THE FINANCIAL SERVICES TRIBUNAL

CASE NO: PFA 58/2023

In the matter between

ALLEN VIVIAN WATERSTON **Applicant**

and

ALTRON GROUP PENSION FUND **First Respondent**

THE PENSION FUNDS ADJUDICATOR **Adjudicator**

Summary: Reconsideration of PFA determination – time bar – allocation in terms of sec 17C of the Pension Funds Act

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DECISION

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1. The applicant applies for the reconsideration of the decision of the Pension Fund Adjudicator of 8 September 2023, dismissing his complaint lodged on 14 December 2022 in terms of sec 30A of the Pension Funds Act 24 of 1956 ("the PFA") on two grounds, namely the time-bar provisions of sec 30I; and that the Adjudicator did not have jurisdiction in

relation to a scheme for apportionment of surplus in terms of section 15 B of the Pension Funds Act.

2. The application for reconsideration is in terms of section 230(1) of the Financial Sector Regulation Act 9 of 2017("the FSR Act"). The parties waived their right to a formal hearing and the reconsideration will be dealt with on the papers.

3. The applicant is a pensioner-elected member of the board of the Altron Group Pension Fund, the first respondent. The second respondent is the Pension Funds Adjudicator, who had made the determination for which the applicant applies for a reconsideration.

4. On 14 December 2022 the applicant submitted a complaint to the Adjudicator. This complaint was lodged as defined in section 1 of the PFA, dealing with the following four transactions by the Board of the Fund:

4.1 The allocation of actuarial surplus in the amount of R118 million to the Fund's Guarantee Reserve Account ("the GRA") in the period 2000 to 2002 (Transaction A).

4.2 The re-allocation of actuarial surplus from the GRA to the Employer Surplus Reserve("ESA") account in the fund, an "employer surplus account" as defined in section 1 of the PFA (ESA) in the period 2006 to 2008. (Transaction B).

4.3 The re-allocation of actuarial surplus from the GRA to the ESA in the period 2015 to 2016 (Transaction C).

4.4 The re-allocation of actuarial surplus from the GRA to the ESA in

2022 (Transaction D).

5. The relief the applicant sought was that the Adjudicator should order that the decisions by the Board in terms of sec 15C of the PFA that resulted in Transactions B, C and D be set aside and that the aggregate of amounts previously allocated to the ESA in Transaction B to D be re-allocated for other purposes and be re-apportioned. The reason furnished for these complaints by the applicant was that, according to him, the impugned decisions of the Board were for the benefit of the employer and not the members of the fund.

6. The Adjudicator first dealt with the transactions A, B and C that had occurred during prior to 2017, and held that they were time-barred. Section 30I of the Act provides:

> "(1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.
>
> (2) The provisions of the Prescription Act, 1969 (Act 68 of 1969), relating to a debt apply in respect of the calculation of the three-year period referred to in subsection (1)."

8. In the application for reconsideration the applicant acknowledges that these complaints are time-barred. This statement by the applicant must be the end of the complaint regarding these three transactions. The Tribunal cannot decide a matter on equitable principles contrary to the Act, something the applicant admits, which means that

his application is in this respect vexatious. The fact that the second reason given by the Adjudicator for dismissing these complaints may have been wrong is irrelevant. Reconsideration applications are concerned with result and not reasons.

9. That leaves transaction D. The Adjudicator could not lawfully set aside Transaction D (and this also applies to B and C) as was conveyed in detail to the applicant in the first respondent's written answer to the applicant's complaint. It was set out that:

9.1 The registered rules of the PFA are binding on the fund, its officials and office bearers.

9.2 Section 7C (1) of the PFA provides that the board of the fund must direct, control and oversee the operations of a fund in accordance with the laws and rules of the fund.

9.3 Section 15 C provides that an "actuarial surplus" that is reflected in a report on the "statutory actuarial valuation" of the fund at a date after its "surplus apportionment date" must be either allocated to a member surplus account or an employer surplus account in terms of the rules of the fund; or should the rules not make provision for the scenario the board must determine the proportions in which the surplus must be allocated to the "member surplus account" or the "employer surplus account".

10. In *Moor and Another v Tongaat Hulett Pension Fund* [2018] 3 All SA 326 (SCA), the Supreme Court of Appeal held that it is neither unlawful nor

inappropriate to have rules that require that future surplus can be allocated to an "employer surplus account".

11. The registered rules of the Fund provide that if it is apparent that there is an actuarial surplus attributed to the GRA; the board of the Fund had to procure the re-allocation of the surplus to the ESA. Furthermore, it is required that if any surplus arises in the GRA, it must be credited to the ESA.

12. It is thus clear that the Fund did not have the power to do what the applicant requested the Adjudicator to do as Transactions B, C and D were done in terms of the rules of the Fund. Therefor the Adjudicator could not consider any decisions in this regard by the board and could not set aside any decisions by the board in this regard.

13. It was argued that the Adjudicator had erred in dismissing this complaint relying on sec 30H(4) which provides:

> "(4) The Adjudicator shall not have jurisdiction over complaints in connection with a scheme for the apportionment of surplus in terms of section 15B which relates to the decisions taken by the board or any stakeholder in the fund or any specialist tribunal convened in terms of section 15K."

14. The argument is that, as set out above, the issue relates to sec 15C and not 15B, but as said, the question is whether the Adjudicator's determination was correct, not whether her reasons were.

COSTS

15. The first respondent requests the Tribunal to grant costs against the applicant on an attorney and client scale.

16. The reason for this request is that the applicant persisted with litigation in relation to Transactions A, B and C whilst admitting that these complaints are time-barred and acknowledging that the Adjudicator was correct in not deciding.

17. The applicant also acknowledged in his complaint to the Adjudicator that "surpluses which arise in the GRA in terms of the rules accrue for the benefit of the employer", and that he did not dispute" the principle that the employer would be required to fund any shortfall in the [guarantee reserve account], the employer has the right to any surplus that may arise in the account".

18. The applicant proceeded with legal action where he himself has acknowledged that the remedies he seeks cannot be granted. His argument that the nature of the issues requires the Tribunal's attention is totally wrong and has no basis in law at all.

19. In terms of sec 234(2) the Tribunal may, in exceptional circumstances, order costs. This is an appropriate case, although not for punitive costs.

ORDER

A. The application for reconsideration is dismissed.

B. The applicant is to pay the first respondent's costs reasonably and properly incurred and taxed in accordance with the Uniform Rules

Signed on behalf of the Tribunal on 15 February 2024.

LTC Harms for self and Judge Cynthia Pretorius