

THE FINANCIAL SERVICES TRIBUNAL

Case No: PFA68/2022

In the matter between:

WILLEM JAKOBUS OOSTHUIZEN	Applicant
and	
FUNDSATWORK UMBRELLA PENSION FUND	First Respondent
MOMENTUM METROPOLITAN LIFE LIMITED	Second Respondent
PENSION FUNDS ADJUDICATOR	Third Respondent

Tribunal: Adv TJ Golden SC (Chair), Adv W Ndinisa and Ms P Moloto-Stofile

For Applicant: In person

For First Respondent: Ms Tania Bakker, Principal Officer of Second Respondent, for the Fund

For Second Respondent: Ms Tania Bakker, Principal Officer of Second Respondent

For Third Respondent: Mr Naheem Essop, an official present for observation

Date of hearing: 28 June 2023

Date of decision: 18 August 2023

Summary: Application for reconsideration in terms of sec 230 of the Financial Sector Regulation Act, 9 of 2017 - Section 13 of the Pension Funds Act 24 of 1956 – Fund is bound by its rules - Section 7D(1)(c) of the Pension Fund Act – not providing adequate and appropriate information to members.

DECISION

Introduction

1. The Applicant applies for reconsideration of a determination by the Pension Funds Adjudicator (“the Adjudicator”) dated 26 October 2022. The Adjudicator is cited as the Third Respondent.
2. The application is brought in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 (“the FSR Act”).
3. The Applicant is aggrieved by the determination of the Adjudicator who dismissed his complaint against the conduct of Fundsatwork Umbrella Pension Fund (“the Fund”), the First Respondent.
4. The Second Respondent is Momentum Metropolitan Life Limited, the administrators of the Fund.
5. At the heart of the matter is the conduct of the Fund when it moved the Applicant’s retirement benefit from the money market investment to the Fund’s business account. It is not in dispute that the retirement benefit was placed in the Fund’s business bank account which has a lower return than an investment in the money market account. The Applicant is also aggrieved that the Fund had never communicated the move of his retirement benefit from the money market to the business account. According to the Applicant, the Fund did not send him any statement or communication to explain this decision.

Grounds for reconsideration

6. The Applicant posited several points for reconsideration in his application.

7. He advanced, amongst other, the following:
 - 7.1 That despite his request, he never received an explanation why no arbitration was held when he requested arbitration;
 - 7.2 He is aggrieved by the comment of the Adjudicator that he, as a former trustee for 27 years, ought to have been aware of the rules of the Fund and should have taken precautionary measures to safeguard his funds;
 - 7.3 At no point was the Applicant advised that his funds will be moved to the Funds' bank account upon his resignation;
 - 7.4 The re-investment was done in February 2020, a year after the Fund was subject to Regulation 38 of the Pension Funds Act 24 of 1956 ("the Act") on 1 March 2019, and again four years thereafter in terms of the Fund's rules which changed on 1 March 2016.

The Relevant Facts

8. The Applicant was in the employ of Maxion Wheels South Africa (Pty) Ltd (the employer") and resigned his employment on 29 February 2016.
9. The Applicant became a member of the Fund by virtue of his employment. It is common cause that he remains a member of the Fund to this day.
10. It was the Applicant's intention to take his pension benefit at the age of 65.

11. The Applicant also confirmed that he never received a statement from the Fund about his retirement funds after he left his company, a fact that the Fund could not dispute. When he enquired about his retirement funds on 26 February 2020, he was told that his pension funds were moved to a bank account of the Fund when he resigned his employment.
12. The Applicant was not requested, nor did he sign any documentation to authorise the Second Respondent (the administrator) to move his retirement benefit. The Applicant contends that his retirement funds were moved without his permission or knowledge.
13. The Applicant was advised in November 2021 when he requested statements of his retirement benefit that his funds were re-invested back into the money market investment fund.
14. The Applicant was dissatisfied that his funds were moved to a bank account with lower returns than the money market account without advising him of this and without his knowledge and consent.
15. He seeks compensation from the Fund for the loss in growth of his investment due to the erroneous placement of his retirement benefit into the Fund's business account as it ought to have been in the Fund's money market investment account.
16. The Fund's answer to the Applicant's complaints lacked substance. The Fund's version is that when the Applicant exited his employment, his employer informed the Fund of the termination of his employment via an

on-line portal system and that accordingly the process of disinvestment had to commence within 7 days of receipt of the Withdrawal Notification in terms of rule 6.3.2.1 of the Fund Rules. The Fund however did not even provide evidence of the online portal notification which it had allegedly received from the Applicant's employer.

