

THE FINANCIAL SERVICES TRIBUNAL

Case No. PFA75/2024

In the matter between:

AUTO WORKERS PROVIDENT FUND

APPLICANT

And

THULANI NYALUNGU

FIRST RESPONDENT

MAPONYA MOTORS t/a SOWETO TOYOTA

SECOND RESPONDENT

ALEXANDER FORBES RETIREMENT FUND (PENSION SECTION)

THIRD RESPONDENT

THE PENSION FUNDS ADJUDICATOR

FOURTH RESPONDENT

KEY WORDS: Reconsideration of Pension Funds Adjudicator's ("PFA") determination

SUMMARY: Application for reconsideration – Transfer of member's fund credits between funds – Payment of pension benefits – Duty to comply with pension fund rules – Determination set aside and remitted back to the PFA for reconsideration.

DECISION

PARTIES

1. The Applicant, the Auto Workers Provident Fund (“the Fund” or “the Applicant”), is what its name says, and is one of the approved Motor Industry Bargaining Council (“MIBCO”) funds.
2. The First Respondent is the Fund member who was the complainant before the PFA (“the Complainant”).
3. The Second Respondent, Maponya Motors, is the current employer of the Complainant (“the Employer”).¹
4. The Third Respondent, Alexander Forbes Retirement Fund (Pension Section), is the fund that the Employer invest in (“AFRF”).²
5. The Fourth Respondent’s is the Pension Funds Adjudicator (“the PFA”).
6. The Applicant (“the Fund”) applies for a reconsideration of the PFA’s determination dated 6 September 2024.
7. The application is in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 (“the FSR Act”) and the determination was made under section 30M of the Pension Funds Act 24 of 1956 (“the Act”).
8. The parties have waived their right to a formal hearing of the application, and this is, accordingly, the decision of the Tribunal.

¹ Maponya Motors was the current Employer until the Complainant’s resignation in June 2024 to join NMI Toyota Menlyn, which participates in AFRF.

² It should be noted that the third respondent paid the Complainant his withdrawal benefit in July 2024, and it chose to abide by the decision of the Tribunal.

MATERIAL FACTUAL BACKGROUND

a) Complaint to the PFA

9. The Complainant lodged a complaint with the PFA. He has been employed by the Employer (Maponya Motors) from 01 March 2023, which employment still subsists.³ The Employer is investing the Complainant's provident fund with AFRF and that prior to his employment with the Employer, the Complainant was employed by CFAD Motors (Monument Toyota Constantia) ("the former Employer") and CFAD Motors was investing his funds with the Applicant. The Complainant indicated that when his employment was terminated with CFAD Motors on 31 January 2023, he requested to withdraw his funds, however, the claim was rejected by the Applicant as he is still employed within the motor industry. Following this, the Complainant requested that his funds be transferred to AFRF, however the Applicant refused to transfer his funds.⁴
10. The relief sought by the Complainant before the PFA was that the Applicant be ordered to transfer his funds to AFRF and that he be reimbursed for the interest or investment returns on the initial amount or fund value that he has accumulated whilst he was working for his previous employer, CFAD Motors from 01 December 2021 to 31 January 2023.
11. On receipt of the complaint, the PFA notified the Applicant, the AFRF, and the Employer of the complaint and requested their response.⁵

b) AFRF's and the Applicant's responses to the complaint

³ See footnote 1, above.

⁴ See paragraphs 12 to 16 below for the reasons why the Applicant refused to transfer the Complainant's funds to AFRF.

⁵ The Employer (Maponya Motors) did not submit any response.

12. AFRF submitted that automotive funds must apply for exemption not to belong to MIBCO funds, Auto Workers Provident Fund and Motor Industry Provident Fund respectively.⁶ It submitted that every year, employers must apply for an exemption to not participate in MIBCO funds and to participate in alternate funds and if the exemptions are rejected, the employer will then have to contribute to the MIBCO fund. AFRF indicated that employers need to prove that the alternate fund is similar or better than their fund. MIBCO looks at benefits, costs and net allocation toward retirement. The Employer applied for its exemption which was rejected due to the costs on the AFRF being higher than the costs on the MIBCO fund. As a result, MIBCO's system expects the Complainant's contribution for his record due to the exemption being rejected.
13. AFRF submitted that the crux of the complaint does not relate to AFRF but to the Applicant's rejection to transfer his benefit to AFRF.
14. The Applicant acknowledged that the Complainant is its member and that he accumulated pension fund credit flowing from his services with CFAD Motors, the former Employer.
15. The Applicant submitted that because the Employer's exemption was revoked, the Complainant's contributions are still held by it (the Applicant), and that the Employer has been in the process of applying for an exemption and to date it is not yet granted.
16. The Applicant stated that it could not transfer the Complainant's benefit until it has received a section 14 transfer request or a letter of exemption from the Complainant's

⁶ The difference in these two funds is that members are placed in them according to their grades.

new employer. The Complainant will remain a member of the Applicant until such time that the latter receives an application of a section 14 transfer.

