

THE FINANCIAL SERVICES TRIBUNAL

CASE NO.: PFA3/2022

TAPE AIDS FOR THE BLIND

APPLICANT

and

ASHWIN ANANDH PALHAD

FIRST RESPONDENT

THE PENSION FUNDS ADJUDICATOR

SECOND RESPONDENT

FUNDSATWORK UMBRELLA PROVIDENT FUND

THIRD RESPONDENT

MOMENTUM METROPOLITAN HOLDINGS

FOURTH RESPONDENT

In re: retention of withdrawal benefit by Fund in terms of sec 37D(1)(b)(ii) of the Pension Funds Act 24 of 1956 – laying of criminal complaint – sec 300 of the Criminal Procedure Act – issue estoppel and binding effect of Tribunal decisions

DECISION

1. The complainant, Mr Palhad, filed a complaint with the Pension Funds Adjudicator in terms of sec 30A of the Pension Funds Act. He had been employed by the applicant, Tape Aids for the Blind (“TAB”), but was dismissed on 13 December 2019 after a

disciplinary hearing. He was a member of the Fund which is administered by Momentum Metropolitan and became entitled to payment of his withdrawal benefit which was about R400 000.00.

2. On 2 January 2020, TAB requested the Fund to withhold payment of the benefit until finalisation of legal proceedings which TAB intended to institute. On 6 March, TAB informed the administrator that it was in the process of opening a criminal case against the complainant, laying charges against him of fraud by misrepresentation, and two weeks later confirmed that it had indeed laid such charges.
3. It also informed the Fund that the direct loss suffered amounted to R600 000.00 and that the estimated value of the fraud and correcting measures was estimated to be R1.18million.
4. The complainant filed his sec 30A complaint on 3 June based on the refusal of TAB to sign his release documents to enable payment of his withdrawal benefit. About a month after receipt of a request for an explanation from the PFA the Fund requested the complainant for his response to TAB's request.
5. The PFA issued a determination on 3 December 2020, setting aside the decision of the Fund to withhold the withdrawal benefit and ordering it to pay the balance of the benefit to the complainant.
6. The *ratio* of the determination was the following:
 - The decision to withhold the withdrawal benefit was not weighed against any material facts presented to the board. The board took a decision to withhold the benefit on 2 January 2020 and at that stage it had no meaningful information to enable it to exercise a proper discretion. The board only

requested the complainant on 3 July 2020, to respond to the third respondent's allegations failing which they will proceed to withhold the withdrawal benefit.

- On a proper analysis of the facts, the board of the first respondent already made the decision on the 2 January 2020.
- There is no explanation why it took the board of the first respondent so long to communicate with the complainant (see *SA Metal Group (Pty) Ltd v Jeftha and Others* [2020] 1 BPLR 20 (WCC) at paragraph [62]).
- The submissions indicate that the board only afforded the complainant the opportunity to give his side of the story, after the decision to withhold the benefit was made.
- The Adjudicator is of the view that there was no reason for the board of the first respondent to keep the complainant out of the proceedings that affected his rights to the withdrawal benefit and only engage with the third respondent.

7. Although the Fund did not ask the complainant for his version until after his complaint lodged with the PFA, six months after the due date, or paid, it alleged in response to the PFA's enquiry that it had not yet decided to withhold the benefit under the provision. It nevertheless believed that TAB was entitled to block payment of the benefit. It said, because of the pending complaint to the PFA it would not pre-empt the decision and it would wait until the PFA had made its decision.
8. To proceed with the narrative, TAB applied for the suspension of the determination, which was granted, and the reconsideration of the PFA's decision was then heard by a panel of the Tribunal. It set aside the decision of the PFA and referred it back for reconsideration.
9. The PFA asked the parties for further information and submissions and then, to the surprise of TAB, made the same order as before. This led to the second, the present,

reconsideration application. For this the parties waived their right to a formal hearing and agreed that the undersigned should decide the new application. TAB submitted written argument.

10. Reverting to the panel's decision: it is implicit that the panel concluded that the Fund had taken a decision prior to the date of the complaint because TAB could only have refused to sign the withdrawal forms if the Fund had decided to block payment. It does not, however, appear that the panel addressed the *ratio* of the PFA's decision directly. Its ratio was rather that the complainant had not contested the allegations made against him before the Fund (namely that he had defrauded TAB) and that TAB would be prejudiced if the funds were to be released.