17. The Fund relied on the definition of *Withdrawal Notification* in the Fund Rules which states the following:

“WITHDRAWAL NOTIFICATION means notification received by the Fund relating to a MEMBER leaving the FUND, which,

(a) If given via the AMDINISTRATOR'S web-based administration portal by either the PARTICIPATING EMPLOYER or a MEMBER, will be the electronic transmission of the notification of a representative of a PARTICIPATING EMPLOYER;

18. The Fund confirmed that the Applicant's retirement benefit was moved to the Fund's business bank account on 4 April 2016. The Applicant's retirement benefit at the time amounted to R5 921 966.60. According to the Fund, the interest earned on the Applicant's investment for the period April 2016 to November 2020 amounted to R2 115 879. 09. The total amount of the Applicant's gross benefit as at 30 November 2020 was R8 037 845.69 (before tax).
19. The Fund confirmed that on 30 November 2020 the Applicant's retirement benefit was re-invested in the Fund' default investment portfolio. This

move was done for all members whose benefit was disinvested but never paid out. According to the Fund, the re-investment was done according to the legislation regarding in-fund preservation.

20. The Adjudicator had to determine whether the Fund acted in terms of its rules when it dealt with the Applicant's pension benefit upon termination of his employment. The Adjudicator had to determine whether the Applicant received adequate and appropriate information to make an investment decision, and lastly whether there was a delay in payment of his retirement benefit.
21. The Adjudicator referred to the definition of Withdrawal Notification and noted that the employer notified the Fund via the administrator's online portal that the Applicant had exited his employment. The Adjudicator noted that the Applicant then became entitled to his withdrawal benefit. The Adjudicator noted that the Applicant in terms of rule 6.3.2.2 of the Fund Rules, had a duty to send the Fund written instructions that he does not want the Fund to start with the disinvestment process, but instead wants his retirement benefit to remain invested in the portfolio applicable to him. The Adjudicator concluded that as the Applicant never instructed the Fund, the Fund had to pay the benefit to the Fund's bank account, while waiting for Applicant's instructions.
22. On the issue of provision of adequate and appropriate information to the Applicant, the Adjudicator referred to section 7D(c) of the Act and noted that there is a duty on the Fund to provide the Applicant with adequate

information regarding his benefit for him to make an informed decision. The Adjudicator stated that the duty becomes more compelling when the complainant had to make a decision which could have adverse consequences for him.

23. The Adjudicator concluded that although she does not believe that the Fund had provided the Applicant with adequate information after his benefit was disinvested, there was a correlative duty on the Fund's members to actively seek information and clarify their position before making a decision. In short, the Adjudicator held that the Applicant also had a duty to seek information about his benefit and would have been aware where his retirement benefit was kept.
24. In respect of the delay in the payment of the retirement benefits, the Adjudicator referred to rule 6.1.6 of the Fund Rules. The Fund's position was that no payment can be made until it receives a fully completed form. The Adjudicator concluded in this regard that the appropriate remedy is for the Applicant to submit a completed retirement claim form to the Fund including details of his preferred insurer to enable the Fund to process payment.
25. The primary issue before this Tribunal is to determine whether the Fund has complied with its rules in respect of dealing with the Applicant's retirement benefit.

Legal Framework and Analysis

26. It is trite law that a pension fund must act in accordance with its Rules.

This is in line with section 5(1)(a), read with section 13 of the Act.

27. In the present matter, the Fund's Rules defines "WITHDRAWAL NOTIFICATION" as follows:

"means the notification received by the FUND relating to a MEMBER leaving the FUND, which,

(a) if given via the AMDINISTRATOR'S web-based administration portal by either the PARTICIPATING EMPLOYER or the MEMBER, will be the electronic transmission of the notification by a representative of the PARTICIPATING EMPLOYER;

(b) ...

(i)

(ii)

(iii)

***together** with the information required by the COMMISSIONER and all the information required by the FUND, included but not limited to the information required to request BANK VERIFICATIN." (own emphasis)*

28. Withdrawal Notification as defined in the Fund Rules consists of, amongst

other things, receipt by the Fund of (i) notification via a web-based administration portal by a representative of a participating employer, **together with;** (ii) information required by the Commissioner; (iii) all information required by the Fund, included but not limited to (iv) the information required to request Bank Verification.¹

29. The representative of the Fund, Ms Bakker, submitted that the Withdrawal Notification as defined by the Fund Rules was received by the Fund but she was not able to point to any evidence to confirm this. No evidence to this effect formed part of the record before the Tribunal.
30. As he did before the Tribunal, the Applicant submitted that at the time that he left his employment on 29 February 2016, he never intended to claim his retirement benefit and that he instead wanted to leave it with the Fund until he reached the age of 65.
31. When regard is had to the definition of the term Withdrawal Notification, it is clear that not all the requirements set out therein were met when the Fund allegedly received the web-based portal notification from the Applicant's erstwhile employer. We therefore cannot conclude on the facts that a valid withdrawal notification had been received and that a compliant withdrawal had been processed.
32. It cannot be correct on the facts that a valid withdrawal notification was received which triggered the disinvestment, and this without the consent

¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality (920/2010) [2012] ZASCA 13 (15 March 2012)*, at par 18, stating the present state of law in the process of interpretation.

of the Applicant and in the absence of him knowing what the Fund intended to do. The Fund is thus precluded from relying on the “automatic trigger” in rule 6.3.2 of the Fund Rule merely upon receipt of the portal Withdrawal Notification as received from the employer. Accordingly, the provisions regulating the disinvestment process of withdrawal benefits was not triggered.

