

# **THE FINANCIAL SERVICES TRIBUNAL**

Case No: PFA35/2023

In the matters between:

**JOHANNES GERHARDUS LOUBSER**

Applicant

And

**NMG UMBRELLA SMART FUND (PROVIDENT SECTION)** First Respondent

**THE PENSION FUNDS ADJUDICATOR**

Second Respondent

Tribunal Panel: Judge LTC Harms and KD Magano

**Summary: Application for reconsideration of the decision of the Pension Funds Adjudicator in terms of section 230 of the Financial Sector Regulation Act 9 of 2017 – Whether there was a delay in disinvesting the applicant’s pension benefit – The fund did not delay – Application for reconsideration dismissed.**

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## **DECISION**

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### **Introduction**

1. The applicant, Mr Johannes Gerhardus Loubser, seeks reconsideration of a determination made by the second respondent, the Pension Funds Adjudicator (*“the PFA”*) on 30 June 2023 (*“the Determination”*). This application is made in terms of section 230 of the Financial Sector Regulations Act 9 of 2017 (*“the FSR Act”*).
2. The Determination was made pursuant to a complaint lodged by the

applicant to the PFA in terms of section 30M of the Pension Funds Act 24 of 1956 (*“the Pension Funds Act”*).

### **The complaint before the PFA**

3. The applicant, by reason of his employment with Mitsubishi Hitachi Power System (Pty) Ltd since 15 August 2015, became a member of the first respondent’s pension Fund, NMG Umbrella Smart Fund (*“the Fund”*) until 31 December 2022. Following his termination of employment, he became entitled to a retirement benefit in terms of the Rules of the Fund. However, he deferred his pension benefit until 1 June 2022.
4. On 1 June 2022, the applicant notified the Fund of his intention to withdraw his pension benefit from the Fund. In his notification of retirement, the applicant did not opt for a cash payment. Instead, he requested the Fund to transfer his benefit by purchasing an annuity from Sanlam.
5. According to the applicant, the Fund delayed the disinvestment of his pension benefit and as a result of that delay, he suffered a financial loss. The financial loss is computed on the basis that when he requested the disinvestment (01 June 2022), his Fund credit was R2,726,517.94 and on the date of the actual disinvestment, the benefit amounted to R2,658,573.13. Therefore, his financial loss is R100,000.00. The applicant further contends that had the Fund disinvested his benefit from the market within 2 days of his instruction, he would not have suffered such a loss.

### **The Fund's submissions before the PFA**

6. The Fund denied that it delayed with the disinvestment and that such delay caused the applicant a financial loss as mentioned above. To demonstrate that there was no delay, the Fund provided the PFA with a chronology of events setting out the timeline from the date of receipt of the retirement notification to disinvest the pension benefit to the date of payment. It argued that it disinvested the applicant's fund benefit within the required time frame.
7. According to the Fund, the administrator did not give an undertaking that its policy and procedure include the withdrawal of the member's disinvestment within 2 (two) days of receiving a completed signed form. In terms of its policies, the administration process and procedure in relation to the payment of benefits is finalised within 10 (ten) business days of receipt of the termination form signed by the member and employer.

### **The Determination**

8. The issue before the PFA was whether or not there was a delay in disinvesting the applicant's retirement benefit.
9. Having considered the submission on behalf of the parties, the PFA made the following findings:
  - 9.1. The services rendered and turnaround time applicable to administrators are defined in terms of a service level agreement

and what is applicable to one administrator is not applicable to the other. Therefore, the 2-day period applicable to Alexander Forbes cannot be uniformly applied to other administrators as it is not in terms of their service level agreement. All administrators are required to perform in terms of their own service level agreement.

9.2. The investments are affected by market conditions, which have an impact on the values. Negative market movement reduces the unit prices underlying the applicant's investments and subsequently reduces Fund value. The Fund value fluctuates daily according to the market performance of the underlying Funds.

9.3. The Fund and administrator did not unreasonably delay the disinvestment of the applicant's benefit and cannot be held liable for the loss that occurred as a result of the market performance.

9.4. The applicant's benefit was disinvested within the period stipulated in the service level agreement. The applicant failed to establish that he is entitled to the relief that he seeks.

10. Having made the above findings, the PFA dismissed the applicant's complaint.

11. The applicant, as stated above, is aggrieved by the Determination and for that reason, lodged this application for reconsideration of the

Determination. Both parties have waived their rights to a formal hearing.