11. Since the complaint was filed six months after due date and that the Fund had not asked the complainant for his version before that date, a finding based on his lack of a denial is difficult to understand. The following statement of the panel does also not apply because the complainant did not "simply resign" – he was dismissed:

Ultimately, the objective of section 37D is also to protect the employer from loss suffered at the hands of the employee. It would serve no purpose if employees were allowed to defraud employers, where they simply resigned and claim their pension benefit.

ISSUE ESTOPPEL

12. Having said that, I'm not sitting on appeal or review of the panel decision. This is a reconsideration application, which requires that I reconsider the second decision of the PFA.

13. This Tribunal may, if it disagrees with the PFA, set the decision aside but MUST refer it back to the PFA for reconsideration. Sec 234(1)(a) is explicit in this regard and the

exceptions or qualifications in sec 234(1)(b) do not apply to decisions of the PFA. The PFA may, after reconsideration, come to the same conclusion as before, and sometimes does. This circuitous process is inherent in the Act.

14. In short, the decision or reasons of the Tribunal do not create issue estoppel. In other words, the panel decision is not a binding precedent and its findings do not make matters moot: apart from having to reconsider, the PFA or a later panel is not bound by its reasoning or finding although we obviously respect each other and seek consistency for the sake of the public and ourselves and wish to finalise matters within reason.
15. The TAB's request that the reconsideration application be upheld simpliciter is therefore not a competent decision which the Tribunal may make.
16. The decision of the panel is dated 28 October 2021 and the second determination of the PFA is 13 January 2022. Between these two dates the Tribunal issued two decisions¹ highlighting aspects that the panel did not consider, and the PFA, in the second determination, considered these issues, did not disagree with them, and based the determination on them. In what follows, major portions of the decision in *Ngobeni* will be repeated without more.

THE ACT AND THE RULES OF THE FUND

17. The basic rule about withholding of benefits is to be found in sec 37A of the PF Act. It states:

Save to the extent permitted by this Act, . . . no benefit provided for in the rules of a registered fund . . . shall, notwithstanding anything to the contrary contained in the

¹ *Fundsatwork Umbrella Pension Fund v NP Matjiane PFA 39/2020; Fundsatwork Umbrella Pension Fund v EE Ngobeni PFA 64/2020.*

rules of such a fund, be capable of being reduced, transferred or otherwise ceded, or of being pledged or hypothecated, or be liable to be attached or subjected to any form of execution under a judgment or order of a court of law

18. Section 37C(1)(b)(ii) contains the following exception. It allows a Fund to deduct any amount due by a member to his employer on the date . . . on which he ceases to be a member of the fund, in respect of compensation (including any legal costs recoverable by virtue of a judgment) in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which . . . judgment has been obtained against the member in any court . . . from any benefit payable in respect of the member . . . in terms of the rules of the fund, and pay such amount to the employer concerned.

19. The Fund rules state that the fund may withhold a portion or the whole of a member's benefit with the intention of giving effect to such a deduction until the matter has been finally determined by a court of law . . . , but only if - in the event of an amount due by the member to his participating employer as referred to in section 37D(1)(b)(ii) of the Act,

(a) the participating employer informs the fund in writing of a potential claim against the member no later than 30 days after the member's termination of service, including the estimated amount, that it requires the fund to withhold; and

(b) the trustees in their reasonable discretion are satisfied that the participating employer has instituted or will institute legal proceedings against the member within a reasonable period and has not caused any unreasonable delays in bringing it to finalisation.

20. This rule is based on the interpretation of the provision in *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* (103/2008) [2008] ZASCA 164; 2009 (4) SA 1 (SCA) ;[2009]

2 All SA 225 (SCA); (2009) 30 ILJ 1533 (SCA) and binds the Fund, the employer and the complainant.

PROCEDURAL COMPLIANCE

21. The first issue raised by the PFA is procedural compliance with (a) above. The only information before the PFA (and me) is the following statement by the administrator:

On 2 January 2020, the employer informed the fund that the complainant had been dismissed due to fraudulent activity, that they were in the process of finalizing an SAPS affidavit and requested that the fund withhold payment to the complainant pending finalization of legal proceedings against the complainant.

22. This, prima facie, does not comply with (a) because it did not contain an estimated amount. The estimation followed on 6 March, which is more than 30 days after the termination. I cannot find any reference in the record on which the finding of the panel in para 36 of its decision was based, namely that

the Fund was advised that there was substantial fraudulent activity and it was indicated that the quantum was large enough to place [a] hold on the entire fund benefits.