17. The Applicant confirmed that once the exemption is granted to the Employer and an application for a section 14 transfer is received by the Applicant, the Complainant's fund credit will accordingly be transferred to AFRF.

18. The Complainant has since left the employ of the Employer and claimed payment of his benefits from AFRF.⁷

c) Determination of the PFA

19. In her determination, the PFA identified that the initial complaint concerned the Applicant's failure to transfer the Complainant's fund credit to AFRF. Upon her investigation, she also discovered that there were other non-compliance issues that should be considered to ensure that the complaint is properly resolved.

20. The PFA concluded that the complaint that she had to deal with was whether or not the Complainant is entitled to payment of his withdrawal benefit.

21. The PFA made the following order in paragraph 6 of the determination:

- i. She directed the Complainant to submit a completed withdrawal claim form to the Applicant together with a copy of his identity document, tax number and stamped bank statement not older than three months to the Applicant.

⁷ The Tribunal notes that the payment of this withdrawal benefit referred to herein relates to the fund credit that the Complainant accumulated after joining the Employer (Maponya Motors) and does not relate to CFAD Motors.

- ii. She directed the Applicant to condone the absence of the Employer's signature or stamp on the Complainant's claim form.
- iii. She ordered the Applicant to pay the Complainant the fund credit that it is currently holding consisting of contributions received from the previous employer for November 2020 to January 2023 and contributions from the Employer for March 2023 to August 2023 and November 2023 for February 2024, within two weeks of receiving the Complainant's claim documents.
- iv. She ordered AFRF to pay the Complainant the fund credit that is currently holding consisting of contributions for March 2023 to June 2024, within two weeks of the determination.⁸
- v. She ordered the Applicant and AFRF to provide the Complainant with the breakdown of the withdrawal benefits stated above, within one week of effecting such payments.

APPLICATION FOR RECONSIDERATION

22. The Applicant is aggrieved by the PFA's order as outlined above and applies for reconsideration of the determination. It lodged an application for reconsideration before this Tribunal on 31 October 2024.

⁸ The Tribunal notes that AFRF has already complied with the PFA order by paying the Complainant his fund credit as well as providing him with the breakdown of his withdrawal benefit.

23. An aggrieved person may, according to section 230(1) of the FSR Act, apply for reconsideration of a decision of the PFA, which in turn requires the Tribunal to assess whether the decision of the PFA was correct or incorrect.
24. The present reconsideration application is under section 230 of the FSR Act, and in terms of section 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.
25. The Applicant avers that the PFA in her determination stipulates that the complaint pertains to the payment of the Complainant's withdrawal benefit by the Applicant, whereas according to the complaint form, the Complainant's desired relief is that the Applicant transfers his fund credit to AFRF, not the payment of his withdrawal benefit.
26. The Applicant submits that notwithstanding the PFA's assertion regarding the need to address additional non-compliance issues requiring adjudication to ensure comprehensive resolution, it appears that the PFA prematurely concluded the nature of the complaint without adequately considering the Complainant's actual grievance, which is transfer of benefits.
27. Contrary to the Complainant's stated desired outcome, the PFA erroneously confined the complaint's scope to the payment of the Complainant's withdrawal benefit.
28. Although the Applicant acknowledges the PFA's jurisdiction to adjudicate on additional matters to ensure fairness, the Applicant contests the PFA's decision to order payment of a withdrawal benefit without reference to the applicable rules, contending this approach is erroneous and *ultra vires*.
29. Rule 4.4 of the Applicant's rules states the following:

“4.4 Termination of Membership

4.4.1 Unless specifically provided for in the Rules, no MEMBER may terminate MEMBERSHIP of the Fund while the MEMBER remains in SERVICE.

4.4.2 The MEMBERSHIP of a member ceases when there is no benefit in the FUND, accrued or payable, in respect of that MEMBER.

4.4.3 A member who leaves the SERVICE of the EMPLOYER to commence SERVICE with another EMPLOYER will be deemed to have remained in SERVICE and will continue to be a MEMBER of the FUND. [My Emphasis]

30. The Applicant submits that the provisions of Rule 4.4.1 expressly state that, unless specifically provided for in the Rules, no member may terminate membership while the member remains in service. The Complainant’s ongoing employment within the motor industry triggers a restriction on withdrawal, pursuant to the Applicant’s rules. Consequently, the Complainant’s membership shall persist until termination of employment in the motor industry.

31. The Applicant further submits that contrary to the PFA’s determination that orders the Applicant to pay the Complainant’s fund credit:

- (i) The Complainant remains employed in the motor industry, as per his submissions.
- (ii) This continued employment within the same industry renders the Complainant ineligible for withdrawal of his funds.
- (iii) Pursuant to the Applicant’s rules above, the Applicant can only facilitate transfer of available funds upon receipt of approval for a section 14 transfer to his current fund.

