

THE FINANCIAL SERVICES TRIBUNAL

Case No: PFA19/2024

In the matter between:

RAND MUTUAL ASSURANCE CO LTD	Applicant
and	
TSHILILI JEANNETE BEGWA	First Respondent
DISCOVERY LIFE PENSION UMBRELLA FUND	Second Respondent
THE PENSION FUNDS ADJUDICATOR	Third Respondent

Tribunal: LTC Harms (Chairperson) and EA Moolla

Summary: Application for reconsideration of a determination by the Pension Funds Adjudicator (PFA) in which the Second Respondent was found to have unlawfully withheld the First Respondent's pension withdrawal benefit under s 37D(1)(b)(ii) of the Pension Funds Act 28 of 1956 and ordered the Second Respondent to pay the funds standing to her credit. Audi alteram partem-rule.

DECISION

1. Section 230 of the Financial Sector Regulation Act 9 of 2017 provides for an aggrieved party to approach the Tribunal for a reconsideration of a determination by the Pension Funds Adjudicator ("the PFA"). It is under this provision that this application is brought by the applicant ("the Employer"). The parties waived their right to a formal hearing, and this is the decision of the Tribunal.
2. The First Respondent, Ms Begwa, became a member of the Fund (the Second Respondent) by virtue of her employment with the Employer on 1 August 2018.
3. Her duties entailed adjudication of claims, claims management, capturing of claims on the Employer's claims system and payment thereof as well as customer service.
4. Between August and January 2023, Ms Begwa allegedly captured and processed for payment on the Employer's claims system, claims for injured employees which the

Employer would be responsible. The Employer paid the claims based on the information captured.

5. Around May 2023, information pertaining to Ms Begwa regarding false/incorrect information about the paid claims was brought to the attention of the Employer and on 4 May 2023, a notice of suspension was sent to her detailing the allegations against her. She was invited to state reasons why she should not be suspended and provide a response to the allegations levelled against her. No response was received.
6. On 11 May 2023 Ms Begwa sought to resign from her employment with immediate effect. The resignation was rejected. On 26 May 2023 she was advised to subject herself to a disciplinary hearing scheduled for 6 June 2023 which she failed to attend.
7. In her absence she was found guilty of gross negligence, dishonesty, breach of trust as well as fraud, and she was dismissed.
8. The Employer applied to the Fund under sec 37D(1)(b)(ii) of the Pension Funds Act 28 of 1956 that the funds to the credit of her pension be withheld until civil proceedings against her had been finalised while she sought to withdraw the pension fund benefit which vested on resignation.
9. The Fund decided to withhold her benefit in an amount of R217 596-49. It is against this decision that she lodged a complaint under sec 30A with the PFA challenging the decision of the Fund.
10. The PFA on the 11 April 2024 issued a determination where the decision of the Fund was set aside and the Fund was ordered to release the withdrawal benefit.
11. The duty of the PFA was to consider 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. As held in *SA Metal Group (Pty) Ltd v Jeftha and Others* [2020] 1 BPLR 20 (WCC), the PFA is called upon to determine whether the Fund's decision had been justified at the time when the decision was taken. It also held that where a benefit has accrued, as in this matter, the member enjoys full ownership of the pension benefit. Thus, any claim that would have the effect of depriving a member of the use and enjoyment of this asset must be carefully scrutinised. This is done by weighing the competing interests of the parties after affording the member the opportunity to place her case properly before the Fund.
12. While the audi rule is broad, it is not absolute. Its application can vary depending on the context, the nature of the decision, and the circumstances surrounding it. The

principle may be limited or modified but any deviation from the principle must be justified and proportionate.

13. The issues for determination by the Tribunal are whether the PFA was correct in finding that the withholding of the pension withdrawal was unlawful because the Fund did not consider the prejudice to the member and that the Fund did not comply with the audi rule before deciding. Eventually, if the audi rule was not complied with, the issue of prejudice could not have been considered. With that in mind we focus on the audi principle.
14. The Fund relied on the fact that the Employer had issued summons against Ms Begwa in which it claimed damages (compensation) for, inter alia, dishonestly and fraud. There must have been some confusion. The issuing of summons relates to the expanded interpretation of sub-par (bb), namely that judgment had to be obtained before suspension of payment was possible: *Highveld Steel & Vanadium Corporation Ltd v Oosthuizen* 2009 (4) SA 1 (SCA)). It does not relate to the audi requirement.
15. It is not disputed that the decision of the Fund was not preceded by compliance with the audi principle. The approach of the Fund was that since Ms Begwa had sufficient opportunity to state her case to the Employer, and did not deny inter alia the allegation of fraud, there had been sufficient compliance.
16. The approach of Ms Begwa was to run once the allegations of serious misconduct were laid against her. Since she was not prepared to face the Employer at the appropriate time there was sufficient reason for the Fund to have been satisfied that the Employer had made out a prima facie case against her and that there was reason to believe that the Employer had a reasonable prospect of success in the proceedings that were later instituted, especially where she relied on a bare denial in her plea. In other words, there was no reason for the Fund to assume that she would pull the innocence rabbit from the hat.
17. It may also be noted that she did not before the PFA dispute the allegations of the Employer about her misconduct. Before this Tribunal she sent an email dealing with the allegations, stating that she had not worked with the three cases. This email is not evidence and does not comply with the Tribunal rules for the filing of new evidence.
18. The effect of non-compliance was therefore the failure of the Fund to have balanced the competing interests of the Employer and the member. Was that material in this reconsideration of the decision where she did not even seek to raise her special interests while the interests of the Employer are clear, as explained in *Highveld*?

19. To summarise: Whilst it is clear on a preponderance of probability that the Employer has made out a prima facie case against Ms Begwa and gave her sufficient opportunity pursuant to the audi rule to record her version or defence to the claim of the Employer, that cannot amount to a discharge by the Fund insofar as its obligation separately to give her an opportunity to respond to the Employer's allegations before the Fund. The Employer's compliance with the audi rule did not discharge the separate independent obligation of the Fund to afford her a similar opportunity to respond. Such a failure on the part of the Fund was fatal to the Fund's decision.
20. Accepting that the PFA was correct in the determination (why 18 pages were required is difficult to fathom) that the decision was 'unlawful', the question then arises why the PFA did not refer the matter back to the Fund to comply with the audi rule within a given period, and to exercise its discretion. That is the ordinary rule under PAJA and administrative law generally.
21. Finally, a request to the PFA. We rely in this regard on the Style Guide of the Supreme Court of Appeal which says that "one of the most confusing and irritating aspects of writing and reading judgments is the reference to parties. It is necessary to identify the position of the parties . . . . But we have to simplify matters for the reader. The easiest, and least likely to lead to confusion both in writing and reading, is to refer to parties by name" (even abbreviated) or, may be added, by position as was done in this decision.
22. Order: The determination is set aside, and the matter is remitted to the Pension Funds Adjudicator for reconsideration.

Signed on behalf of the Tribunal on 15 August 2024

EA Moolla for self and LTC Harms