

THE FINANCIAL SERVICES TRIBUNAL

CASE NO: PFA4/2021

In the matter between:

CHRISTIAAN PIETER WILLEMSE

Applicant

and

LIFESTYLE RETIREMENT ANNUITY FUND

First Respondent

LIBERTY GROUP LIMITED

Second Respondent

THE PENSION FUNDS ADJUDICATOR

Third Respondent

Panel: Adv Harshila Kooverjie SC (Chair) , Mr Jay Pema and Ms Zama Nkubungu-Shangisa.

Appearances

For the Applicant:

In person

For First Respondent :

Ms Lillian Jardim

For Second Respondent:

Liberty Group representative

Hearing: 19 August 2021, Held virtually.

Duties of pension fund trustees – section 7 (c) of the Pension Funds Act – investment performance - covid19 global market collapse factor – alleged financial loss suffered.

DECISION

INTRODUCTION

- [1] On 29 May 2020, the applicant, Mr Christiaan Pieter Willemse lodged a complaint with the Pension Funds Adjudicator (“the PFA”). The main thrust of Mr Willemse’s complaint to the PFA concerned the alleged loss he suffered due to the reduction in the value of the Liberty Property Portfolio and the interim bonus rate declared by the first respondent. The nature of the alleged loss suffered by the applicant entailed a reduction of 20% of his investment capital value and a reduced interim bonus rate from 6.25% per annum to 5.5% per annum for the remainder of 2020.
- [2] The first respondent is the Lifestyle Retirement Annuity Fund (“The Fund”), with whom Mr Willemse is a member. The second respondent is Liberty Group Limited, the Fund administrator.
- [3] Following an investigation conducted by the office of the PFA in terms of section 30J of the Pension Funds Act, 24 of 1956 (“The Act”), the PFA, on 12 November 2020 subsequently issued a determination in terms of section 30M of the Act. The

present application is brought in terms of section 230 of the Financial Sector Regulation 9 of 2018 (“*FSR Act*”) in terms of which Mr Willemse seeks the reconsideration of the determination made by the Pension Funds Adjudicator (“*the PFA*”). For purposes of convenience, Mr Willemse will be referred to as the applicant, the Fund will be referred to as the first respondent, and the Liberty Group Limited will be referred to as the second respondent. The PFA, which is cited as a third respondent, is not an active participant in the present proceedings.

BACKGROUND

- [4] Following the outbreak of Covid-19 global pandemic and the announcement of the country’s national lockdown, on 30 March 2020, the first respondent adjusted the capital value of investments held with the second respondent in its Liberty Property Portfolio (“LPP”). The capital adjustment resulted in a 20% reduction in the value of properties held by the LPP and a reduced interim bonus rate which moved from 6.25% per annum during December 2019 to 5.5% per annum for the remainder of 2020¹. In an email correspondence attaching the applicant’s complaint’s form dated 29 May 2020 lodged with the PFA, the applicant succinctly described his complaint as: “*My complaint is that Liberty did not act in the best interest of their clients, did not communicate with us and did not provide us with the necessary information or allow us enough time to make informed*

¹ Part B: page 25 - 37 of the record.

decisions regarding our investments"². The applicant further described his dissatisfaction as "*Liberty reducing the capital amount of the Liberty Property Portfolio with 20% and the income with 29.6%*"³.

- [5] The records before us reflect that the applicant of his own accord applied for membership and was duly admitted as a member of the first respondent on 1 May 1996 with policy number **57273012600**. The elected retirement date under this policy was 1 May 2021. With effect from 1 July 2003 a portfolio switch to the LPP was made under policy **57273012600**. Notably, the financial advisor at the time when this policy commenced and at the time when the switch took place was the applicant acting of his own accord. Policy number 57203374500 was a second policy issued to the applicant, which was a single premium retirement annuity that was not invested in the LPP and therefore was not impacted by the reduction. For purposes of this application, I shall be dealing with policy number **57273012600**.
- [6] In his complaint to the PFA, the applicant contended that there was a lack of communication by the first and second respondents on their decision to adjust the capital value of the LPP portfolio. In one of his several email correspondences to

² Page 50 of the record.

