

THE FINANCIAL SERVICES TRIBUNAL

Case No: **PFA34/2020**

In the matter between:

RECKITT BENCKISER RETIREMENT FUND

Applicant

and

MR BONGANI C GAMEDE

First Respondent

THE PENSION FUNDS ADJUDICATOR

Second Respondent

RECKITT BENCKISER PHARMACEUTICALS SA (PTY) LTD

Third Respondent

Tribunal: H Kooverjie (chair), E Phiyega and A Jaffer

Summary: The Fund, in exercising its discretion, must be satisfied that it applied its mind appropriately, impartially and in a balanced manner in terms of Rule 11(2) of the Fund Rules.

DECISION

A INTRODUCTION

1. The applicant ("**the Fund**") instituted this application for reconsideration against the determination of the Pension Fund Adjudicator ("**Adjudicator**") regarding the withholding of the first respondent's (Mr Gamede's) withdrawal benefit by the Fund.

B COMPLAINT

2. The complaint concerned the withholding of Mr Gamede's withdrawal benefits in terms of section 37D(1)(b)(ii) of the Pension Fund Act ("**PFA**") by the applicant.
3. Mr Gamede was employed with Reckitt Benckiser Pharmaceuticals (Pty) Ltd (third respondent) from December 2015 to 30 March 2019. He was a member of the applicant by virtue of his employment. Mr Gamede indicated that he was served with a notice of misconduct a day before he was due to complete his notice period, consequent to him resigning. At the time and upon exiting from his employment on 30 March 2019, he was entitled to his withdrawal benefit of R444,879.00. The employer had however requested the Fund to withhold the complainant's withdrawal benefit in terms of section 37D(1)(b)(ii) of the PFA.
4. Five months later, after leaving his employment, the employer instituted criminal proceedings against Mr Gamede.

C THE ADJUDICATOR'S DETERMINATION

5. Ultimately the issue for determination is whether the Adjudicator's decision was justified on the facts placed before it at the time? The core dispute centres on the Adjudicator's finding that the Fund's decision to withhold the payment of the withdrawal benefit was merely on the strength the employer's submissions dated 13 August 2019.
6. Furthermore the Adjudicator reasoned that:

- 6.1 The Fund failed to monitor the progress in the criminal case. This in itself constituted a failure on the part of the Board of the Fund to comply with its duties imposed in terms of section C of the PFA.
- 6.2 The Adjudicator took note of the fact that the employer opened a criminal case against the complainant in August 2019, which was just under five months after his resignation. The employer had informed the Fund in the said letter of 13 August 2019 the criminal proceedings against the complainant together with the case and investigation officer's details. The criminal proceedings were instituted due to allegations of fraud levelled against the complainant.
- 6.3 In its further reasons the Adjudicator made reference to the **Jefta**¹ matter where the Court acknowledged that the Fund is required to apply its mind appropriately, impartially and in a balanced manner. Furthermore that the Fund is required to afford the employee an opportunity to respond to the employer's notification regarding withholding with the funds.
7. From the determination it appears that the Adjudicator was only equipped with the 13 August 2019 letter.² In this regard we refer to paragraph 5.11 of the determination:

“Based on the evidence placed before the Adjudicator, it is found

¹ SA Metal Group (Pty) Ltd v Deon Jefta and Two Others, Case no 20298/2018, unreported

² Page 3, Part B

that the Board of management of the first respondent exercised its discretion to withhold the payment of the complainants withdrawal benefit merely on a letter dated 13 August 2019 received from the third respondent and without any supporting evidence, that the third respondent made out a prime facie case against the complainant.”

D ANALYSIS

8. The Fund challenged the Adjudicator’s decision and reasoning on the basis that that Adjudicator failed to apply principles of equity as envisaged by section 30D(2)(a) of the PFA. In particular, there were findings of procedural shortcomings in the decision making process of the Board of the Fund; the legislative purpose of section 37D(1)(b)(ii) of the PFA; and the disproportionate negative impact it would have on the rights and interests of the employer.
9. Section 37D(1)(b)(ii) of the PFA allows the Board of the Fund to withhold any amount due by a member to his employer on the date of his retirement on or which he ceases to be a member of the Fund in instances when there is theft, dishonesty, fraud or misconduct by a member from any benefit payable in respect of the member or the beneficiary in terms of the Rules of the Fund.
10. It is understood that the object of this section is to protect the employer’s right to pursue the recovery of money misappropriated by employees.³ The court reasoned that this provision should be interpreted purposively because a contrary interpretation would render the protection afforded to the employer by

³ ABSA Bank Limited v Barmiest and Others [2004] 5 SA 595 SCA at para 14

virtue of section 37D(1)(b)(ii) meaningless, as a result which plainly could not have been intended by the legislature.

