

THE FINANCIAL SERVICES TRIBUNAL

CASE NO: PFA76/2023

In the matter between:

ADIEL ISMAIL

Applicant

and

BASHKAR LATCHMAN
(In his capacity as the Principal Officer of the
UWC RETIREMENT FUND)

First Respondent

THE PENSION FUNDS ADJUDICATOR

Second Respondent

SANLAM LIFE INSURANCE LIMITED

Third Respondent

Tribunal Panel: LTC Harms (Chair) & SM Maritz

Decision on Papers

Date of Decision: 13 March 2024

Summary: Application for Reconsideration in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 (“FSR Act”) of a decision of the Pension Funds Adjudicator (“the PFA”), dated 21 September 2023 and application for condonation. No undue delay proven against Fund and/or Principal Officer in executing switch request of benefit from Conservative retirement portfolio to Money Market portfolio. No liability proven against Fund and/or Principal Officer for financial losses suffered.

DECISION

A. INTRODUCTION

1. The Applicant applies for reconsideration in terms of section 230 of the Financial Sector Regulation Act, 9 of 2017 (“the FSR Act”) of a decision taken by the Pension Funds Adjudicator (“the PFA”), dated 21 September 2023. In this decision the PFA dismissed the

Applicant's complaint, citing that the Applicant's initial switch request did not align with the investment mandate of the University of the Western Cape Retirement Fund ("the fund"). The fund required a board resolution to process the Applicant's switch request. Consequently, the PFA found no undue delay on the part of the fund in transitioning the Applicant's retirement benefit from the conservative portfolio to the Nedbank Money Market portfolio. The switch was conducted in accordance with the rules of the fund.

2. Additionally, the Applicant seeks condonation for the late filing of the reconciliation application, which was filed on 21 November 2023. However, it is unnecessary to further address the matter of condonation, as this Tribunal determines that the Applicant's reconciliation application was filed within the 60-day timeframe permitted by the rules of this Tribunal from the date of the decision.
3. The parties waived their rights to a formal hearing.

B. RELEVANT BACKGROUND FACTS AND CHRONOLOGY

Applicant's submissions in complaint

4. The Applicant commenced employment with the University of the Western Cape ("the UWC") from 1 January 1986 until his retirement on 1 July 2020. On the last day of his employment being 30 June 2020, he submitted all documentation required for retirement to Human Resources at the UWC. The Applicant was a deferred member of the fund.
5. The Applicant's fund credit was R5 625 987.04 as at 25 February 2022.
6. The Applicant submitted that on 14 July 2020 he elected to preserve his benefits in the fund.
7. On 22 July 2020 Sanlam Life Insurance Limited ("Sanlam" or "the fund's administrator") advised the Applicant that his benefit was switched to the phased retirement member group ("deferred member") and he was provided with a paid-up member certificate. Sanlam is the fund's administrator.
8. The Applicant submitted that during February 2022 he contacted Sanlam and requested the contact details of a financial advisor who is conversant with the rules of the fund. He was provided with the contact details of a financial advisor.

9. The Applicant submitted that after a consultation with the Principal Officer of the fund, a written request was drafted on 2 February 2022 to move his retirement benefit from the conservative portfolio to the Nedbank Money Market portfolio. The written request was submitted to Sanlam on 3 February 2022, which receipt was acknowledged by Sanlam.
10. The Applicant further submitted that on 8 February 2022 he was informed by Sanlam that the requested switch was not possible as an investment. The Applicant was then provided with a list of other valid options. According to the Applicant the Sanlam employee misinterpreted his request as a switch between the various investment options available, and not as a request to exit the retirement fund.
11. According to the Applicant the only written and signed request for the switch was on 2 February 2022 and that no new request for the switch was submitted on 15 February 2022. He submitted that in his email, dated 15 February 2022 he only repeated his request of 2 February 2022.
12. The Applicant further alleges that the Principal Officer provided inaccurate information to his financial advisor which resulted in a simple switching of his benefits from the retirement fund to drag on for 22 days.
13. The Applicant claims that on 16 February 2022 Sanlam requested a board resolution in order to effect the switch. However, the board resolution was only provided on 24 February 2022 and the switch was effected on 25 February 2022.
14. The Applicant submitted that the switch certificate reflected a retirement benefit of R5 625 978.04, which is less than his fund credit of R5 731 715.00 as at 15 February 2022.
15. The Applicant requires the fund to compensate him for the loss of R105 727.96 due to the delay in the switching of his retirement benefit from the fund's conservative portfolio to the Nedbank Money Market portfolio.
16. The Applicant further submitted that the fund's Service Level Agreement ("SLA") provides that a switch should be concluded within 5 working days.

