

IN THE FINANCIAL SERVICES TRIBUNAL

CASE NO: PFA15/2023

In the matter between:

TIGER CONSUMER BRANDS LTD

Applicant

and

DERRICK SANDRAGASAN

First Respondent

PENSION FUNDS ADJUDICATOR

Second Respondent

**TIGER BRANDS MANAGEMENT PROVIDENT
FUND**

Third Respondent

**ALEXANDER FORBES FINANCIAL SERVICES
(PTY) LTD**

Fourth Respondent

Tribunal panel: LTC Harms (chair), Adv W Ndinisa and Mr PJ Veldhuizen

For the Applicant: Adv GD Wickens SC and Adv T Scott instructed by Norton Rose Fulbright SA Inc

For the First Respondent: Adv Reece Renae Kisten instructed by Pather & Pather Attorneys

Hearing: 13 October 2023

Date of decision: 26 October 2023

Subject: Suspension of payment of pension benefit under sec 37D(1)(b)(ii)(bb) of the Pension Funds Act 24 of 1956 and the Fund rules – criminal charges – delay in civil proceedings

**APPLICATION FOR RECONSIDERATION OF DECISION OF THE PENSION FUNDS ADJUDICATOR
IN TERMS OF SECTION 230 OF THE FINANCIAL SECTOR REGULATIONS ACT 9 OF 2017**

DECISION

INTRODUCTION

- 1 The Applicant, Tiger Consumer Brands Ltd (“Tiger”) applies for the reconsideration of a determination by the Pension Funds Adjudicator (“the PFA”), which upheld a complaint of the First Defendant, Mr D Sandragassen (“the Complainant”), concerning the failure of the Third Respondent, Tiger Brands Management Provident Fund (“the Fund”) to pay him his termination benefit after the termination of his service contract with Tiger and consequently his membership of the Fund. The Fourth Respondent is the administrator of the Fund and references to the Fund hereafter includes references to the administrator.
- 2 The Fund withheld the benefit purportedly acting in terms of sec 37D(1)(b)(ii)(bb) of the Pension Funds Act 24 of 1956 and the Fund rules, and the complainant’s complaint was under sec 30A et seq of the same Act and the PFA’s determination was under sec 30M.
- 3 The present reconsideration application is under sec 230 of the Financial Sector Regulation Act 9 of 2017, and in terms of sec 234(1) this Tribunal may either dismiss the application or set aside the determination of the PFA and remit it to the PFA for reconsideration.
- 4 The Complainant had been in the employ of the Tiger group for close to 32 years when, because of disciplinary proceedings that were instituted against him, he resigned with immediate effect (which Tiger accepted) and both parties reserved their respective rights – in particular the right of the Employer to the Complainant’s pension benefits in terms of sec 37D(1)(b)(ii)(bb).
- 5 The inevitable happened. Tiger informed the Fund of its intention to lay a criminal complaint (bribery and corruption) against the Complainant and to recover part of its losses from the benefit, and the Complainant, in turn, asked for the release of his termination benefit. The Fund delayed payment, the complaint followed and after more than a year the PFA ordered

the Fund to release the benefit primarily because of the failure of Tiger to have instituted civil proceedings in good time.

6 The relevant provision in the Pension Funds Act must be read in context. First, sec 37A(1) states that no benefit provided for in the rules of the registered fund, shall, notwithstanding anything to the contrary contained in the rules of such a fund, be capable of being reduced. Then, sec 37A(3) states that the prohibition against reduction does not apply to a reduction effected under s 37D.

7 It then provides that a Fund may deduct any amount due by a member to his employer on the date of his retirement in respect of compensation (including any legal costs recoverable from the member 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.
[All has been redacted.]

8 The Supreme Court of Appeal, in *Highveld Steel and Vanadium Corporation Ltd v Oosthuizen* 2009 (4) SA 1 (SCA) interpreted the provision purposively – the preferred method of interpretation at the time:

[19] [A literal] interpretation would render the protection afforded to the employer by s 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 Funds therefore had the discretion to withhold payment of the respondent's pension benefit in the circumstances.