³ Page 3 of the PFA complaints form (page 16 of part B).

the PFA, the applicant quoted various investor communications, from the period of 20 March 2020 to August 2020, between the first and second respondent and investors, and he highlighted that there was no upfront communication on the decision taken by the first and second respondent. In one of the communications referred to by the applicant in his email to the PFA he attached communication from the second respondent dated 24 March 2020, wherein the second respondent referred investors in the LPP portfolio to contact their financial advisors or brokers to seek advice in respect of any adjustments or changes they wished to make on their investments. The applicant further pointed out that in all the various communications he received from the first and second respondents, there was no mention of any reduction of investment value. He accordingly stated that it was only after 32 days after the impugned reduction was implemented that the second respondent communicated with the investors in a communication to their clients that was dated the 30th of April 2020.

- [7] The nub of the applicant's complaint is that he was not treated fairly. In that regard, the applicant referred to the six principles of Treating Customers Fairly (TCF) which he says were not adhered to.

DETERMINATION OF THE PFA

[8] It is noteworthy to state that the applicant's initial complaint to the PFA was dismissed on the basis that the PFA had no jurisdiction as the matter was still being considered by another Ombudsman, the office of the FAIS Ombud. In the letter dated 9 June 2020, the PFA stated that since the applicant lodged the complaint with the FAIS Ombud on the same facts, the FAIS Ombud must first complete its investigation and that therefore the PFA complaint would be closed. It is not clear on record what became of the advisory complaint that was allegedly lodged with the FAIS Ombud. On assessment of the records, the PFA subsequently launched a full investigation on this matter on aspects which related to pension funds and related issues.

[9] In analysing the basis of the applicant's claim, the PFA correctly identified the issue as entailing a determination of whether or not the first respondent should be held liable for the alleged loss suffered by the complainant due to the reduction of 20% in the value of the LPP and the interim bonus.

[10] As a starting point, the PFA considered the relevant legislative provision, section 7D of the Act, which reads as follows:

“The duties of the board shall be to-

(c) ensure that adequate and appropriate information is communicated to 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.”

[11] The determination highlighted that the Act requires the trustees to take all reasonable steps to ensure that the interests of members are protected at all times. The Act also encompasses the duty of the trustees to act with due care, diligence and in good faith. The PFA proceeded and stated that all customers regardless of the level of sophistication , are entitled to fair treatment and that financial service providers, representatives and intermediary service providers have to work together closely to ensure that financial service offered and provided are aligned to the TCF outcomes.

[12] The PFA also sought and considered the version of the first and second respondents. The submissions of the first and second respondents were *inter alia* that:

12.1 that the LPP is a retail property focused portfolio with allocations in both the office and hospitality sector and as such was affected by the Covid-19 pandemic.

12.2 they contended that following the outbreak of Covid-19, the review of the LPP was necessary and property evaluators and property managers were

consulted as a result, on 30 March 2020 the respondents adjusted the capital value of all investments held in the LPP. This adjustment resulted in:

12.2.1 a 20% reduction in the value of the properties held by LPP.

12.2.2 a reduced interim rate from 6.25% per annum which was set based on the projection carried out during December 2019, to 5.5% for the remainder of 2020.

12.3 Furthermore, that the first respondent provides a diverse range of investment portfolio to suit varying risk profiles of members which can range from aggressive to conservative risk profiles. Having made a range of portfolios available, it is up to the individual member through his or her advisor to choose a portfolio matching his or her individual risk profile for an investment.

12.4 They submitted that the average growth achieved on policy 57273012600 from commencement date, 1 May 1996 to 4 September 2020 was 7.03% per annum.

12.5 The underlying principle behind the capital adjustment was that of fair treatment of all investors, and that this was so given that investors are investing and disinvesting from LPP every day. The respondents submitted that they had to act swiftly to protect and preserve the interest of all investors.