11. The reality, however, is that when a purposive interpretation of section 37D(1)(b)(ii) is followed, an employee subsequently found innocent would have been prejudiced while the Fund withheld his/her pension benefit. Therefore, in exercising its discretion afforded by section 37D(1)(b)(ii), a pension fund must act with care and reasonableness. In this regard the court held in the Highveld⁴ matter that:

“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.”

12. The South African Broadcasting Corporation SOC Ltd v South African Broadcasting Corporation Pension Fund and Others⁵ upheld the Highveld matter approach by interpreting section 37D(1)(b)(ii) purposively. The court held that if an employer can prove *prima facie* that the employee might be liable for damages and that the employer has a *prima facie* right to recover the losses it incurred which is directly attributable to the employee’s behaviour, the pension fund may withhold payment in terms of section 37D(1)(b)(ii).

13. Pension funds should, however, be aware that the discretion afforded to them

⁴ Highveld Steel and Vanadium Corporation v Oosthuizen 2009 (4) SA 1 SCA

⁵ 2019(4) SA 608 GJ

must be exercised with due diligence and take into account various different factors. In **Tleane v The Pension Fund Adjudicator and Others**, the Appeal Board of the Financial Services Tribunal cautioned pension funds and held that the withholding of a pension benefit is unjust, oppressive and inequitable where the actions by the fund cannot be sustained even under a liberal and purposive interpretation of section 37D(1)(b)(ii).

14. The Appeal Board held that a material factor to be taken into account in making a value judgment is the nature of the decision and its effect on the applicant. The competing interests of the employer and the employee need to be taken into account with specific regard to the strength of the employer's claim against the applicant's prejudice.
15. In this particular matter we note that the Fund withheld the withdrawal benefit due to the employer advising the Fund of serious allegations made against Mr Gamede of theft and/or fraud and corruption, which was to the detriment of his employer.
16. In arriving at its discretion we are mindful that the Adjudicator acknowledged that the Fund is required to apply its mind appropriately, impartially and in a balanced manner in deciding to withhold the benefit. The mere satisfaction by the Board that the employer has placed allegations before it would not on its own be sufficient.⁶
17. It was intended that the said provision be interpreted liberally, in that where a

⁶ SA Metal Group (Pty) Ltd v Deon Jeftha and Others Case No 20298/2018 at paragraph 62 – 63 (unreported)

benefit has accrued as in this matter, the member enjoys full ownership of the pension fund. Thus any claim that would have the effect of depriving such a member of the use and enjoyment of this asset, must be carefully scrutinised. This is done by weighing the competing interest of the parties after affording a member the opportunity to place this case properly before the Fund.

18. If we consider the relevant correspondence, it becomes apparent that the Fund did not conduct such enquiry with Mr Gamede. The Fund however submitted that it had indeed followed up on the criminal proceedings and had the necessary documentation including the investigation report when it exercised its discretion to withhold the benefits.
19. In having considered Part B of the record (particularly the 14 August 2019 letter) it appears that the Fund failed to furnish the Adjudicator with the supporting information. If we have regard to the chronology of events, we are mindful that the Fund was requested to withhold the benefits shortly after the criminal proceedings were instituted.
20. Prior to that we note from the minutes of the meeting of 19 July 2019 that the Board was informed of the forensic investigation being conducted against the member and decided that it would only withhold the benefit if criminal proceedings were instituted.⁷

⁷ P180, Part A of the record

E FURTHER EVIDENCE

21. Apart from what was placed before the Adjudicator, Mr Gamede applied for the admission of further evidence. Shortly before the hearing, on 13 August 2020, Mr Gamede sought leave to admit further evidence before this Tribunal, which constituted the oral evidence, in support, and filed a “*progress report*” (in terms of section 232(5) of the FSR Act.