The Fund's, Sanlam's and Principle Officer's responses to the complaint

17. On 6 June 2023, Sanlam in its capacity as the fund's administrator provided a response. It was submitted that on 30 June 2020, it received the Applicant's retirement claim form. On 14 July

2020, the Applicant advised that he wants to preserve his benefit in the fund. On 22 July 2020 the Applicant was advised that his benefit was switched to the phased retirement member group (“deferred member”).

18. A letter from the fund’s administrator, dated 7 March 2022, is a summary of the fund’s, Sanlam’s and the Principle Officer’s respective responses. In this letter the Applicant was informed of the following:

- 18.1 On 3 February 2022, the Applicant requested a switch.
- 18.2 On 8 February 2022, the Applicant was told that the option was not available and was given other fund options.
- 18.3 On 15 February 2022, the Applicant requested again to switch to the Nedbank Money Market Fund.
- 18.4 The Applicant was told that the request was not standard, so it was sent to the board for approval.
- 18.5 On 16 February 2022, a signed resolution was requested from the Principal Officer, which was received on 24 February 2022.
- 18.6 The switch to the Nedbank Money Market portfolio was completed on 25 February 2022.
- 18.8 The Applicant was told that there is a 1- day delay in the portal’s values.
- 18.9 The Applicant’s benefit changed from R5 700 646.44 (Fund’s Conservative portfolio) as at 15 February 2022 to R5 625 987.04 (Nedbank Money Market portfolio) on 25 February 2022.
- 18.10 The fund indicated that the current SLA provides that it must within 5 days after receipt of a valid switch instruction validate the information and update the records.
- 18.11 The fund indicated that there was no undue delay in executing the switch instruction. The Applicant’s switch instruction was invalid and required a signed board resolution.
- 18.12 The switch was executed 8 days after receipt of the valid instruction given on 15 February 2022.
- 18.13 The fund does not guarantee member retirement amounts and that members bear the risk and liability.
- 18.14 The Applicant’s financial loss was due to negative investment returns and the fund cannot be held liable for same.
- 18.15 On 18 September 2023 the fund provided a copy of the SLA which provides that it should complete the instruction for a switch within 5 days from receipt of the switch request. However, switches are not executed within the first 2 days as daily prices have, on average, a 2-day price lag. This practice is applied to prevent anti-selection by

members against remaining members in the portfolio. Further, dis-investment rules of underlying portfolios shall supersede the SLA.

The PFA's determination

19. The crux of the PFA's determination is set out in paragraph 1 above.

C. APPLICANT'S GROUNDS FOR RECONSIDERATION

20. The Applicant's grounds for reconsideration can be summarised as follow:

- 20.1 The Principal Officer of the fund provided incorrect information regarding a permissible truncation, causing a delay in processing a fund switch. This delay could have been avoided if the Principal Officer had accurately outlined the allowable transactions.
- 20.2 The request, which should have been straightforward and compliant, was deemed non-compliant, requiring board approval. This could have been prevented if the Principal Officer had clarified the request's non-compliance with the fund rules, thus leading to undue delay requiring board intervention.
- 20.3 The delay in the switch should have been counted from the date the switch request was accepted by Sanlam, not from when the board approved it. A standard switch, permitted by the fund rules, would typically take 5 to 7 days, contrasting with the prolonged period due to the initially permissible but deemed impermissible switch.
- 20.4 Due to the inaccurate information provided by the Principal Officer the Applicant alleges a loss of approximately R105,000.00 in his retirement fund's value.
- 20.5 That the PFA's decision does not mention that the Principal Officer, when consulted by the Applicant's financial advisor, provided inaccurate information. Additionally, the Principal Officer issued an instruction to his (Applicant's) financial advisor that was not allowed by the fund's existing rules.

