

THE FINANCIAL SERVICES TRIBUNAL

CASE NO: PFA81/2023

In the matter between:

STEVEN ALLAIN BROWN

Applicant

and

PENSION FUNDS ADJUDICATOR

First Respondent

AUTO WORKERS PROVIDENT FUND

Second Respondent

MOTOR INDUSTRY BARGAINING COUNCIL

Third Respondent

Summary: Reconsideration of a decision of the Pension Funds Adjudicator (30M) - Section 30H(2) of the Pension Funds Act limits the Adjudicator from investigating a complaint if proceedings had been instituted in a civil court in respect of a matter, which constitutes the same subject of the investigation. The issue turns on whether the Adjudicator's decision in declining to entertain the complaint based on this ground was justified.

DECISION

1. This is an application for the reconsideration of a decision by the Pension Funds Adjudicator (the PFA) in terms of sec 230 of the Financial Sector Regulation Act 9 of 2017 holding that the PFA had no jurisdiction to deal with the complaint since the complaint fell within the jurisdiction of the Motor Industry Bargaining Council (MIBCO) and sec 30H(2) of the Pension Funds Act 24 of 1956 prevents the PFA from investigating a complaint if proceedings had been instituted in a civil court in respect of a matter, which constitutes the same subject of the investigation.
2. The parties waived their right to a formal hearing, and this is the decision of the Tribunal.

3. Applicant was employed by the employer from August 2017 to April 2023. During that period the employer deducted provident fund contributions from the Applicant's salary but did not remit all to the Auto Workers Provident Fund.
4. The Applicant is aggrieved by the fact that he only received an amount of R 75 000.00 upon the termination of his employment and his desired outcome was that the employer should be ordered by the PFA to pay all his arrear contributions so that he could receive his full withdrawal benefit from the Fund.
5. The Fund confirmed that the employer had failed to comply with section 13A of the Pension Funds Act (and the collective agreement in the motor industry) namely that
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.
6. Regarding the arrear contributions due by the employer on the complainant's behalf, the Fund stated that there is a recovery process in terms of its dispute resolution process, which consists of conciliation and/or arbitration, which the Fund is pursuing through the Motor Industry Bargaining Council.
7. The result of this process may be that the complainant will receive a pro rata share of any amount recovered from the employer.
8. The PFA refused to consider the complaint, and these were the reasons:

MIBCO has been accredited by the Commission for Conciliation, Arbitration and Mediation (CCMA) to resolve most types of labour disputes which occur in the motor industry and its dispute resolution procedures closely mirror those of the CCMA. To this end it has created the Dispute Resolution Centre (DRC), recognised by the CCMA. A DRC arbitration award is final and binding and, when certified by the CCMA, in terms of section 143(3) of the Labour Relations Act 66 of 1995 ("LRA") it can be enforced as

if it were an order of the Labour Court (see *OA Maphanga v Auto Workers Provident Fund and Another* (PFA/GP/00058109/2019/TD) par 5.8). As such, we are prohibited from investigating this matter in terms of section 30H (2) of the Act.

9. Section 30H(2), the basis of the PFA's decision, states as follows:-

The Adjudicator shall not investigate a complaint, if, before the lodging of the complaint, proceedings have been instituted in any civil court in respect of a matter which would constitute the subject matter of the investigation.

10. In his augmented grounds for the reconsideration application, the Applicant submits that the PFA is obliged to investigate the complaint and make an order in terms of section 30E(3) of the Act as the Bargaining Council has not resolved his complaint.

11. The the meaning and effect of section 30H(2) was considered by the Supreme Court of Appeal in *City of Cape Town Municipality v South African Local Authorities Pension Fund and another*.¹ We quote the appropriate parts:

- The first is that section 30H(2) does not expressly require that the complainant should have been the plaintiff or the applicant in the proceedings instituted in the court.
- The second is that it does not require the proceedings in the civil court to be proceedings concerning 'the complaint'.
- The language used is rather wider in saying that the proceedings in a civil court are proceedings 'in respect of a matter which would constitute the subject matter of the investigation'.
- Its purpose was and is to deal with the fact that civil courts, usually the High Court, and the adjudicator have concurrent jurisdiction over the same legal disputes. In those circumstances, where the dispute has first been lodged before a court, priority is given to the court by excluding the jurisdiction of the Adjudicator.

¹ [2014] 1 All SA 526 (SCA), 2014 (2) SA 365 (SCA).

- Once there is a proper appreciation of the structure of Chapter VA and the linkage between the various provisions, particularly the definition of complaint, the status of the Adjudicator's award as a civil judgment in terms of section 30O and the right of access to court under section 30P, the role of section 30H(2) is perfectly clear. It is to deal with concurrence of jurisdiction in circumstances where the matter to be investigated by the Adjudicator is a matter already before the civil court having jurisdiction.
- In determining what the matter is before the civil court and comparing it with the matter which would be the subject of an investigation by the Adjudicator it is appropriate to adopt the same approach as that in the case of a plea of *lis alibi pendens*.

12. In other words, the provision introduces the principles of *lis pendens*: if a matter is pending elsewhere, the PFA does not have jurisdiction to consider the complaint.

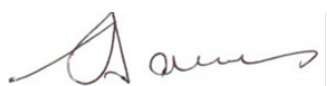
13. However, *lis pendens* was not introduced without limitations. This is apparent from the the emphasis in the judgment that there must be 'pending proceedings' in a 'civil court'. The reason is clear: that is what the provision states – and the word 'court' is defined in sec 1: it is a High Court. (When the SCA said "usually the High Court", Homer nodded, and does not affect the reasoning in this decision.)

14. First, the complaint is not subject to pending proceedings in a court, and not only the High Court.

15. Obviously, once an order has been made pursuant to the arbitration/conciliation process as explained by the PFA, it will have the effect of an order of the Labour Court under the Labour Relations Act, but the Labour Court is not a provincial or local division of the High Court under either the Constitution (sec 169) or the Superior Courts Act.

16. ORDER: The reconsideration application succeeds and the determination of the PFA is set aside and the complaint is remitted to the PFA for further consideration.

Signed on 8 July 2024 on behalf of the Tribunal



LTC Harms (chairperson)