22. The Fund, upon receipt of the “*progress report*” elicited a response from the employer. Furthermore the Fund learned that as late as 21 August 2020, separate civil proceedings were also instituted for the recovery of damages that the employer had alleged to have suffered due to the conduct of Mr Gamede. Consequently this caused the Fund to seek leave to file the further evidence presented by Mr Gamede.

23. The Fund demonstrated that it was obliged to bring such further information to the Tribunal’s attention.

24. Although the Fund did not object to the further evidence, it placed on record that it did not accept the accuracy of the allegations set out in the progress report. The Tribunal considered the said applications and allowed the oral evidence on the basis that it was relevant to the issues before us. The first respondent’s case was *inter alia* premised on the employer being dilatory in the finalization of the criminal proceedings. Although the evidence of the witness was not in a form of an affidavit, the progress report filed by Mr Gamede dealt with the nature of the evidence to be presented. The Tribunal condones the failure to follow the prescribed form and process in this instance.

25. The Investigating Officer, Detective Maserame, testified that the employer was not cooperating efficiently with him in order for him to finalize the investigation. Consequently the intention to file the “*progress report*” was to demonstrate the dilatoriness of the employer in finalizing the criminal proceedings.
26. With the presentation of the evidence we took cognisance of the fact that Mr Gamede resigned on 29 March 2019 and the criminal matter was only registered on 6 August 2019.
27. He further testified that on or about 10 August 2019, the Investigation Officer requested statements from the employer. Thereafter the matter was referred to the NPA for a decision. Around January 2020 more statements were requested from the employer as it became evident that further investigation was necessary.
28. Mr Dirk Labuschagne, responsible for conducting the investigation on the employer’s behalf showed that due to COVID-19 lockdown there was inevitable delay in obtaining the statements from the necessary witnesses. He testified that the outstanding affidavits were furnished to the Investigation Officer around 31 August 2020.
29. It cannot be gainsaid that it took the employer just less than 5 months to institute criminal proceedings against Mr Gamede, and over 17 months to institute civil proceedings. Although and understandably so, we appreciate that the employer does not have control over the criminal proceedings, it was however the employer’s responsibility to monitor the criminal proceedings and avoid unreasonable delay in the finalisation thereof. Although one can argue that the

COVID lockdown contributed to the delay, it still remained the responsibility on the employer to ensure that the criminal proceedings went underway and that the affidavits requested were filed timeously.

30. The Investigation Officer testified that he was continually working on the said matter, even during the lockdown period and requested the statements from the employer early on. Despite such requests he received the affidavits months later in August 2020. Mr D Engelbrecht was required to furnish the outstanding evidence/affidavits to the Investigation Officer.
31. Mr Engelbrecht testified and as gleaned from his answering affidavit that there was no intended delay on his part. Moreover he maintained continuous contact with the Investigating Officer, and also met with him. He testified that the delay was due to the COVID-19 pandemic lockdown and the movement restrictions, which made it difficult for him to obtain the necessary affidavits from witnesses. Mr Engelbrecht added that currently there is minimal evidence which remains outstanding.
32. In considering this matter we are mindful of the documentation and facts placed before the Adjudicator when the determination was made. The evidence that is now being presented was not before the Adjudicator. The issue is whether such further evidence is material and should be considered by the Adjudicator. In the event that the facts which have now become to light are material then the matter should be remitted for reconsideration to the Adjudicator.
33. The Fund in this application emphasized that the Adjudicator's reasoning is flawed as the Fund had, at all times, exercised its discretion after having

considered the matter appropriately.

34. In particular it was submitted that the Fund was aware of further factors such as the forensic investigation. As per the investigation findings, the Fund was aware that the loss suffered or suspected to have suffered by the employer was in the region of R9 million. Hence it was argued that the Adjudicator was incorrect in a finding that the employer had not established a *prima facie* right to request or withhold Mr Gamede's pension benefit pending the finalisation of the criminal proceedings.
35. This then brings us to the pressing question; what facts were placed before the Adjudicator at the time of the determination? The applicant submitted that the following were placed before the Adjudicator namely that:
- 35.1 the criminal complaint was lodged in 2019, about a month prior to the Fund submitting its representations on the complaint;
 - 35.2 the Fund stated in its submission that "***it will monitor a progress in a criminal matter***";
 - 35.3 the Fund was made aware of the progress in the criminal matter through the updates provided by the employer;
 - 35.4 the employer held Board meetings, and in such meetings the criminal proceedings were discussed and followed up;
 - 35.5 moreover around February 2020, the employer provided a progress report to the Adjudicator's office upon their request regarding the criminal proceedings. It could only be then upon this basis that the

Adjudicator at paragraph 5.8 of its determination could state:

“It appears from the submissions made by the third respondent that it is actively pursuing the case against the complainant. A case by the third respondent is supported by a forensic investigation and whilst a substantial amount of R9 million. It also appears from the submission that the criminal cases were referred to the NPA for further investigation. It would be unjust to ignore the efforts made by the third respondent in pursuing its case.”

