

**THE FINANCIAL SERVICES TRIBUNAL**

Case Number: **PFA1/2023**

In the matter between:

**BORWA FINANCIAL SERVICES (PTY) LTD**

First Applicant

**HOSPITALITY AND GENERAL PROVIDENT FUND**

Second Applicant

and

**THE PENSION FUNDS ADJUDICATOR**

First Respondent

**CONSTANCE CONTY SIBULELE**

Second Respondent

For the First and Second Applicants:

Sooner Incorporated Attorneys

For the Second Respondent:

Kgoroadira Mudau Incorporated

Date of Decision:

21 April 2023

*Summary: Application for Reconsideration in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 ("FSR Act") against decision of Pension Funds Adjudicator not to withhold pension fund benefits in terms section 37D(1)(b)(ii) of the Act pending finalization of civil action instituted. Non-compliance with principles of the audi alteram partem rule.*

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**DECISION**

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## INTRODUCTION

1. The First Applicant, Borwa Financial Services (Pty) Ltd is the benefit administrator of the Hospitality and General Provident Fund, and has lodged an application for reconsideration in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 (“the FSR Act”) against a decision of the First Respondent, dated 25 November 2022.
2. The Second Applicant is the Hospitality and General Provident Fund (“the Fund”) registered in terms of the provisions of the Pension Funds Act 24 of 1956 (“the Act”).
3. The First Respondent is the Pension Funds Adjudicator (“the Adjudicator”), who is mandated, amongst other things, to make a determination in terms of section 30M of the Act.
4. The Second Respondent, Constance Conty Sibulele, is a former employee of the Applicant and a member of the Second Applicant by virtue of her employment. For ease of reference, the Second Respondent shall be referred to as the Complainant.
5. The Fund applies for the reconsideration of the decision in terms of section 230 of the Financial Sector Regulation Act, 2017. The parties have waived their right to a formal hearing and the matter will be decided on the papers and submissions filed.

## **RELEVANT BACKGROUND FACTS AND CHRONOLOGY OF EVENTS**

6. The Complainant was employed by the First Applicant and joined the Fund on 01 July 2004 and her employment was terminated on 5 July 2021. The Fund received contributions from the First Applicant on behalf of the Complainant and as at 23 March 2022 the Complainant had a member credit in the amount of R1 367 430.87. (“the withdrawal benefit”).
7. On 27 July 2021 the Complainant referred a dispute to the Commission for Conciliation, Mediation and Arbitration (“CCMA”) for unfair dismissal, which was settled on 20 August 2021 in terms of a written and signed settlement agreement, whereby the First Applicant agreed to pay the Complainant an amount of R120 000.00, which amount was paid on 3 September 2021.
8. On 6 September 2021, the First Applicant issued summons out of the Johannesburg Regional Court, under case number: 2021/1445, claiming damages, for the Complainant’s alleged misconduct and breach of her fiduciary duties as the Managing Director of the First Applicant, in the total amount of R225 991.00. It is noted that the summons was reissued on 21 February 2022, under case number: 205/2022 and the Complainant has since filed a Plea thereto, but this has no relevance to the outcome of this matter as there are no contentions that there was a substantial delay by the First Applicant to proceed with litigation against the Complainant or that there is a substantial delay in the finalisation of such litigation.

9. On 7 September 2021 the First Applicant requested the Fund to withhold payment of the Complainant's withdrawal benefit in an email dated 7 September 2021, wherein the First Applicant stated that, ***"...Kindly note that Borwa Financial Services is requesting that the Fund withhold the share of the Fund for Constance Sibulele as there is a litigation matter to recover monies from her share of fund (See attached summons). I will inform you as soon as the monies are recovered or of Borwa is going to take the stance to proceed with Section 37D of the Pensions Funds Act route..."***. It is noteworthy that since 7 September 2021 the Fund had in fact acceded to the request from the First Applicant and has withheld payment of the Complainant's withdrawal benefit.
10. On 24 August 2021 the Complainant submitted her claim form to the Fund in an attempt to claim her withdrawal benefit.
11. On 24 November 2021 the Complainant lodged a complaint at the offices of the Adjudicator regarding the withholding of her withdrawal benefit.