[20] Considering the potential prejudice to an employee who may urgently need to access his pension benefits and who is in due course found innocent, it is necessary that pension funds exercise their discretion with care and in the process balance the competing interests with due regard to the strength of the employer's claim. They may also impose conditions on employees to do justice to the case.

CHRONOLOGY

9 Before discussing the matter further, it would be convenient to set out the relevant chronology of events, minutely detailed by the PFA in her determination.

- 15 December 2021: the Complainant was informed in detail of the charges against him and that his conduct caused Tiger a loss of at least R18 million.
- 24 Jan 2022: The Complainant resigns.
- 25 January 2022: Tiger informs the Fund that it had registered a criminal complaint against the Complainant and that it is in the process of investigating and formulating a civil claim to recover damages and losses incurred arising from his misconduct involving an element of dishonesty. Factually, the criminal complaint was lodged later, on 31 January.
- 2 February 2022: The Complainant requests the Fund to release his pension benefit. The request reads like a legal opinion. He disclosed the criminal allegations against him and attached and the documents filed during the disciplinary process spelling the case out in fine particularity. However, he did not address those allegations by either admitting, denying, or avoiding them.

All he says is that Tiger's contention is "flimsy", which is worse than a bare denial. The essence of his request to the Fund was that the Act

"makes no provision for the withholding of benefits on the flimsy contention or suspicion of monies being owed. It is recognised that there are instances wherein benefits can be withheld as consequence of potential liability, however if consideration is given to the potential prejudice that faces the Complainant who needs access to his pension fund in order to assist in the proving of his innocence and to support his family it is necessary that pension fund to exercise their discretion with care and in the process and balance the competing interests with due regard to the strength of the employer's claim, which we submit has no prospect of success (or even any time line as to when such will be launched or even if such will be launched). The Claimant cannot be kept in limbo because the Respondent thinks it may have a case, such is not reasonable nor within the contemplation of the PFA, such is an abuse of the provisions of the Act and ought not to be perpetuated."

- 29 March 2022: The Complainant files a complaint with the PFA purportedly under sec 30A, relying on the memorandum sent to Fund on 2 February.
- 4 May 2022: Tiger files a response to the complaint with the PFA. The following is of relevance: It noted that it had lodged a complaint with the SAPS against the Complainant for conduct amounting, inter alia, to bribery and corruption (the case against him was set out: PFA record 91-92); it confirmed that Tiger is actively pursuing a civil claim against the Complainant; it had given instructions to that effect to attorneys and counsel was instructed to prepare the necessary claim; it is first necessary for Tiger to quantify its claim with sufficient accuracy; and

that it is anticipated that summons would be issued by 31 July 2022. It further relied on the criminal charge that had been laid.

- 6 May 2022: The Fund decides to withhold the benefit on condition that regular updates on the criminal and civil proceedings are received.
- 18 July 2022: The Fund explained its decision to the PFA in detail (PFA record 187). It said in particular:
 - Although a withholding has been seen as a relatively extreme measure it is tempered by the fact that a withholding in a sense, is never completely final. This is because, if there is an unreasonable delay in the process the Fund may decide to release the benefit. In addition, if sufficient progress is not being made the Fund may decide to release the benefit. If circumstances change and there is sufficient reason to release the benefit at some point the Fund may decide to release the benefit. This is to ensure that the Complainant is treated fairly.
 - One cannot dispute that it takes time to institute legal proceedings and eventually get an order against an employee, whereas an employee could resign with immediate effect and his pension benefit may be withdrawn which may be prejudicial to the Employers claim. The reasonableness in respect of the time taken to institute legal proceedings will depend on the facts of each case.
 - Due to the allegations that the misconduct is over a prolonged period and may involve multiple counts, one can appreciate that an investigation may take relatively longer than usual cases where the misconduct happens on one particular day and perhaps only one finite allegation of fraud.