33. It is not in dispute that the Applicant did not issue any written instructions to the Fund regarding the withdrawal of his retirement benefit. Rule 6.3.2.2 provides inter alia that if the Fund does not receive instructions from the member, the provisions of rule 6.3.4 will apply.
34. Section 7D(1)(c) of the Act states that, amongst other things, that the duties of the board of the fund are to ensure that adequate and appropriate information is communicated to the members and beneficiaries of the fund informing them of their rights, benefits and duties in terms of the rules of the fund, subject to such disclosure requirements as may be prescribed.
35. The Applicant was aggrieved by the Fund’s failure to provide him with information regarding his retirement benefit.
36. The Fund did not dispute that it did not communicate with the Applicant between the years 2016 to February 2022,² to enable him to make an informed decision regarding his retirement benefit. The conduct of the

² Record, Part B, page 15

Fund, in our view, violates the provisions of section 7D(1)(c) of the Act.

37. We note that the Fund Rules do not appear to provide for the disinvestment of retirement benefits of a member into the business bank account of the Fund.
38. The Fund was afforded an opportunity during the hearing of the matter to refer the Tribunal to a specific rule empowering it to transfer the funds into its business account, but it was not able to do so. We are not persuaded that the transfer of funds under these circumstances was done lawfully and in compliance with the Fund Rules.
39. It is also not in dispute that the business bank account of the Fund into which the retirement funds were transferred on 4 April 2016 yielded lower returns than the money market investment platform where the Applicant's funds were originally invested. This formed part of the Applicant's complaint to the Adjudicator.
40. The Applicant has remained a member of the Fund. When the Applicant resigned from his employment, he did not exit the Fund, nor did he indicate an intention to leave the Fund.
41. The Fund Rules were amended with effect from 1 March 2016, which is the day after the Applicant resigned his employment. Ms Bakker did not dispute this. She rather submitted that the Applicant's retirement benefit was dealt with in terms of the unamended Fund Rules applicable prior to 1 March 2016. This however does not assist the Fund.

42. The Applicant's retirement benefit is governed by the Fund Rules and any applicable and relevant legislation. The Applicant's retirement benefit was clearly subject to the amended Fund Rules *from* 1 March 2016. It is not clear why the Fund did not apply the amended Fund Rules which provided for a default investment portfolio (investment in money market) and which was clearly applicable to the Applicant's retirement benefit.
43. It is equally unclear why the Applicant's retirement benefit was not re-invested in the default investment portfolio pursuant to Regulation 38 of the Act when the regulation became effective on 1 March 2019. This issue does not appear to have been considered by the Adjudicator at all.
44. On a conspectus of the largely uncontested facts, we are of the view that the Fund did not act in compliance with its own rules when it dealt with the Applicant's retirement benefit. The Fund also failed to act in accordance with Regulation 38 of the Act as set out above. Overall, the Fund failed to act in the best interest of the Applicant as a member of the Fund.

Conclusion

45. There was no valid Withdrawal Notification as defined in the Fund Rules. It follows that the subsequent disinvestment process and the transfer of the Applicant's retirement benefit into the Fund's business bank account was irregular and unlawful.
46. The Fund was not able to provide a cogent basis as to why the Applicant's

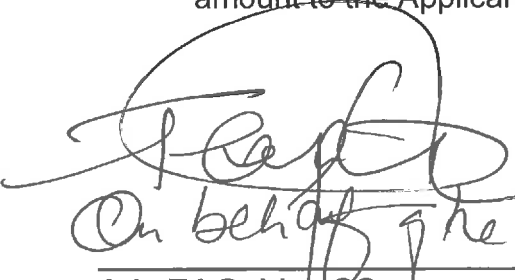
retirement benefit was not re-invested back into the Money Market investment platform in terms of Regulation 38.

47. The application for reconsideration must succeed.
48. The determination of the Adjudicator is accordingly set aside in terms of section 234(1)(a) of the FSR Act.

ORDER

(a) The application for reconsideration is upheld.

(b) The matter is remitted to the Adjudicator in order to determine the amount which the Applicant should have received from the Fund for the growth of his investment had his retirement benefit remained invested in the Money Market investment platform, and for the First Respondent to pay this amount to the Applicant as part of his retirement benefit.



On behalf of the Panel.

Adv TJ Golden-SC

(Chairperson of the panel)

Adv W Ndinisa

Ms P Moloto-Stofile

18 August 2023