[13] Having considered the complaint and the responses of the first and second respondents, the PFA came to the conclusion that the applicant's investment was subject to market volatility due to the Covid19 pandemic and that the first respondent could not be held liable for the financial loss suffered by the applicant. The PFA ruled that the applicant failed to establish that he was entitled to the relief that he sought. The PFA consequently dismissed the applicant's complaint. Aggrieved by the decision of the PFA, the applicant now approaches this Tribunal seeking the setting aside of the decision of the PFA and its remittal back to the PFA for reconsideration.

GROUND OF RECONSIDERATION

[14] The applicant delivered its application for reconsideration together with its basis for the challenge. In the main, the applicant contends that he received false and misleading information from his financial advisor regarding the risk profile and classification of the LPP⁴. During the hearing and in the applicant's papers he avers that the LPP was a moderate portfolio and a moderate portfolio does not match his risk profile⁵. He argued that before the switch to the LPP he was on a low risk and a conservative portfolio. The applicant in his oral submissions during

⁴ Page 5 of the record "*Summary of my complaint*".

⁵ Page 5 of the record.

the hearing reiterated that all new investors in the LPP were left in the dark and immediately after investing in the LPP lost a substantial part of their money. I advert to this aspect later in this decision.

ANALYSIS

[15] On a proper assessment of the applicant's complaint lodged with the PFA, it is premised on the following. It concerns the loss suffered by the applicant in so far as his retirement annuity fund credit was less than it otherwise would have been had it not been for the 20% capital adjustment. The reduced capital adjustment on the LPP was a decision taken by the trustees of the first respondent on all its LPP portfolios. This adjustment resulted in:

15.1 A 20% reduction in the properties held by LPP.

15.2 A reduced interim bonus rate from 6.5% p.a. which was based on a projection carried out during December 2019, to 5.5% p.a. for the remainder of 2020. This bonus rate is applicable on the reduced number of units. This meant that if the value of a client's units in LPP was previously R 100, Liberty had adjusted the value to R 80, and the client will now earn a return of 5.5% p.a on that R 80 for the remainder of the year⁶. This is the first leg of the applicant's complaint to the PFA.

⁶ Part B, page 26 of the record.

[16] The applicant joined the first respondent (Lifestyle Retirement Annuity Fund) as a member, and took a retirement annuity policy which commenced on 1 May 1996 under policy number 57273012600. It is worth noting that at the time of commencement of the policy in issue, the applicant was acting on his own since he was a qualified financial advisor.

[17] Consequently, on 1 July 2003 a portfolio switch to the LPP was made under policy 57273012600. The record shows the applicant as the financial advisor during this time⁷.

[18] The elected retirement date under the aforementioned policy was 1 May 2021.

The summary of the values on this policy were as follows⁸:

Total contributions received	R 1 299 968.90
Negative Property Adjustment on 28 March 2020	R 543 220.50
Positive Property Adjustment on 1 August 2020	R 152 070.94
Investment value as at 4 September 2020	R 2 836 048.00

[18] As can be seen from the table above, the average net growth achieved on the policy from its commencement date, of 1 May 1996 to 04 September 2020, was 7.03%

⁷ Part B, page 89 of the record.

⁸ Part B , page 27 of the record.

per annum. A negative property adjustment was made during March 2020 and a positive property adjustment was made during August 2020. All of this aforementioned information was common cause between the parties.

[19] The applicant alleges that he made a loss when the first and second respondents implemented the reduction in capital and interim bonus rate on 30 March 2020.

[20] Upon the proper consideration of the first leg of the applicant's complaint, it must be shown that the trustees' conduct was wrongful and negligent (i.e. was without due care) and that this resulted in financial loss to the applicant.