23. Another aspect of the PFA's determination is that the board only afforded the complainant the opportunity to give his side of the story after the complaint was filed and the decision to withhold the benefit was made. The PFA believed that there was no reason for the Fund to keep the complainant out of the proceedings that affected his rights to the withdrawal benefit and only engage with TAB. The PFA relied in this regard on *SA Metal Group (Pty) Ltd v Deon Jeftha and 2 Others* Case No: 20298/2018 (Western Cape High Court) where Steyn J stated at paragraph [62] that:

I agree with the argument of Mr Freund SC, that one can safely assume that the employer's case, as related to the fund, must be put to the employee to afford him an opportunity to respond thereto before the fund should assume the liberty to take a

decision impacting on the rights of the employee ... The question remains whether the fund applied their mind appropriately, impartially and in a balanced manner.

24. The same issue was debated before the panel, and it held that since the Fund had requested the complainant to respond to the allegations levelled against him in July 2020, after its last communication with the employee, "it may not have been timeous, but it was certainly not extensive."
25. With respect to the panel, I agree with the PFA that this does not answer the question. There was either compliance with the *audi* rule or there was not.
26. Since I am reconsidering the PFA's second determination, I conclude that her reconsideration on these aspects cannot justify a setting aside. It is however necessary to consider the further self-standing aspects of her determination.

SECTION 300 OF THE CPA

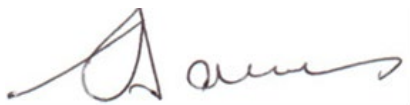
27. In *Ngobeni*, I said on behalf of the Tribunal the following:

The section deals with two situations, namely an admission of liability (which does not apply to the facts) and a civil judgment. *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* (103/2008) [2008] ZASCA 164; 2009 (4) SA 1 (SCA) ;[2009] 2 All SA 225 (SCA); (2009) 30 ILJ 1533 (SCA) dealt with the withholding of payment pending the finalisation of civil proceedings. It did not hold that a Fund is entitled to withhold payment because a criminal case has been opened or even upon conviction. 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. Since the employer did not inform the Fund of a civil action or even an intention to claim, a jurisdictional fact for the exercise of its discretion by the Fund was absent.

28. Likewise, TAB did not inform the Fund that it intended to institute any civil claim against the complainant. It stated that it intended and did in due course file criminal charges against the complainant.
29. After the panel decision, TAB was advised during November 2021 by its attorneys to state that it intends in due course to use sec 300 of the Criminal Procedure Act to obtain a judgment, which is civil in nature, after conviction. It stated further that it is not to blame for the fact that the complainant has not yet been prosecuted and that it did not cause the delays in finalisation. If the criminal matter is not concluded within three years after the applicant's dismissal, it intends to institute civil proceedings before prescription kicks in against him to recover its losses.
30. There is no basis on which the Fund or the PFA could have been satisfied that TAB has instituted or will institute civil legal proceedings against the complainant within a reasonable period.
31. Section 300 of the Criminal Procedure Act 1977 provides that where a person is convicted of an offence which has caused damage to or loss of property (including money) belonging to some other person, the court in question may, upon the application of the injured person or of the prosecutor acting on the instructions of the injured person, forthwith award the injured person compensation for such damage or loss. Such an award has the effect of a civil judgment.
32. It would follow that such an award by a criminal court may entitle the Fund to withhold payment of pension benefits, but we do not have such an award and it is unlikely that there will be one before the claim becomes prescribed.

33. The next question is whether fraud as alleged by TAB is covered by sec 300. That is doubtful if regard is had to the judgment of Didcott J in *S v Liberty Shipping and Forwarding (Pty) Ltd and Others* [1982] 4 All SA 141 (D) 1982 (4) SA 281 (D).
34. Assuming that it is, the final issue is whether laying a criminal complaint amounts to the institution of legal proceedings (“instituted or will institute legal proceedings”). Criminal proceedings are instituted by the State through the prosecuting authorities. Laying a charge has no legal consequences. It does not begin legal proceedings. Legal proceedings may or may not follow depending on the decision of the prosecutor. See *Kader v Minister of Police* 1989 (4) SA 11 (C).
35. This is the end of the present application. The main basis for the application was that TAB would be prejudiced if the complainant were to be paid. That, obviously, applies to every employer who seeks the special remedy but the weighing up of the interests of the parties only arises once the conditions set in the Act and the rules have been complied with. They have not.
36. The application is dismissed.

Signed on behalf of the Tribunal on 16 May 2022.

A handwritten signature in black ink, appearing to read 'LTC Harms', written in a cursive style.

LTC Harms (Deputy chair)