 - 20.5.5 The ongoing civil action in the Johannesburg High Court may take another two to three years to resolve, causing further financial deprivation due to the Third Respondent's actions.
- 20.6 In support of the Applicant's grounds for reconsideration of the determination of the PFA related to the **violation of his rights and an abuse of the legal process**, the following:
- 20.6.1 The Third Respondent is misusing the legal framework, against the Applicant, and the First Respondent's refusal to release the Applicant's benefits is irrational, unreasonable, unfair and without merit.

20.6.2 The prolonged withholding of the pension funds, caused by the Third Respondent's delay in pursuing its claim, is causing undue prejudice to the Applicant.

D. THIRD RESPONDENT'S (EMPLOYER'S) RESPONSE TO THE APPLICANT'S RECONSIDERATION APPLICATION

21. The Third Respondent disputes the PFA's decision being unjust.

22. The Third Respondent refutes claims of dilatory conduct, citing the following:
 - 22.1 Summons for the civil action (case number 2023-053228) was served on the Applicant on 9 June 2023 ("Civil Action").
 - 22.2 The Applicant's plea was served on 8 August 2023, followed by a consultation with its (Third Respondent's) attorneys in early September 2023.
 - 22.3 Preparing of its discovery affidavit began in September 2023.
 - 22.4 The primary representative and witness was involved in a related dispute at the CCMA until mid-December 2023.
 - 22.5 The discovery affidavit, containing numerus documents, will be served on the Applicant soon.
 - 22.6 The Third Respondent will initiate pre-trial preparations, including applying for a trial date and arranging the pre-trial conference.
 - 22.7 An 8-month period since the summons, given the parallel CCMA matter, is not an undue delay.

- 22.8 The Applicant failed to specify the proceedings and findings he refers to that allegedly affect the civil action.
- 22.9 The Third Respondent denies retaliation claims, citing an investigation by Oxfam International that dismissed the Applicant's whistleblower report.
23. The Third Respondent denies lacking evidence for the civil action:
- 23.1 Confident in its case, the Third Respondent claims the Applicant acted recklessly in approving unauthorised transactions.
- 23.2 The CCMA Award (January 2024) supports the claim of misconduct by the Applicant. In support of this submission the Third Respondent attached the CCMA's award handed down in January 2024 ("the CCMA Award") in which the CCMA Commissioner's findings is embodied. The findings are *inter alia* as follows: "*The Applicant was fully aware of the obligations he had with respect to his duties as set out in the Job Description: Senior Financial Manager....However, despite this undisputable information, he decided to ignore the rules and tampered with the process and even allowed fraudulent activities to go unpunished... He admitted as such that the conduct of Sekhula in this regard amounted to fraud. Invariably, he failed to exercise proper judgment in order to mitigate the risk and prevent the fraud.*"
- 23.3 The CCMA Award and forthcoming evidence provided during the discovery process, constitutes sufficient prima facie evidence of misconduct, supporting the Third Respondent's case's prospects.
- 23.4 The Third Respondent denies that it has a duty or obligation to interview the Applicant. It was further submitted that the Applicant will have an opportunity to state his case, when the civil matter is heard in court.

24. The Third Respondent denies that the Applicant will suffer irreparable harm if his withdrawal benefit is not released. If the Applicant wins the civil action, he will receive his withdrawal benefits and may pursue damages against the Third Respondent.
25. Releasing the withdrawal benefit now risks dissipation, potentially preventing the Third Respondent from recovering funds if successful in the civil action. The fact that the Third Respondent is a "*going concern*" is irrelevant to whether the withdrawal benefit should be released or not.
26. The Third Respondent denies abusing the legal process or infringing on the Applicant's rights, asserting its duty to protect its assets and address fraudulent activities.
27. The Third Respondent requests the dismissal of the Applicant's application with costs.
28. In addition to the above, the Third Respondent submits that:
 - 28.1 It disputes that it or its attorneys are "*deliberately applying a delayed style of litigation*".
 - 28.2 Considering standard legal timelines, including the *dies non* period between December 2023 and January 2024, the alleged delay is reasonable for a complex matter of this nature. Furthermore, the Third Respondent is, of its own accord and without the Applicant having served Uniform Rule 35 notices (discovery, inspection and production of documents) finalising its discovery affidavit for service on the Applicant.
 - 28.3 If the Applicant was truly intent on progressing the civil court action, he would have already served his Uniform Rule 35 notices to place the Third Respondent under pressure to progress the matter.