D. TRIBUNAL'S DECISION

21. Against this backdrop, is the Applicant's application for the reconsideration of the decision of the PFA, dated 21 September 2023.
22. The pivotal issue to be determine is whether the PFA was justified in rejecting the Applicant's assertion that the fund and/or its Principal Officer should bear responsibility for the losses suffered due to the purported undue delay in transitioning/switching the Applicant's retirement benefit from the fund's Conservative portfolio to the Nedbank Money Market portfolio.
23. Section 13 of the Pension Funds Act, 24 of 1956 ("the Act") stipulates that the rules of a registered fund are binding on the fund, its members, shareholders and officers, and on any person who claims under the rules or whose claim is derived from a person so claiming.
24. Thus, because of the binding nature of the fund's rules, the fund may only pay out to its members those benefits provided for in its rules. This principle was underscored by the Supreme Court of Appeal in *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D-E, where Marais JA stated as follows:

"What the trustees may do with the fund's assets is set forth in the rules. If what they propose to do (or have been asked to do) is not within the powers conferred upon them by the rules, they may not do it."
25. These principles were reasserted by the Supreme Court of Appeal in the case of *Municipal Employees Pension Fund v Mongwaketse* (969/2019) [2020] ZASCA 181 (23 December 2020) at [42]-[44], where Wallis JA affirmed that a fund's rules serve as its constitution, and the doctrine of *ultra vires* applies. Thus, if a fund's rules do not grant it the legal authority or capacity to undertake an action, such action by the fund is *ultra vires* and consequently null and void. The Constitutional Court upheld the Supreme Court's conclusions, asserting that the application of the *ultra vires* doctrine to pension funds aligns with the constitutional principles of legality (See: *Municipal Employees Pension Fund v Mongwaketse* (CCT34/21) [2022] ZACC 9 at [39]).
26. The relevant rules of the fund are as follows:
 - 26.1 Rule 5.2 of the fund provides the postponement of retirement benefits and reads as follows:

“When a Member retires from the services of the Employer in terms of Rule 5.1 and elects or failed to elect, to postpone payment of his/her retirement benefit, then the Member’s retirement benefit will remain in the Fund until payment in terms of Rule 5.3,...”

26.2 Further, Rule 5.3 provides as follows:

“5.3(1) ...

5.3(2) The Member only becomes entitled to his/her Member Shares, and it becomes due and payable, on the earlier of –

(a) The date on which the Administrator is informed of the Member’s choice, in terms of the preceding sub-rule, with regard to the manner of payment of his/her benefits; or

(b) The date on which the Member reached the maximum age at which the benefit must be paid in terms of income tax legislation, if applicable.

26.3 Whereas, Rule 11.2 of the fund provides as follows:

“Subject to sub-rule (3), the benefit of a Member...

11.2(2) (a) who had retirement and who elected to postpone payment of his/her retirement benefit or who failed to make an election in this regard;

or

(b) whose service was terminated and who elected to make his/her withdrawal benefit paid-up on the Fund in terms of rule 7.1(1)(d) or whose benefit was made paid-up in terms of rule 7.3

must remain in the investment portfolio(s) they were invested in on the date of the Member’s retirement from or termination of service, as the case may be subject to any investment choices exercised by the Member thereafter in terms of the preceding Rule.

When the Member's benefit must be paid in terms of the Rules it is invested in the money market portfolio within a reasonable period after the relevant date described in Rule 5.3(2) or 7.2 as the case may be."

27. Application of legal principles to facts

- 27.1 The Applicant retired on 1 July 2020 and became a deferred member of the fund. At that stage the Applicant's retirement benefit vested in the fund's conservative portfolio in compliance with rule 5.2 of the fund's rules as no election has been made by the Applicant. On 14 July 2020 the Applicant informed Sanlam that he wants to preserve his benefit in the current fund. On 22 July 2020, Sanlam informed the Applicant that his benefit was moved to the phased retirement member group, as requested, and a paid-up certificate was provided to the Applicant.
- 27.2 On 2 February 2022, the Applicant requested a switch of his investment benefit to the Nedbank Money Market portfolio. The fund administrator received the Applicant's instruction to switch his benefit on 3 February 2022. On 8 February 2022, the Applicant was advised that the option was not available to members of the fund. The Applicant was provided with a list of valid/permissible options, including the UWC Retirement Fund Aggressive portfolio, the UWC Retirement Fund Moderate portfolio and the UWC Retirement Fund Conservative portfolio.
- 27.3 On 15 February 2022, the Applicant declined all of the proposed/provided options and insisted on switching his retirement benefit to the Nedbank Money Market portfolio. The Applicant was informed that his request was not in line with the standard options permitted by the fund's investment mandate. Consequently, the Applicant's request was forwarded to the board for its consideration and approval.
- 27.4 Subsequently, on 16 February 2022, the fund's administrator requested a signed resolution from the Principal Officer. The signed resolution was provided on 24 February 2022.
- 27.5 On 25 February 2022, the switch of the Applicant's retirement benefit from the fund's conservative portfolio to the Nedbank Money Market portfolio was finalized. The Applicant's switch request demanded a distinct authorization process since the initial switch request, dated 2 February 2022, did not align with the investment mandate of the fund and thus could not be authorized according to the fund's rules. As previously