## **THE DETERMINATION OF THE ADJUDICATOR**

12. The Adjudicator, after having considered the submissions of the parties, proceeded to determine whether the decision of the Fund to withhold the Complainant's withdrawal benefit was in accordance with section 37D(1)(b)(ii) of the Act and therefore lawful.

13. In her analysis, the Adjudicator highlighted a few points that appeared to be decisive in her determination. The Adjudicator noted that although the rules of the Fund permit the Fund to withhold the withdrawal benefit, there are limitations to the rule.
14. The Adjudicator referred to Rule 8.15.2.1 of the Fund Rules in terms of which the amount being withheld may not exceed the amount that may be deducted in terms of Section 37D(1)(b)(ii) of the Act.
15. Further, the Adjudicator referred to Rule 8.15.2.2 of the Fund Rules in terms of which the Fund is required to be satisfied that the First Applicant, as the employer, has made out a *prima facie* case against the Complainant and there is reason to believe that the First Applicant has a reasonable chance of success in the proceedings instituted.
16. Accordingly, on 25 November 2022 the Adjudicator ordered that the Fund to pay the Complainant's withdrawal benefit premised upon the following grounds:
  - 16.1 ***"It is common cause that the fund made a decision to withhold the complainant's benefit without hearing from her. Therefore, it is clear that the fund deprived itself of considering the complainant's response by not allowing her an opportunity to make representations to it."***

- 16.2 ***“...The conduct of the board is a dereliction of its statutory and fiduciary duties to direct, control and oversee the operations of a fund in accordance with the applicable laws and the rules of the fund and to act with due care, diligence, and good faith”; and***
- 16.3 ***“...Further, the fund was aware in September 2021 that only R225 991.00 was being claimed by the employer. However, the fund withheld the complainant’s entire benefit of R1 367 430.87. In this matter, the board of the fund acted in breach of their fiduciary duties towards the complainant. It failed to comply with basic procedural requirements before exercising its duty to withhold.”***

## **THE FIRST APPLICANT’S GROUNDS FOR RECONSIDERATION**

17. The Fund approached this Tribunal based on 2 (two) grounds which are in the main falling within procedural and substantive aspects. The grounds for reconsideration may be summarised briefly as follows:-

- 17.1 the Adjudicator failed to consider, *alternatively* failed to give appropriate weight to the fact that the discretion afforded to the Fund in terms of Rule 8.15 of the Fund Rules, read with Section 37D(1)(b)(ii) of the Act, was exercised properly, in an impartial and balanced manner; and

17.2 The decision of the Fund to withhold the Complainant's withdrawal benefit was in accordance with section 37D(1)(b)(ii) of the Act, as the decision was made after due consideration of the competing interests of the First Applicant and the Complainant.

## LEGAL FRAMEWORK

18. Section 37D(1)(b)(ii) of the Act, which deals with the withholding of withdrawal benefits of members, is at the heart of this matter.

19. Section 37D(1)(b)(ii) of the Act contains a limited exception to the principle that "*pension benefits are sacrosanct*"<sup>1</sup> and may only be dealt with strictly in accordance with the provisions of the Act and the Rules of the fund in question.

20. Section 37D(1)(b) provides that:

*"(1) A registered fund may –*

*(a) ...*

*(b) deduct any amount due by a member to his employer on the date of his retirement or on which he ceases to be a member of the fund, in respect of –*

*(i) ...*

*(ii) compensation (including any legal costs recoverable from the member in a matter contemplated in subparagraph (bb)) in respect of any damage*

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<sup>1</sup> *SA Metal Group (Pty) Ltd v Jeftha* 2020 JDR 2379 (WCC) para 9.

*caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member, and in respect of which –*

*(aa) the member has in writing admitted liability to the employer; or*

*(bb) judgment has been obtained against the member in any court, including a magistrate's court,*

*from any benefit payable in respect of the member or a beneficiary in terms of the rules of the fund, and pay such amount to the employer concerned”.*

21. Accordingly, this Tribunal must establish whether the Adjudicator considered all the relevant facts and applied such facts to the law, in arriving at the determination dated 25 November 2022.