**Grounds of reconsideration**

12. The applicant's application for reconsideration is based on the following grounds:

12.1. The adjudicator only used the Fund's service level agreement as his "*root evidence*" to adjudicate the case;

12.2. The adjudicator was biased towards the Fund;

12.3. The PFA did not consider the fact that the Fund's notification of retirement document does not deal with any disinvestment timeline and neither the claim process payout time;

12.4. The PFA treated the applicant as a pension contributing employee and not as a private investor meaning that when he requested his investment to be deferred in January 2022 in terms of the Fund's Rules, he should have signed a new service level agreement which he did not;

12.5. The PFA did not, when adjudicating this case, consider the guidelines set out in a document titled "*Treating Customers Fairly & the Financial Planning Process*";

12.6. The PFA based its decision on the definition and Rules of the Fund's investment switch as described in the service level agreement while ignoring the fact that the applicant did not

request the Fund to switch his pension investment but rather factually requested the Fund to disinvest his investment from the market.

### **The issues for the decision**

13. We are required in this application to decide whether there was any delay by the Fund in disinvesting the applicant's pension benefit.

### **Analysis**

14. The payment of the applicant's benefit is governed by the Rules of the Fund dated 11 December 2007 (as amended) (*"the Rules"*), read with the Service Level Agreement dated 30 March 2022 between the Fund and NMG Consultant & Actuaries Administrators (Pty) Ltd, NMG Consultant & Actuaries and NMG Employee Benefits.
15. In adjudicating this dispute, we are guided by the provisions of the Rules and the SLA. In the paragraphs below, we quote and interpret the relevant provisions of the said Rules and SLA.
16. Clause 1.6 of the Rules provides that these Rules are binding on the Fund and the members. As a member of the Fund, the applicant is bound by those Rules.
17. Clause 4.1 of the Rules states that:

*"The benefit payable to a member on his retirement in terms of this general rule shall be a pension that can be secured by his Fund credit."*

18. The Fund credit is defined as follows:

*“...in relation to a member, at any particular date, the sum:*

- (a) the realised value of the assets held in respect of the member's Fund account at that date; plus*
- (b) the realised value of the assets held in respect of the member's personal account at that date,*

*provided that a member's Fund credit shall at all times be subject to a minimum of his minimum individual reserve.”*

19. In the context of a pension fund, "realised value" refers to the actual value or return that an investment has generated when it is sold or liquidated. It represents the gains or losses that have been "realised" or turned into actual cash or assets by selling the investments within the pension fund's portfolio. It must be noted that pension funds typically invest in a variety of assets such as stocks, bonds, real estate, and other financial instruments with the goal of generating returns that will fund future pension obligations to retirees. The value of these investments can fluctuate over time due to changes in the financial markets. Therefore, the realised value of the applicant's assets will be determined after the valuation date of his investments, taking the market fluctuations into account.

20. Clause 6.2 provides as follows:

*“6.2.1 A member's withdrawal benefit shall be paid as a cash lump sum, provided that the member may, within five months of termination of his service elect in writing, in a form prescribed by the administrator, duly completed by the member and the employer and delivered to the administrator within the aforementioned five-month period,*

*to have his benefit transferred as follows:*

*6.2.1.1. That any portion of the benefit be transferred to an approved preservation Fund selected by the member, in which case the balance (if any) shall be transferred to an approved retirement annuity Fund, subject to the provisions of the tax act and any general or practice notes as the revenue service may have issued in respect of approved preservation Funds.*

*6.2.3 Any amount to be transferred to another approved fund, approved preservation fund or approved retirement annuity fund in terms of rule 6.2, shall be transferred to such other fund within 60 days of receipt by the fund of the member's written instruction, indicating that he has elected to transfer his benefit to such other fund, provided that such transfer is permissible in terms of the act, the tax act and any conditions applied to such transfers by revenue service from time to time. Interest, at a rate prescribed in terms of the act from time to time, compounded daily, shall be paid to such other fund on any benefit transferred after the aforementioned 60-day period and shall be calculated from the expiry of the 60-day period until the date of payment to such other fund."*

21. Annexure E to the service level agreement deals with the turnaround times. The turnaround time in respect of the retirement claim is ten (10) business days. According to the SLA, the following process is followed in processing a retirement claim and should be finalised within ten (10) business days:

- 1. "Receipt by Administrator from the Participating Employer of the correct, signed (by Member and Participating Employer representative) and fully completed retirement claim form, including any information or documentation specified on the form or requested by the Administrator.*
- 2. Receipt and investment of the final contribution for the Member.*
- 3. Receipt by the Fund of the proceeds of disinvestment.*
- 4. Receipt by the Administrator of tax directive from SARS.*



*5. Receipt by Administrator of any statutory or regulatory requirements.”*

22. Clause 2.4.13 of the Rules defines “*business days*” as every day except a Saturday or a Sunday or an official South African public holiday.

23. To decide whether the Fund delayed with disinvesting the applicant’s benefit, we consider the following chronology of events which seems to be common cause between the parties:

23.1. On **1 June 2022**, the applicant submitted his claim to the Fund. The claim form was fully completed with a copy of his Identity Document attached to the form.