- The Complainant has timeously received and responded to the allegations made by the employer. The Complainant denies the allegations levelled against him but provides no detail as to why he denies same or substance with regard to his denial. He does not say why the allegations may be false or are incorrectly levelled against him. It is appreciated that the Complainant and attorneys on his behalf may respond in any way they see fit and the Complainant is not obliged to present this kind of information. The Complainant's version, however, is a factor that must be taken into account by the Fund when deciding to withhold or continue withholding a member's benefit.

10 It is fair to accept that Tiger's expert and counsel did the necessary to produce the pleading for the institution of civil proceedings because a detailed summons was issued on 9 February 2023 claiming more than R35 million from the Complainant. It is probable that the issuing was triggered by a communication from the SAPS towards the end of January that the Director of Public Prosecutions had declined to prosecute the Complainant because the evidence was insufficient to prove the commission of any crime beyond reasonable doubt. In any event, Tiger informed the PFA on 9 February of these facts, made submissions about the effect of the DPP's decision, alleged that the Fund was entitled to suspend payment of the benefit, reiterated its two in limine points (the particulars are unnecessary for present purpose), and asked for a determination.

11 The PFA issued her determination on 30 March, setting aside the Fund's decision to withhold the withdrawal benefit and (in effect) ordering the Fund to pay the full amount due with interest to the Complainant.

SUSPENSION AND RECUSAL

- 12 Before considering the determination and the grounds for reconsideration it is necessary to mention the events that followed on the determination.
- 13 Tiger applied for suspension of the determination in terms of sec 231 pending the disposal of the reconsideration application. Such an application is dealt with on the papers by the deputy chair of the Tribunal. In this instance, the chair of this panel had to deal with the matter and, after consulting with another member of the present panel, Mr Veldhuizen, dismissed the suspension application.
- 14 This gave rise to an application for an urgent interdict, preventing the Fund from paying the Complainant pending the determination of the second part of that High Court application, which was for the review of the PFA's determination and the dismissal of the sec 231 application. We understand that the interdict was granted by agreement which probably meant that the review of the deputy chair's decision became academic. We have been given the assurance that by proceeding with this matter we will not interfere with the High Court proceedings.
- 15 The involvement of the two panel members in dismissing the suspension application gave rise to a last-minute application for their recusal because of a perception of bias. In essence the argument boiled down to this: The chair and the one member have in the reasons filed in the review application indicated that their view was that lodging criminal complaints do not entitle an ex-employer to invoke the protection of sec 37D(1)(b)(ii)(bb) and that they have expressed views about the correctness of the PFA's determination about the delay in instituting civil proceedings especially where the one reason given (namely that Tiger had sufficient time to institute a civil claim for R18 million and could have amended once the

- extent of its loss had been determined) was adopted by the Complainant in his further submissions.
- 16 The two implicated panel members refused to recuse themselves and we mention as an aside that the Complainant opposed the recusal.
- 17 The basis of the criminal charge ground is that the chair held in past decisions (*Fundsatwork Umbrella Pension Fund v EE Ngobeni* PFA 64/2020; *Tape Aids For The Blind v Palhad* (PFA3/2022) [2022] ZAFST 38 (16 May 2022) that the mere laying of a criminal charge does not trigger the provision (agreed with by Mr Veldhuizen in the suspension decision). The third member of this panel (Adv Ndinisa) was a member of a panel that held the same in *Fundsatwork Umbrella Pension Fund v Matjiane* (PFA 39/2020) [2021] ZAFST 162 (11 February 2021).
- 18 It is uncertain whether counsel wished the deputy chair in his administrative capacity to constitute a panel of only those who have not sat in similar matters or only those who have found (“assumed” would be a better description because the older decisions contain no ratio, something that applies to the High Court decisions relied on) that a criminal charge does trigger the provision. Although the Tribunal does not apply the stare decisis principle it tends, for the sake of consistency, to follow previous decisions unless they appear to be clearly wrong. Any other panel would also have had to take the same approach on what is a purely legal argument. Counsel was entitled to argue that but although he raised the matter in his written argument and his opening, he concluded his argument by stating that the only issue in the case was “time”.
- 19 In the event, as we shall indicate, this aspect of the case became irrelevant to the decision of the case. The question whether the DPP had refused to charge the Complainant was