20.1 Central to the determination as to whether the conduct of the trustees bears scrutiny is section 7D (c) of the Act. The PFA dealt at some considerable length with the latter provision in its determination⁹. We do not find it necessary to rehash all aspects of section 7D (c). It suffices to mention that in terms of the Act, the first respondent is required to take all reasonable steps to ensure that the interests of members are protected at all times and that the trustees act with due care, diligence and in good faith¹⁰. In the same vein, a key responsibility of trustees in a fund is to closely monitor the performance of the fund's assets to ensure that a good long-term return is

⁹ See paragraphs 4.1 – 4.10 of the PFA Determination.

¹⁰ Section 7(c) of the Pension Funds Act, 24 of 1956.

achieved while also ensuring that the investment managers do not take undue risks.

20.2 In a letter dated 7 September 2020 to the PFA, The second respondent furnished a comprehensive response on behalf of the trustees and set out in some detail the key aspects of its investment strategy adopted in response to the global market collapse and in the wake of the Covid-19 pandemic. The aforementioned details of the second respondent's letter were comprehensively set out in the PFA determination and are similarly summarised on paragraph 12 of this decision. In essence, the underlying asset class of the LPP consists of the retail property with allocations in both the office and hospitality sectors. Moreover, it is worth noting that the interim rates in a property portfolio are determined annually by an investment committee based on available data which is premised on the best estimated returns. It was submitted, on behalf of the first and second respondents, that the 2020 interim rate was set in a very different investment market than the current market, and that as such, the capital adjustment was necessary.

20.3 The second respondent consequently contended that it adopted its impugned strategy pursuant to expert advice. In that regard, the decision to reduce the interim bonus and the 20% reduction in capital growth was a response to market fluctuations.

20.4 At the hearing of the present matter, the applicant readily conceded that, over the years, he has always been privy to his retirement annuity fund statements and that his investment has been performing quite well until recently.

20.5 In our view, upon the conspectus of the common cause facts, the applicant has not demonstrated that there was any negligence or recklessness on the part of the trustees that resulted in his financial loss.

[21] However, that is not the end of the matter. The applicant raised another contention concerning the conduct of the respondents. He contended that had he (and other investors like him, who were soon to retire) been informed prior to the implementation of the capital reduction, he would have been in a position to make an informed decision about his investment. In that regard, the applicant asserted that the respondents only notified the internal advisors like him about the reductions in the LPP on 31 March 2020. He further complained that the investors were informed on 30 April 2020 at 17:30PM, some thirty-two days after the implementation.

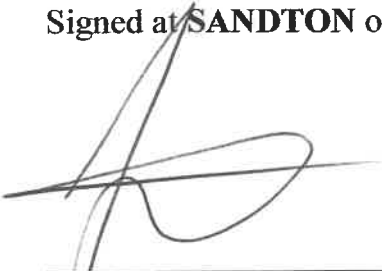
[22] In the applicant's summary of his complaint to this tribunal, he further stated that he received false and misleading information from his financial advisor regarding the risk profile and classification of the LPP. Furthermore, he stated that the LPP was a moderate portfolio and that a moderate portfolio does not match his risk profile. He accordingly contended that before the switch to the LPP his risk profile

was low risk and that this meant he was suitable to a conservative portfolio. It is not necessary to entertain that particular aspect of the complainant's complaint since it clearly turns on financial product suitability and the rendering of ongoing financial advice. That being so, it falls outside the jurisdiction of the PFA. The applicant, if so advised may approach the relevant authority to deal with this aspect of the complaint. However, in the present matter the financial advisory aspect of the applicant's complaint cannot avail him because, as already pointed out, it falls outside the jurisdiction of the PFA.

[23] In the light of the foregoing, having considered the records and material before us, including the submissions made by the parties, we hold the view that the determination of the PFA is sound in law and cannot be faulted. That being the case, the determination of the PFA is upheld.

In the result the following Order is made: The application is dismissed.

Signed at SANDTON on this 1st day of October 2021 on behalf of the Panel.



Ms Z Nkubungu - Shangisa

With the Panel consisting also of:

Adv H Kooverjie SC and

Mr J Pema.