36. We however cannot agree in totality with the Fund. The evidence more particularly the minutes of the Board meeting was not before the Adjudicator.

F FINDINGS

37. We further find that the Fund however fell short of not inviting Mr Gamede to make his submissions. The Fund's response in this regard was that the allegations of misconduct was sufficient to establish a *prima facie* right to have the withdrawal benefit withheld. The Fund thus did not have to be absolutely convinced that Mr Gamede committed the relevant transgressions.

38. Rule 11(2) of the Fund Rules states the following:

“Trustees may, where an employer has instituted legal proceedings against a member, withhold payment of the benefit until such time as the matter has been finally determined by a competent court or has been settled formally or withdrawn provided that-

(b) 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;

(c) 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."

(our underlining)

39. Mr Gamede in his defence submitted that in order to withhold payments of any benefits, the Fund:

39.1 had to satisfy that there is a *prima facie* case against him and which the Fund failed to establish;

39.2 was required to consider the potential prejudice that he would suffer;

39.3 failed to contact him and afford him the opportunity to present his version;

39.4 was required to monitor the progress of criminal proceedings to ensure that the benefits not withheld unreasonably;

39.5 unreasonable and indefinite delay in criminal proceedings does not justify the withholding of the member's benefit.

40. As already alluded to above, the beneficial interpretation given to section 37D is that a member is entitled to enjoy full ownership of the pension benefits and the withholding of the funds must be considered with the necessary care. This includes the weighing of the competing interests of the parties after affording the member the opportunity to place his case properly before the Fund.

41. On perusing the determination, we note that the Adjudicator acknowledged that the employer initiated a forensic investigation, there exists a damages claim of around R9 million and the employer made an effort to pursue the criminal proceedings. The Adjudicator further found that the Fund did not make necessary enquiries in order to satisfy itself that a *prima facie* case is made.
42. From the 14 August 2019 letter, we note the Fund advised the Adjudicator that it was allowing the employer an opportunity to pursue the criminal matter and that it will monitor the progress of the proceedings and ensure that it is not withheld unreasonably or indefinite. In its 5 September 2019 letter to the Adjudicator, the Fund submitted that it had access to the various documentation pertaining to the allegations of fraud levelled against Mr Gamede. The determination was issued in May 2020. From the further evidence and contents of this application that the Fund had access to more than the 13 August 2019 letter.
43. Cognisance should be taken of the following factors:
- 43.1 the “**dilatoriness**” issue was not a factor considered by the Adjudicator at the time;
- 43.2 the Adjudicator was correct in finding that the Fund faulted in not consulting with Mr Gamede;
- 43.3 further facts and information have been placed before us which requires the Adjudicator to reconsider its decision;
- 43.4 the Fund demonstrated that it was informed of the allegations against

Mr Gamede by the employer and had discussed it in its Board meetings. Only the minutes of the Board meeting of 19 July 2019 was furnished and we noted that the Fund was aware of a possible criminal case to be opened against Mr Gamede;

43.5 even though the 13 August 2019 correspondence appears to be the only letter placed before the Adjudicator, in fact it was not the only information the Fund had regard to when it decided to withhold the benefits of Mr Gamede;

43.6 it is evident from our authorities that the duty to monitor and ensure that there is progress in the criminal proceedings, is on the employer. In the event that there is unreasonable delay, the benefits have to be withheld;⁸

43.7 Mr Gamede took issue with the fact that despite the criminal proceedings being instituted in August 2019, he has still not been charged. Mr Gamede submits due to this delay there is no justification in withholding his benefits;

43.8 from the evidence presented during the oral hearing process, we do not find that the employer was solely responsible for the delay between March and August 2020. The independent investigation team led under Mr D Engelbrecht was pivotal in this process. The COVID lockdown further had a hand in the delay;