22. Our courts have considered the application of the provisions of this section. In *Highveld Steel v Oosthuizen*<sup>2</sup> the Supreme Court of Appeal stated the following in respect of section 37D<sup>3</sup>:

*“It seems to me that to give effect to the manifest purpose of the section, its wording must be interpreted purposively to include the power to withhold payment of a member's pension benefits pending the determination or acknowledgment of such member's liability. The Funds therefore had the discretion to withhold payment of the respondent's pension benefit in the circumstances....*

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<sup>2</sup> 2009 (4) SA 1 (SCA)

<sup>3</sup> *Highveld Steel* (above) paras 19 and 20



...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. (own emphasis added).

23. It is implicit in the above quoted paragraphs of the *Highveld Steel* judgment that the Fund had to adhere to the *audi alteram partem* rule, as was established in the *SA Metal Group* judgment wherein Judge Steyn stated that:

*"I agree with the argument of Mr Freund SC, that one can safely assume that the employer's case, as related to the fund, must be put to the employee to afford him an opportunity to respond thereto before the fund should assume the liberty to take a decision impacting on the rights of the employee ... The question remains whether the fund applied their mind appropriately, impartially and in a balanced manner."*<sup>4</sup>

## ANALYSIS AND FINDINGS

24. Accordingly, in order to adhere to the *audi alteram partem* rule, before the Fund made the decision to withhold the withdrawal benefit, the Fund ought to have complied with the following procedural requirements<sup>5</sup>:

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<sup>4</sup> *SA Metal Group* (above) para 62

<sup>5</sup> *SA Metal Group* (above) para 62-64

- 24.1 The Fund was required to notify the Complainant that the Fund had received the request from the First Applicant to withhold her pension benefits;
- 24.2 The Fund was required to inform the Complainant of the First Applicant's case against her; and
- 24.3 The Fund was required to afford the Complainant an opportunity to respond thereto.
25. There is no evidence on the papers before the Tribunal that the Fund had either notified the Complainant that the Fund had received the request to withhold her pension benefits on 7 September 2021, or that the Fund informed the Complainant of the First Applicant's case against her, or that the Fund afforded the Complainant the opportunity to respond thereto.

## CONCLUSION

26. The Tribunal is therefore in agreement with the findings of the Adjudicator that there was non-compliance with the principles of the *audi alteram partem* rule and that the Fund decided to withhold the Complainant's pension benefits in the absence of a response from the Complainant, and that the Fund did not have the benefit of the Complainant's version when it made this decision.<sup>6</sup>

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<sup>6</sup> *Fundsatwork Umbrella Pension Fund v EE Ngobeni*, PFA64/2020; *Oasis Group Holdings (Pty) Ltd v Mansoor Mia*, PFA74/2020

27. The Tribunal is in further agreement with the findings of the Adjudicator that the decision of the Fund to withhold the amount of R1 367 430.87 exceeds the amount of R225 991.00 that is being claimed by the First Applicant, which run afoul of Rule 8.15.2.1 of the Fund Rules.
28. Accordingly, the Tribunal does not find a basis for the aforementioned grounds for reconsideration, which grounds cannot be sustained.
29. The Tribunal finds that the discretion afforded to the Fund in terms of Rule 8.15 of the Fund Rules, read with Section 37D(1)(b)(ii) of the Act, was not exercised properly, in an impartial and balanced manner, as the Complainant's rights in terms of the *audi alteram partem* rule were denied by the Fund, which precluded the Fund from being able to make an informed decision to withhold the Complainant's pension benefits.
30. In the circumstances, the Tribunal can find no grounds to interfere with the Adjudicator's determination dated 25 November 2022.

**ORDER:**

- (a) The application is dismissed.

Signed on behalf of the Tribunal on 21 April 2023.



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Adv M. Holland & LTC Harms (chair)