mentioned, the rules of the fund constitute its constitution and are binding on the fund, its members and officials. In other words, neither the fund officials, including the Principal Officer, and/or the fund's administrator nor its members may act beyond the powers granted to them by the fund rules. Therefore, the Applicant's initial switch request, dated 2 February 2022, was deemed invalid and nullified.

- 27.6 According to the Applicant, he sought the advice of a financial advisor, who in his understanding, was familiar with the fund and its rules. If the financial advisor truly understood the fund's rules, as claimed by the Applicant, he should have informed him (the Applicant) that his switching instruction fell outside the investment scope of the fund. The Applicant asserts that his financial advisor recommended transferring his retirement funds to a Nedbank Money Market. Nonetheless, the Applicant's assertion that his financial advisor was informed by a Human Resources fund official of the Principal Officer's endorsement for the Nedbank Money Market switch remains unverified and based on hearsay. Even if we assume that the Principal Officer was aware of the Applicant's initial switching request, it could not be executed as it did not align with the fund's investment mandate.
- 27.7 On 8 February 2020, the fund's administrator duly informed the Applicant that the chosen/selected portfolio (Nedbank Money Market) was not accessible to fund members. Despite this, the Applicant persisted in requesting the switch to the Nedbank Money Market portfolio. On the Applicant's own version he submitted a request via email to a Sanlam official, on 15 February 2022 to switch his retirement fund to the money market. This request was made in writing to comply with the SLA. As mentioned earlier, board approval was necessary to execute this instruction, which was granted on 24 February 2022. Subsequently, and on 25 February 2022 the transition of the Applicant's retirement benefit from the conservative portfolio to the Nedbank Money Market portfolio was completed.
- 27.8 The SLA provides that the fund should complete the instruction for a switch within 5 days from receipt of the switch request. However, switches are not executed within the first 2 days as daily prices have, on average, a 2-day price lag. This practice is applied to prevent anti-selection by members against remaining members in the portfolio. Further, dis-investment rules of underlying portfolios shall supersede the SLA.
- 27.9 The Applicant's switch instruction was concluded within one day from receipt of the signed board resolution and 8 days from date of the Applicant's valid switch request,

which was the switch request of 15 February 2022. If one consider the 2-days delay period as per the SLA, then the switch was effected within 6 days from date of the Applicant's valid switch request. Thus, the Applicant's switch instruction was not unduly delayed and was executed within a reasonable period in accordance with the rules of the fund.

27.10 This Tribunal additionally considered the fact that the fund is a Defined Contribution Fund ("a DC fund") and does not guarantee or specify the amount a member will receive on retirement. In a DC fund, members bear the investment risk and liability rather than the fund or the employer. Neither the fund nor its Principle Officer can be held liable for the negative performance of the financial markets.

28. The Applicant's initial switch request was not valid and it required a signed resolution from the board of the fund. The administrator of the fund confirmed in its letter, dated 7 March 2022, that the Principal Officer worked together with them to make sure the signed resolution was provided and that the Applicant's switch was not unduly delayed. Thus, neither the fund nor the Principal Officer or the fund's administrator can be held liable for the financial losses suffered by the Applicant.

29. For reasons, stated above this Tribunal finds no reason to deviate for the decision taken by the PFA and the application for reconsideration is accordingly dismissed.

E. ORDER

1. The Applicant's application for reconsideration is dismissed.

SIGNED on behalf of the Tribunal on this 13th day of MARCH 2024.



ADV SALMÉ MARITZ

Assisted by LTC Harms (Chair)