43.9 the Adjudicator acknowledged that the employer has been actively pursuing the criminal proceedings and that it would be unjust in ignoring

⁸ Appanna v Kelvinator Group Services of SA Provident Fund (2000) 2 BPLR 126 (PFA)

the efforts made by the employer in this regard;

43.10 on the merits, the allegations against Mr Gamede are serious and that the alleged damages are extensive. Obviously the allegations against Mr Gamede have to be proven beyond a reasonable doubt in the criminal proceedings. Mr Gamede in this application, dealt with his version on the merits as well. Such facts were not before the Adjudicator at the time;

43.11 all that the Fund was required to establish, is a *prima facie* case against Mr Gamede. The Fund has brought to light what factors it considered in arriving at its decision;

43.12 the complaint was lodged on 18 June 2019. The determination was issued on 28 May 2020, almost a year after the complaint was lodged;

44. A crucial point to note is that by virtue of rule 11(2), the Board is only required to exercise a reasonable discretion and be satisfied that the employer has made out a *prima facie* case against the member and there are reasonable prospects of success. It could therefore have never been envisaged that the Fund was required to determine if the allegations of fraud, dishonesty or theft have been proved. However there must be merit in the case to the extent that there are reasonable prospects of success on the part of the employer. Ultimately the enquiry is whether the Fund applied its mind appropriately, impartially and in a balanced manner.

45. We find that with the further evidence placed before us it is necessary for the Adjudicator to reconsider its decision, and therefore deem it appropriate to

remit the matter to its office.

46. The factors which the Adjudicator would be required to consider and as envisaged in terms of rule 11(2) of the Fund Rules are *inter alia* the following:

46.1 The fact that Mr Gamede has not been criminally charged as yet;

46.2 Whether Mr Gamede's version regarding the allegations has merit.

This would assist the Adjudicator in determining whether the Fund had reason to believe that a *prima facie* case has been made out by the employer;

46.3 The competing interest of both parties must be weighed where one of the factors would include the duration before the proceedings, both criminal and civil, are finalized and whether it would be justified to withhold the said benefits.

47. In these instances, the reconsideration by the Tribunal of a determination of the Adjudicator, under section 230 of the Financial Conduct Sector Authority Act ("***the Act***"), is *res nova*.

48. The Tribunal's jurisdiction under section 230 of the Act is not identical to the wide appeal jurisdiction of the High Court under section 30P of the Pension Funds Act, 24 of 1956, which was described as follows in **Meyer v Iscor Pension Fund** 2003(2) SA 715 (SCA) at 7251-726A:

"From the wording of s30(P) it is clear that the appeal to the High Court contemplated is an appeal in the wide sense. The High Court is therefore not limited to a decision whether the adjudicator's decision was right or wrong. Neither is it confined to the evidence or the grounds upon which

the Adjudicator's determination was based. The Court can consider the matter afresh and make any decision it deems fit. At the same time, however the High Court's jurisdiction is limited by s30(P)(2) to a consideration of the complaint in question."

49. Under the Rules, the Tribunal may hear further evidence on good cause shown, and under section 232(5) the Tribunal may itself call for further evidence. Although the Tribunal is not confined to the evidence or the grounds upon which the Adjudicator's determination was based, its jurisdiction is limited to a ***"(re)consideration of the complaint in question."***

50. Therefore the orders that the Tribunal may make are more limited than the orders that the High Court may make under section 30(P) of the Pension Funds Act. Under section 234(1) of the Act, in the case of a decision of a statutory ombud such as the Adjudicator, the Tribunal may, by order, (only):

- set the decision aside and remit the matter to the decision-maker for further consideration, under section 234(1)(a) of the Act; or
- dismiss the application for reconsideration, under section 234(1)(c) of the Act.

51. Consequently the Tribunal is not empowered to substitute its own decision for that of the Adjudicator.

52. The following order is therefore made:

- (1) the decision is set aside and remitted for further reconsideration to the Adjudicator.

SIGNED at **PRETORIA** on this **19th** day of **NOVEMBER 2020** on behalf of the Panel.

A handwritten signature in blue ink, appearing to read 'Koooverjie', written in a cursive style.

ADV H KOOVERJIE SC

With the Panel consisting also of:

E Phiyega

A Jaffer