23.2. On **7 June 2022**, the Fund assessed the claim by checking the following:

23.2.1. Payment instruction;

23.2.2. Last price was confirmed;

23.2.3. Dates of calculation and exit type; and

23.2.4. Section 37D, for housing loans, divorce and maintenance orders and any acknowledgement of debt or court cases.

23.3. On **7 June 2022**, the claim was sent to the audit manager to confirm all the details.

23.4. On **10 June 2022**, the Fund disinvested the applicant’s

investment from the market.

- 23.5. On **15 June 2022**, the Fund prepared the Recognition of Transfer form (“ROT01”) and sent it to Sanlam to [Alfred.rabie@sanlam.co.za](mailto:Alfred.rabie@sanlam.co.za) and cc [hventer@yebo.co.za](mailto:hventer@yebo.co.za).
- 23.6. Sanlam completed the ROT01 and sent it back to the Fund on **15 June 2022**.
- 23.7. Having received the ROT01 form back from Sanlam, the Fund applied to SARS for a tax directive on **15 June 2022**.
- 23.8. On **16 June 2022**, SARS provided the Fund with the tax directive.
- 23.9. On **22 June 2022**, the Fund loaded banking details for the transfer of Funds onto the system for verification and validation.
- 23.10. On **23 June 2022**, the Fund submitted the claim for the first approver to approve the payment.
- 23.11. On **26 June 2022**, the claim was submitted to the second approver to approve the payment.
- 23.12. On **28 June 2022**, the claim was completed and cleared from the Fund’s bank account. The claim letter and IRP5 were generated and emailed to the broker. The proof of payment and tax directives were sent with a payment breakdown and split to Sanlam.

24. In his response to the Fund's representations, the applicant makes it clear that his problem is the date of the disinvestment and not the payment date. Therefore, if one has regard to the above timeline and the submissions of the parties, the Fund disinvested the applicant's pension benefit within 7 (seven) business days from the date of receipt of the instructions to disinvest the pension benefit. This is within the required time frame.
25. Whilst the applicant may, to a certain extent, be correct that disinvestment means "*the instruction to the Fund manager to withdraw your Funds*", it does not mean that the disinvestment will occur on the same day. The benefit is, on the date of the notification, unpriced and as such, the disinvestment benefit must still be calculated and priced after taking into account the actual proceeds received from the applicant's investments. This benefit is determined by subtracting any transaction costs, fees, or taxes from the total sale proceeds of investments.
26. The key point is that the calculation of the applicant's disinvestment benefit typically occurs after the transaction is priced, not on the date that he gave notification. In other words, the applicant's disinvestment is based on the market value or price of the investments at the time they are sold, not at the time he initially notified the Fund of his intention to disinvest. Market fluctuations can occur between the notification date and execution of the transaction, which is why the actual transaction price is used to determine the benefit. The disinvestment benefit is determined based on the actual market value or price of the investments at the time

they are sold or liquidated.

27. It is also clear from the papers that the applicant does not dispute the chronology of events and that the disinvestment occurred on 10 June 2022. It should therefore follow that the disinvestment occurred within the period of 10 (ten) business days as set out in the SLA.
28. Different pension plan providers or retirement account administrators may have different processing times for disinvestment requests. Some pension plans or retirement accounts may have regulatory requirements that dictate certain processing times or waiting periods for disinvestment requests. Administrative processes within the pension plan or retirement account provider's organisation can also influence the timeline. This includes tasks such as verifying your identity, confirming the applicant's request, and ensuring compliance with plan Rules.
29. We, therefore, find that the PFA was correct in finding that the applicant should note that the services rendered and turnaround time applicable to administrators are defined in terms of the service level agreement and what is applicable to one administrator is not applicable to the other. Therefore, the 2-day period applicable to Alexander Forbes cannot be uniformly applied to other administrators as it is not in terms of their service level agreement. All administrators are required to perform in terms of their own service level agreement.
30. An analysis of the chronology of events shows that the fund took a total of 16 (sixteen) days to finalise the applicant's claim. This includes

applications for a tax directive and transfer of funds to Sanlam as per the applicant's request. As quoted above, Clause 6.2.3 of the Rules states that any amount to be transferred to another approved preservation fund or approved fund must be done within 60 (sixty) days from receipt of the member's instruction. The transfer of funds to Sanlam was done within the required time frame from date of receipt of the applicant's instruction.

### **Conclusion**

31. The PFA was correct in finding that she is satisfied that the applicant's benefit was disinvested within the period stipulated in the SLA. There is no basis for us to interfere with those findings.

### **Order**

32. The following order is made:

32.1. The application for reconsideration is dismissed.

**SIGNED AT PRETORIA ON THIS 26<sup>TH</sup> DAY OF SEPTEMBER 2023.**



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**KD MAGANO**  
(On behalf of the panel)