- 28.4 The Third Respondent is under no obligation to provide the Applicant with a platform to relay his version of events as the Applicant had an opportunity at the CCMA and will have another in court.
- 28.5 The Third Respondent was not involved in the PFA's deliberations and subsequent determination. The Applicant's plea was part of the PFA's record and as such considered during the reaching of the PFA's determination.
- 28.6 The Third Respondent was not required to provide a final investigation report to the Applicant, which, if necessary, will be disclosed during the trial.
- 28.7 The Third Respondent reiterates that the Applicant will not suffer irreparable harm, as he will receive his frozen funds with interest if successful and may seek further damages.
- 28.8 The Third Respondent requests the tribunal to dismiss the Applicant's reconsideration application.

E. LEGAL PRINCIPLES AND TRIBUNAL'S FINDINGS

29. Section 37D(1)(b)(ii) of the Act, the basis of the PFA's determination, states as follows:

"37D(1) A registered fund may-

- (a) ...*
- (b) 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-*
- (i) ...*
- (ii) compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb)) in respect of any damages 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 rule of the fund and pay such amount to the employer concerned."

30. On a plain reading of these provisions, section 37D(1)(b)(ii) does not authorise the withholding of a member's benefit where he is potentially liable for theft, fraud or misconduct against the employer. However, the Supreme Court of Appeal ("the SCA") in the matter of *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen [2009] 1 BPLR 1 (SCA)* at para [19] held as follows:

"Such an interpretation would render the protection afforded to the employer by section 37D(1)(b) meaningless, a result which plainly cannot have been intended by the Legislature. It seems to me that to give effect to the manifest purpose of the section, its wording must be interpreted purposively to include the power to withhold payment of a member's pension benefits pending the determination or acknowledgement of such member's liability. The Fund therefore has the discretion to withhold payment of the Respondent's pension benefit in the circumstances."


31. Accordingly, the PFA argued that under the above circumstances, it is permissible for a board of a Fund to deduct or withhold a benefit of a complainant in terms of section 37D(1)(b)(ii) of the Act. The PFA further considered whether the board of the Fund correctly exercised its discretion with care and in the process balanced the competing interests with due regard to the strength of the employer's claim, the prejudice the member will suffer if the benefit is withheld, and what response did the member have to the employer's case.

32. The PFA noted that the employer has a *prima facie* case, and that the complainant had not provided a substantive response. Furthermore, there is a pending civil claim against the Applicant/complainant, confirmed by the summons filed with the High Court on 5 June 2023, in the Gauteng Local Division, Johannesburg (Case No: 2023-053228). The PFA found that the board acted appropriately, impartially, and lawfully in withholding the complainant's withdrawal benefit. Therefore, the PFA dismissed the complaint.
33. The Applicant argued in his augmented grounds for his reconsideration application that the PFA misrepresented facts by claiming he had an opportunity to present his case, failed to consider the plea in the High Court, and did not properly review all documents and timelines.
34. This Tribunal notes that the Applicant did not make any substantive submissions regarding the alleged misconduct but at the same time claims lack of *prima facie* evidence. The outcome of the CCMA proceedings, at the very least, provides prima facie evidence. The applicant had the opportunity to state his case to the Fund and he did not do so.
35. As far as dilatory conduct of the Third Respondent in pursuing the lawsuit against him is concerned, the complaint lacks merit if regard is had to the chronology set out earlier, the irreparable harm that he claims he will suffer if his withdrawal benefit is withheld must be weighed against the harm that the employer will suffer, in the absence of evidence to discharge the prima facie case.
36. For reasons stated above, the Applicant's reconsideration application is dismissed.

F. ORDER

1. The Applicant's reconsideration application is dismissed.

SIGNED on this 8th day of AUGUST 2024.

A handwritten signature in black ink, appearing to read "A. M. Maritz". The signature is written in a cursive, flowing style.

ADV SALMÉ MARITZ

For self and on behalf of LTC Harms (Chair)