32. The Applicant submits that the PFA's order contravenes the rules of the Applicant.⁹
33. The Applicant submits that it noted that the Employer, applied for an exemption to participate/contribute to a different fund, however, the exemption does not provide the Complainant's an entitlement to a withdrawal benefit as he is still employed within the motor industry. Furthermore, the PFA's inexplicably shifted from a request to transfer funds, to a withdrawal benefit, notwithstanding the Complainant's ongoing employment within the same industry. The PFA's determination errors, which the Applicant identified, include mischaracterizing the Complainant's complaint, failing to apply the applicable rules and incorrectly relying on rules pertaining to fund membership. Despite the PFA's broad powers, the Applicant's rules cannot be disregarded and must be considered when rendering decisions.
34. The Applicant further submits that it is clear from Paragraph 1.1 of the determination that the PFA incorrectly captured the complaint and such it was bound to arrive at an incorrect decision. The PFA relied on rules relating to membership and no rules were referred to that relates to the withdrawal benefit.
35. The Applicant concluded that it can only act in accordance with the Act and its rules, which are sacrosanct as held in the *Tek v Lorentz case*.¹⁰ The Applicant acted in terms of the Act and the rules, therefore the decision by PFA should be set aside and she be ordered to reconsider the matter based on the provisions of the Rules of the Applicant as quoted.

ANALYSIS AND FINDINGS

⁹ See paragraph 21 above where the PFA's order is outlined.

¹⁰ *Tek Corporation Provident Fund and Others v Lorentz* (2000) 3 BPLR 235 at paragraph 15.

36. The Applicant argues that the PFA's determination deviated from the scope of the original complaint.
37. The Tribunal agrees that the PFA's determination shifted the focus from the complaint to request to transfer benefits to the payment of withdrawal benefit to the Complainant.
38. Section 30D of the Act provides that the main object of the PFA is to dispose of complaints lodged in terms of section 30A(3) of the Act "in a procedurally fair, economical, and expeditious manner". This section emphasizes the importance of adhering to principles of fair procedure.
39. In this case, the PFA reformulated the Complainant's complaint by focusing on the payment of withdrawal benefit, a point not raised in the original complaint about the transfer of pension fund credit to AFRF. In terms of the complaint the Applicant had to transfer the Complainant's fund credit to AFRF but under the PFA's reformulation of the complaint and her order both the Applicant and AFRF must pay the withdrawal benefits.
40. The provision of the Applicant fund rule 4.4 is expressly clear in that – *a member shall not cease to be a member while he/she remains in the service of the motor industry.*
41. The Complainant's resignation from CFAD Motors did not have the effect of terminating his membership with the Applicant. By operation of the Fund Rules, by which the Complainant is bound, the Complainant's membership would only have terminated if his benefits were paid out before he joined the service of another motor industry. This did not happen. After leaving the previous employer, the complainant

immediately joined the services of the Employer (Maponya Motors). Under rule 4.4, the Complainant remains a member of the Applicant to this day.

42. There is no dispute that the Complainant remained in the employment of the motor industry and continues to be so even after his resignation from the Employer.¹¹ The PFA nowhere in her determination did she address the submission of the Applicant about the termination of service and the applicable rules.

43. We note that the PFA became aware of the Complainant's resignation from the Employer and the fact that he thereafter joined a new employer (NMI Toyota Menlyn) that has exemption, but this aspect is not addressed by the PFA in the determination.¹²

44. This Tribunal must thus establish whether the PFA considered all the relevant facts and applied such facts to the law, in arriving at her determination dated 6 September 2024.

45. Applying the above legal principles, and premised upon the documents filed of record, this Tribunal agrees with the submission of the Applicant that the PFA's order is directing the Applicant to act unlawfully.

46. The Applicant relies on its rule 4.4 for the submission that the determination directing it to pay the Complainant his current fund credit and, in due course, his outstanding withdrawal benefits requires the Applicant to act unlawfully.

47. In this instance, it is therefore appropriate to refer the matter to the Adjudicator for reconsideration and specifically by having regard to the provision of the Applicant fund rule 4.4 and the fact that the Complainant remains in the services of the motor industry.

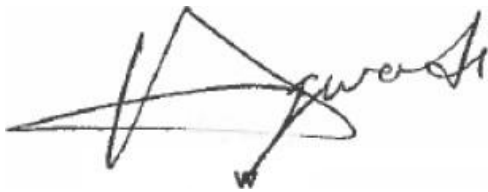
¹¹ See paragraph 43 below stating that the Complainant has now joined NMI Toyota Menlyn.

¹² See paragraphs 4.1. and 4.12 of the PFA's determination (Part A, page 15 of the Tribunal record).

ORDER:

For the reasons stated above, the reconsideration application must succeed, and the PFA's determination dated 6 September 2024 ought to be set aside, and the matter is referred back to the PFA for reconsideration.

Signed on behalf of the Tribunal on 25 March 2025.

A handwritten signature in black ink, appearing to read 'M Sigwadi', is written over a horizontal line. The signature is stylized and cursive.

Prof/Dr M Sigwadi (Member) and Judge LTC Harms (Chair)