common cause and the letter from the police (the year was 2023, not 2022) is clear although Tiger, in its founding application, relied on the interpretation of the letter by unnamed experts, as if that were of any relevance. The charge had lapsed and has to date not be reinstated or followed up by a private prosecution.

20 As to the question of time delay, the two members expressed a prima facie view. When asked whether judges who, for instance grant interim orders or hear application for leave to appeal are perceived to be biased, we were informed that since we are an administrative tribunal, the public perception is that we tend to be biased because we do not take a judicial oath, and, we assume, that that we are reasonably seen to ignore sec 219(2). We reject the submission/aspersion. The perception must be reasonable and if some administrative tribunal may have an interest in its decisions (institutional bias) we have none and we also believe that this applies to the PFA.

THE RULES OF THE FUND

21 Assuming for the sake of argument that the mentioned Tribunal decisions are correct, Tiger and the Fund nevertheless relied on the Fund rules that provide as follows:

"Notwithstanding any other provision of these Rules, the Trustees may, where an Employer has instituted legal proceedings in a court of law and/or laid a criminal charge against the member concerned for compensation in respect of damage caused to the Employer as contemplated in Section 370 of the Act, withhold payment of the benefit until such time as the matter has been finally determined by a competent court of law ... provided that [inter alia]:

- the Trustees in their reasonable discretion are satisfied that the Employer has made out a prima facie case against the Member concerned and

there is reason to believe that the Employer has a reasonable chance of success in the proceedings that have been instituted;

- the Trustees are satisfied that the Employer is not at any stage of the proceedings responsible for any undue delay in the prosecution of the proceedings." (Underlining added.)

22 Counsel submitted that since the rules have been registered, they apply and may trump the provisions of the Act as interpreted by the Tribunal. No authority for this bold proposition was cited and we, without wishing to belabour the point, disagree. The Rules cannot take away what the Act gives and the Registrar/FSCA cannot by registering rules do so. Once again, it does not matter for the sake of this decision.

THE FINDINGS OF THE PFA

23 The findings of the PFA are many and detailed but we deal with the pertinent matters only. The point of departure was that the criminal charge was insufficient to delay payment because of the decisions mentioned. Although the PFA quoted the mentioned Fund rule, it did not consider its effect on the conduct of the parties any further.

24 The PFA proceeded to judge the decision of the Fund of 6 May 2022 and held in essence that the Fund did not apply the audi-rule, having failed to obtain the Complainant's version of the criminal allegations against him. It is correct that what the Fund did is somewhat suspect. To formulate an answer for the PFA to the complaint, the Fund sent an email to the Complainant on 4 July at 18h58, asking for his response to the allegations of Tiger by 6 July. On 5 July the Fund wrote to the PFA as follows:

The Fund did not receive the Complainants personal view of the 37 D withholding from him or from his attorneys. Even the PFA Complaint itself did not contain any detail

regarding why the Complainants Funds should not be withheld. The Fund therefore thought that it would be prudent to engage with the Complainant to invite him to make submissions regarding the withholding. The Complainant was given until the 6th of July 2022 to make his submissions to the Fund.

25 The Fund did not disclose to the PFA that the “personal views” were requested the previous evening, leaving the Complainant two days to respond. The Complainant was nevertheless able to respond on 5 July, relying on its submissions and representations of 29 March which the Fund received on 7 April.

26 The Complainant knew in detail what the case against him was when he resigned from Tiger. He also knew, because of the Tiger’s submissions what the case was, and he, properly represented, chose to ignore that aspect of the case in his original submissions of 29 March. In other words, the Complainant had given his side of the story (which was an avoidance) to the Fund already then in reply to Tiger’s full exposition of 7 March.

27 What happened during July was therefore of no consequence. The Fund probably acted out of excess of caution. The first sentence of the quoted letter was incorrect. The Complainant did have the opportunity to state his case, he consciously chose not to do so – even as of today – and the audi-requirement was, therefore, complied with when the decision was made. We consider the approach of the PFA in par 5.19 of the determination to place form over substance.

28 It may also be noted that the complaint was never that the Complainant had not been afforded the right to state his case before 6 May.

29 The second material finding relates to the delay in instituting civil proceedings. The PFA held that the Fund was obliged to impose “strict time limits” for Tiger to institute civil legal

proceedings, and since it did not do so, the decision was set aside and replaced with that of the PFA.

30 The Tribunal cannot recall that the PFA had in the past required of funds to impose strict time-limits when withholding benefits under the provision. The concept of such requirement is not compatible with a preliminary decision of the Fund that is subject to variation and where the rules of the Fund require that the Fund must be satisfied that the Employer is not at any stage of the proceedings responsible for any undue delay in the prosecution of the proceedings

31 Since one is dealing with the issue of reasonableness, it is necessary to have regard to the subjective views of the parties involved. The fact is that the Complainant, Tiger, and the Fund assumed that the rules govern the situation. This is apparent because the Fund, in its decision, relied on the rules as did Tiger in its submissions. The Complainant, too, acted on that assumption – otherwise he would previously, have raised the question that the rules do not govern the situation to the attention of the Fund and the PFA and he would not have brought the NPA's decision to their notice as soon as it was communicated to him. The argument that the rules were inapplicable or that the rules do not comply with the Act and that the Fund could accordingly not delay payment in the light of the rules was also not raised anywhere by the Complainant. (The PFA, by the way, was also insistent that a Fund had to follow its rules – para 5.6 – and did not suggest that the rule is or may be ultra vires the Act).

32 If that is the case, and we hold it to be so on the probabilities, it means that Tiger had no reason to issue its civil action before the conclusion of the criminal proceedings (in this case, based on the SAPS letter, the end of January 2022). There was in every-one's view a valid

withholding in force. The only limitation was prescription, and that was not an issue. Once that ground fell away, the civil proceedings were instituted within days.

- 33 The PFA considered the possibility that Tiger should have instituted civil proceedings during October 2022 when it was informed that the NPA required additional information for a successful prosecution. The PFA decided the matter on the legality or validity of the decision of 6 May because strict time-lines had not been set on 6 May and because of the failure of complying with the audi-rule at the time. Once that is the basis on which cases such as this should be decided what followed afterwards appears to be of no relevance.

FINAL COMMENTS

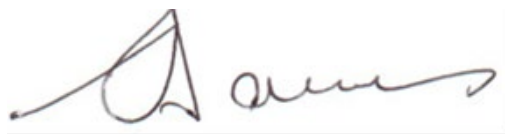
- 34 Much of the argument filed by the counsel for the respondent became irrelevant because of the limited line along which the applicant argued the case eventually. There was some reference to the Complainant's rights under the Constitution which boiled down to an implicit submission that the interpretation of the provision by the courts, especially that of the Supreme Court of Appeal in *Highveld Steel*, impinged on his rights. If the provision so interpreted is unconstitutional, that is for the court system.

- 35 It was also submitted that the reconsideration application was vexatious and lacks bona fides and should have been summarily dismissed in terms of sec 234(4) of the FSRAct and that a special costs order should be made against Tiger under sec 234(2). The outcome of the matter shows otherwise.

ORDER

- 36 The determination of the Pension Funds Adjudicator is set aside and remitted for further consideration.

Signed on behalf of the Tribunal Panel on 26 October 2023.

A handwritten signature in black ink, appearing to read "LTC Harms", enclosed in a thin black rectangular border. The signature is written in a cursive style with a large initial 'L' and 'H'.

LTC Harms (chair)